PEER TO PEER SEXUAL HARASSMENT: EMERGING LAW AS IT
APPLIES TO SCHOOL BUILDING ADMINISTRATORS’ LEGAL
RESPONSIBILITY FOR PREVENTION AND RESPONSE

by

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(ABSTRACT)

The purpose of this study was to closely examine relevant case law to determine if a legal argument exists that holds school administrators legally responsible for protecting students from peer to peer sexual harassment, particularly under federal laws. A second purpose of this study was to determine if a theoretical and/or regulatory base is available to support the argument. The research questions for this study were: (1) Does an argument emerge from analysis of appropriate case law and legislation that finds peer to peer sexual harassment to be sex discrimination that school administrators may be held legally responsible for preventing? (2) In addition to case law and legislation, what support can be found in the language and reasoning of scholarly writings, regulatory documents and case law dissents to forecast expanded judicial reasoning to hold school administrators responsible for protecting students from peer to peer sexual harassment?
A traditional methodology of legal research was employed, using traditional legal finding tools and electronic data bases. An analysis of relevant court cases addressing sexual harassment was completed to establish and examine the judicial reasoning of the courts in those decisions.

The legal analyses conducted in this study showed that the cases of peer to peer sexual harassment heard in federal courts since 1989 have resulted in a pattern of decisions ruling increasingly in favor of administrators’ legal responsibility for preventing peer to peer sexual harassment and their liability for failure to do so. While cases heard under Section 1983 of the Civil Rights Act of 1871 and the Due Process Clause were, with one exception, unsuccessful in assigning legal responsibility to school administrators, decisions in cases heard under Title IX of the Educational Amendments of 1972 have increasingly placed legal responsibility and liability on administrators. Two recent Title IX cases heard in federal appellate courts resulted in opposing decisions, a situation which sets the stage for a possible Supreme Court ruling on the issue.

Regulations and procedures enforced through state judiciaries and federal regulatory agencies, such as the Office of Civil Rights of the United States Department of Education, support the argument that school administrators are legally responsible when they knew of sexual harassment
between peers and failed to stop the behavior. Scholars have advocated application of Title VII principles to Title IX, equating administrators’ responsibility for protecting students from peer harassment to employer responsibility for preventing co-worker sexual harassment they knew or should have known about. And, finally, the dissents of two federal circuit court judges in cases decided in favor of defendant school districts have strongly favored holding administrators responsible for peer sexual harassment that they knew about and failed to stop.
DEDICATION

This study is dedicated to my family. To my mother, Bea Berlin, who always had words of encouragement although she worried that I was working too hard, and to my father, Walter Berlin, who isn’t here to read it but always knew I could do it. He would be very proud. To my “big” sisters Beth Shaffer and Sandy Havneraas, who thought I was crazy but offered their love and support throughout. To my mother-in-law Jean Frankfourth who asked pertinent questions and couldn’t wait to read the final copy. And especially to my husband Larry Stuebing, whose constant encouragement, support and patience throughout this long process gave me the strength to persevere. He willingly read and commented at every stage of the study’s evolution and provided important and rational feedback. His pride in my accomplishment makes me glow. I am thankful for all the support my family provided. It is because of them that this study is finished.
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CHAPTER I
INTRODUCTION

The Background of the Study

As many as 9 million young people a year may be sexually harassed by peers in school. Empirical studies of peer to peer sexual harassment conducted between 1980 and 1993 tell us that from 50% to 85% of students in elementary and secondary schools report experiencing such behavior.\(^1\) Peer to peer sexual harassment appears to be widespread in our schools. Stein has concluded that, while sometimes identified and curtailed, more often than not it is characterized as a normal stage in healthy American adolescent development and tolerated. Frequently it is identified as "flirting" or dismissed as part of acceptable "initiation rites."\(^2\) Regardless of the ways school authorities classify its appearances, sexual harassment interferes with a student's right to receive equal educational opportunities, and is a violation of Title IX of the Educational Amendments of 1972 which outlaws sex


discrimination in educational institutions receiving federal financial assistance.\(^3\)

Being sexually harassed at school made me feel upset, angry and violated. I mean, I shouldn't have to take this crap at school, should I? It's my right to go to school and not be harassed isn't it? I feel confused because I wonder if all guys think those things about me! I feel insecure after this happens. I hate it. I shouldn't have to feel sexually intimidated by people who barely know me. (16 year old from a mid-sized city in northern New England).

Finally I decided to tell the counselor and Dean of Students. I regret it to this day because they made me feel as if I were lying and I felt more interrogated than listened to. I felt really alone and stupid. (16 year old girl from a city in North Dakota).

Finally I got the courage to do something about it. I told my principal what was happening. He was very skeptical about the whole thing, and he didn't do much about it. I wish I knew I was being harassed and had done something more about it...but I still felt like it was my fault, and I still do a little bit. (14 year old girl from a small town in PA.).\(^4\)

Sexual harassment is not a new phenomenon. It has existed in the workplace since men and women have worked together. What is new, however, is society's attitude toward sexual harassment. Once considered a joke or of little importance, sexual harassment has been identified as being a

\(^3\) Ibid., 316.

widespread and significant workplace problem that needs to be eliminated.  

The newest bastion for sexual harassment violations under federal law exists in the area of institutional liability or sexual harassment of students by other students, otherwise known as peer harassment. Actionable peer harassment may include harassment in its more identifiable forms including physical abuse. However, it may also include behavior which has formerly been viewed as innocuous. A recent report by the American Association of University Women sets the stage for institutional liability based upon the "boys will be boys" perception of peer harassment:

There is mounting evidence that boys do not treat girls well. Reports of student sexual harassment—the unwelcome verbal or physical conduct of a sexual nature imposed by one individual on another—among junior high school and high school peers are increasing. In the majority of cases a boy is harassing a girl...  

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6 See generally American Association of University Women, The AAUW Report: How Schools Shortchange Girls. (Washington, D.C.: AAUW Educational Foundation and Educational Association, 1992). See also C. Shakeshaft et. al, "Peer Harassment in Schools": 37. Shakeshaft et. al observed that verbal harassment or fear of harassment touched almost all students observed in their study; however, three types of students reported more harassment than did others: girls who are perceived by their peers as physically unattractive, girls who are physically well developed, and boys who
When boys line up to "rate" girls as they enter a room, when boys treat girls so badly that they are reluctant to enroll in courses where they may be the only female, when boys feel it is good fun to embarrass girls to the point of tears, it is no joke. Yet these types of behaviors are often viewed by school personnel as harmless instances of "boys being boys"...

When schools ignore sexist, racist, homophobic and violent interactions between students, they are giving tacit approval to such behaviors....

According to Mondschein and Greene, elementary and secondary schools have an obligation to provide a harassment free environment since they have minor children who attend their schools under compulsory education laws. School officials must assure that the learning environment of their school is free from sexual harassment by administrators, teachers, staff and students. School employees are under the control of the board of education, particularly in their relationship to pupils, but schools must also be in control of pupils to the extent that an appropriate learning environment is maintained.

Sexually harassing behavior by employers to employees and co-workers is prohibited by Title VII of the Civil Rights Act of 1964 and Title IX of the

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do not fit a stereotypical male macho image.

7 AAUW, How Schools Shortchange Girls, 73-74.
Education Amendment of 1972 because it is sex discrimination. Title IX was patterned after Title VI of the Civil Rights Act of 1964.\footnote{Title VI is codified at 42 U.S.C. §§ 2000d-2000d-6 (1988).} The purpose of Title VI is to end discrimination based on race, color or national origin in any program or activity receiving federal funds,\footnote{42 U.S.C. § 2000d. Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id.} including discrimination in educational institutions.\footnote{See 34 C.F.R. pt. 100 app. B (1991) (restricting discrimination in public school systems).} Title IX was enacted to eliminate sex discrimination in educational institutions receiving federal funds.\footnote{20 U.S.C. §§ 1681-1688 (1988). Prior to the enactment of Title IX, Senator Birch Bayh commented that “[d]iscrimination 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.” 228 CONG. REC. 5807 (1972).} The Supreme Court has ruled that remedy is available under Title IX to students harassed by school employees when school administrators knew or should have known of the action and did not prevent it from continuing.\footnote{Franklin v. Gwinnett County Sch. District, 112 S.Ct. 1028 (1992). Christine Franklin was subjected to continual harassment by Andrew Hill, a}
However, federal courts have ruled in at least three cases\textsuperscript{14} that school officials do not have an affirmative duty to protect students from constitutional violations because a special relationship does not exist between the state and students as it does between administrators in state penal institutions or mental hospitals where their charges are not free to come and go at will.\textsuperscript{15}

**The Purpose of the Study**

The purpose of this study was to closely examine relevant case law to determine if a legal argument exists that holds school administrators legally responsible for protecting students from peer to peer sexual harassment, particularly under federal laws. A second purpose of this study was to determine if a theoretical and/or regulatory base to support the argument is

\underline{teacher} in her high school. Complaints to administration resulted in a plea to Franklin to keep the situation quiet after Hill was convinced to resign. The Supreme Court decided in Franklin’s favor and awarded monetary remedy since school administrators knew or should have known of the continuous harassment and did nothing to stop it.

\textsuperscript{14} D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992) and Dorothy J. v. Little Rock, 7 F. 3d 729 (8th Cir. 1993) and B.M.H. v. School Board of the City of Chesapeake, 833 F.Supp. 560 (E.D. Va. 1993). These cases were brought under the legal provisions of 42 U.S.C. Section 1983 of the Civil Rights Act of 1871.

available.

The research questions addressed in this study were:

1. Does an argument emerge from an analysis of appropriate case law and legislation that finds peer-to-peer sexual harassment to be sex discrimination that school administrators may be held legally responsible for preventing?

2. In addition to case law and legislation, what support can be found in the language and reasoning of scholarly writings, regulatory documents and case law dissents to forecast expanded judicial reasoning to hold school administrators legally responsible for protecting students from peer to peer sexual harassment?

Justification of the Study

Peer to peer sexual harassment is the newest form of sexual harassment to be recognized by the courts, and the number of cases alleging harassment between peers is increasing. Incidents of verbal or physical behavior of a sexual nature inflicted on girls by boys in elementary, middle and high schools are reported with increasing frequency. During 1992 and 1993, there was a four-fold increase in the number of letters of finding dealing with school age peer sexual harassment compared to the four year period immediately preceding
1992. However, administrators lack definitive guidelines and react to peer sexual harassment from different perspectives. What is considered a Title IX violation to one may be an act of "boys will be boys" to another. As a result, some school administrators and school districts have been cited by the Department of Education's Office of Civil Rights [OCR] for failing to act effectively to combat sexual harassment, a situation that puts those districts in jeopardy of losing federal funds.

Peer to peer sexual harassment is behavior between students that is violent and harmful. It denotes an imbalance in power between the individuals involved, with the victim always having less control. Administrators who allow peer to peer harassment to occur unabated may run the risk of litigation and possible liability for monetary awards as remedy to victims of harassment.


17 34 C.F.R. § 100.6, made applicable to Title IX investigations by 34 C.F.R. § 106.71 (1993). OCR has the responsibility "to the fullest extent practicable [to] seek the cooperation of recipients [of federal financial assistance] in obtaining compliance with [Title IX] and to provide assistance and guidance to recipients to help them comply voluntarily..."

They may also be demonstrating a standard of care that begs the question of whether they are exercising deliberate indifference to their students' safety and discriminating on the basis of sex.

The first case of alleged peer to peer sexual harassment to be heard in a federal lower court was Doe v. Petaluma in 1993.\(^{19}\) Although the court ruled that hostile environment sexual harassment did occur as a result of the peer harassment Jane Doe was subjected to, monetary damages were not awarded due to lack of clear proof that the employees of the school discriminated against her on the basis of sex. When Doe v. Petaluma\(^{20}\) was heard by the Ninth Circuit of Appeals, discrimination was established but monetary remedy was still denied on the basis that the law was not clearly established that school officials had a duty to prevent peer sexual harassment at the time the events in the case occurred.\(^{21}\)

Cases involving peer to peer sexual harassment that have followed the decisions in Doe v. Petaluma have focused on Title IX and 42 U.S.C. Section


\(^{20}\) (Petaluma II) 54 F.3d 1447 (9th Cir. 1995).

\(^{21}\) Id. at 1451. Franklin v. Gwinnett which ruled that monetary remedy could be awarded under Title IX of the Education Amendments of 1972 was decided by the Supreme Court in 1992 after the events of Doe v. Petaluma.
1983 claims. With few exceptions, the courts have ruled in favor of defendant school administrators, counselors and teachers; however, the language in some of the decisions and in the dissents of two judges contains elements of divergent interpretations of Title IX and 42 U.S.C. Section 1983.22

Historically, the dissents and alternative interpretations of law have often led to the development of new law; consequently, the statements and opinions of members of the courts are significant to developing legal patterns in the area of administrator responsibility for preventing peer to peer sexual harassment.

Definition of Terms

Deliberate indifference means disinterest that is carefully considered and willful rather than merely intentional. It is formed, arrived at, or determined upon as a result of careful thought and weighing of considerations, as a deliberate judgment or plan.23


**Duty to act** refers to the obligation to take some action to prevent harm to another and for failure of which there may or may not be liability in tort depending upon the circumstances and the relationship of the parties to each other.\(^{24}\)

**In loco parentis** means in the place of a parent and with a parent's rights, duties and responsibilities.\(^{25}\)

**Reasonable man doctrine or standard** means that the standard which one must observe to avoid liability for negligence is the standard of the reasonable man under all the circumstances, including the foreseeability of harm to one such as the plaintiff.\(^{26}\) This term has been revised to that of the reasonable woman standard as a means of recognizing that men and women may react to the same behavior in different ways.

**Respondeat superior** literally means let the master answer. This doctrine means that a master is liable in certain cases for the wrongful acts

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\(^{24}\) *Id.* at 505.


\(^{26}\) *Id.* at 1266.
of his servant and a principal for those of his agent.\textsuperscript{27}

\textbf{Standard of care} refers to the degree of care that a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such standard, he may be liable in damages for injuries or damages resulting from his conduct.\textsuperscript{28}

\textbf{Method of the Study}

A traditional methodology of legal research was employed, using traditional legal finding tools as well as electronic data bases. An examination of federal statutes and \textit{case law} related to peer to peer sexual harassment was conducted. Secondary sources, particularly legal periodicals, were analyzed for scholarly interpretations of the current status of federal statutes addressing peer to peer sexual harassment and for indicators of emerging themes of law related to peer sexual harassment. An analysis of relevant court cases addressing sexual harassment that have interpreted federal legislation was completed to establish and examine the judicial reasoning of the courts in these decisions.

\textsuperscript{27} \textit{Id.} at 1311-1312.

\textsuperscript{28} \textit{Id.} at 1404-05.
Limitations of the Study

1. Although there are reported cases of females harassing males and males harassing males in the schools, the literature shows that the greater percentage of sexual harassment is perpetrated by males against females. Therefore, female pronouns were used throughout the study when referring to victims of sexual harassment.

2. This study includes sexual harassment case law related to peer to peer sexual harassment that has been decided since 1989 inclusive of April 1996. Cases decided since the passage of the Education Amendment of 1972 were discussed in the Literature Review as background for more recent decisions.

3. This study focused on building level school administrators' responsibility and liability. Although Superintendent and School Board liability and 11th Amendment qualified immunity have played major roles in some of the § 1983 cases discussed, they were not examined in depth as part of this study. However, an explanation of Superintendent and School Board liability as well as 11th Amendment immunity is provided in Chapter 3 as background information.
Organization of the Study

Chapter 1: An introduction and overview of the study, and the purpose of the study with research questions are presented.

Chapter 2: The methodology of the study is explained including data collection of federal legislation and applicable case law.

Chapter 3: A review of the literature is provided as a background for the rationale of the study and to examine the theoretical base upon which it is grounded. A review of the federal legislation which addresses sexual harassment in the workplace and in educational settings generally is provided with appropriate case law which interprets the statutory language.

Chapter 4: An analysis of relevant case law and statutes is conducted to determine if a legal argument exists to support holding school administrators legally responsible for protecting students from peer to peer sexual harassment.

Chapter 5: An analysis of the language and reasoning of scholarly writings, regulatory documents and case law dissents is presented to determine if additional support exists for
holding school administrators legally responsible for preventing peer to peer sexual harassment.

Chapter 6: The study analysis is summarized, implications for practice are discussed, and conclusions from the study with recommendations for further study are made.
CHAPTER II
METHODOLOGY

Traditional legal research focuses on a particular topic and asks, "What is the law?" One way to understand current judicial and legislative practices is to know how these practices developed and to clarify the issues affected by them. Therefore, explanations of past educational ideas or concepts, judicial decisions, legal principles, and policy-making can suggest insights about current educational events. Specific laws related to a topic may be examined and past cases and law review articles may be explored to trace judicial reasoning. All forms of research are interested in arriving at a better understanding of the question at hand. The difference in legal research is that the primary source of information is the law itself. Therefore, a traditional methodology of legal research seeks to trace the development of legal principles by examining past cases and legal practices.

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3 Adler, "Qualitative Research of Legal Issues," 2.

research was employed in the organization of this study.

Legal research is the process of finding the law that governs activities in human society. It involves locating both the rules which are enforced by the state and commentaries which explain or analyze those rules. This procedure is necessary in legal practice to determine both the impact of past actions and the implication of contemplated actions.\textsuperscript{5}

Systematic inquiry into the law can be described as a form of historical-legal research. In other words, it is a systematic investigation that involves the interpretation and explanation of the law and events in a wide array of settings in which the law may be involved.\textsuperscript{6}

To be reliable and useful, legal research must look at previous case law or legislation as well as legal commentary in order to understand how a law has evolved through time; and to predict how that law may evolve in the future.\textsuperscript{7} The researcher, then, embarks on a search for a pattern or patterns within a single case or across multiple cases.\textsuperscript{8}

\begin{flushleft}

\textsuperscript{6} Russo, "Legal Research: The 'Traditional' Method," 2.

\textsuperscript{7} Ibid.

\textsuperscript{8} Adler, "Qualitative Research of Legal Issues," 3.
\end{flushleft}
However, research of legal issues can also take the form of interpretive
and/or evaluative case study, containing rich description, explanation and
judgment. Interpretive case studies can be used to develop conceptual
categories, or to illustrate, support or challenge theoretical assumptions held
prior to the data gathering.\textsuperscript{9} The level of abstraction and conceptualization in
interpretive case studies may range from suggesting relationships among
variables to constructing theory. It is important to note that the aim of
qualitative research such as a case study is not to find the 'correct' or 'true'
interpretation of the facts, but rather to eliminate erroneous conclusions so
that one is left with the best possible, the most compelling, interpretation.\textsuperscript{10}

\textbf{Sources of the Law}

In researching a legal question, three broad categories or sources of
information must be investigated: primary, secondary and research tools.\textsuperscript{11}

Primary sources include two broad categories. Federal, state and local
statutes form one category, and case law found in court decisions comprises the

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\textsuperscript{9} Sharan B. Merriam, \textit{Case Study Research in Education: A Qualitative

\textsuperscript{10} Ibid., 30.

\textsuperscript{11} Russo, "Legal Research: The 'Traditional' Method," 3.
second category. Federal and state statutes can be located in both official compilations of codes such as constitutions, government rules and regulations and federal and state statutes, and unofficial annotated compilations of codes such as editorial comments and historical notes. Examples of primary sources of law are the U.S. Constitution, statutes, regulations (including administrative decisions and rulings which interpret them) and case law. Applicable federal and state codes can be found using a descriptive word method, topic method or popular name method.

While it is important to analyze germane legislation, case law which addresses the legal issue of study should be researched. Even though statutes control all situations legally contested, the interpretations of statutes by judges in courts of law are what give meaning and force to written legislative pronouncements. To understand the scope of statutes, it is necessary to

12 McMillan and Schumacher, Research in Education, 455.

13 Ibid.


15 McMillan and Schumacher, Research in Education, 455-56.

understand the judicial interpretations that give them their true meaning.

Texts of court decisions can be found in Reporters, a series of bound volumes and looseleaf services which contain the courts' opinions.\(^{17}\)

Written expressions of the law other than primary are secondary sources which the researcher must use to locate and to supplement the legal analysis of primary sources. Although these writings may not be considered authoritative, they can be and have been used by the courts in reaching their decisions.\(^{18}\)

Examples of secondary sources are restatements of the law, legal periodicals, legal encyclopedias, dictionaries and yearbooks, dissertations, monographs and conference papers, and law journals.\(^{19}\)

Research tools such as case digests which index case law and corresponding legal commentary both nationally and regionally can be useful instruments in researching a legal issue. Research aids include digests of case law, citators and various indexes. *Shepard's Citations* are used to update the legal status of a case to determine if it has been affirmed, reversed, overruled,


\(^{18}\) Russo, "Legal Research: The 'Traditional' Method," 3.

\(^{19}\) McMillan and Schumacher, *Research in Education*, 458.
vacated, distinguished or otherwise modified by subsequent court action.\textsuperscript{20}

Manual legal investigation can and should be supplemented with computer databases designed to retrieve legal information. The best known legal databases are WESTLAW and LEXIS. WESTLAW allows a researcher to shepardize a case, browse through cases at a display terminal, and search for other citations by key terms.\textsuperscript{21}

The origins of the legal material analyzed in the research are clearly described and defined by the terms primary and secondary; however, they do not necessarily describe the order in which the researcher locates the material. Secondary sources were used first to locate specific information, legislation and case law which addressed the issue of sexual harassment, in general, and peer to peer harassment in schools.

Pertinent legislation was read in order to determine what type of conduct was being regulated along with congressional debate which provided the necessary background for ascertaining the sentiments behind the passage of the legislation. Case law (primary sources) was then analyzed to learn the judicial reasoning behind each of the court's decisions. The analysis of case law

\textsuperscript{20} Ibid., 459.

\textsuperscript{21} Ibid.
and applicable legislation revealed the progression of the concept of peer to peer sexual harassment.

Data Sources

Both primary and secondary sources were used to locate applicable legislation and case law concerning peer to peer sexual harassment in the schools. The primary sources of law used were federal legislation and federal case law which addressed the issue of peer sexual harassment in K-12 schools.

A search was conducted to find relevant legislation in both the United States Code Annotated (U.S.C.A.) and the United States Code Service (U.S.C.S.) which also cited applicable congressional debate. Legislation was located through use of the descriptive method and the topic method. A search for federal case law was made in the United States Reports and the Supreme Court Reporter for those cases reaching the Supreme Court level. The National Reporter System was searched for federal cases at the District Court and Circuit Court levels. The cases were shepardized using Shepard's Citations and WESTLAW to assure that the case law cited reflected the most current status of applicable law.

Secondary sources were located using the Index to Legal Periodicals and JACOB, the online access catalog at the George Washington University Law
Library, which references law review articles as well as scholarly articles from other legal publications. WESTLAW, the legal database located on computer, was used to ensure that all research was as thorough and current as possible. ERIC and Dissertation Abstracts were used to locate germane references to nonlegal publications.

Data Organization

All collected data were organized chronologically within various subject headings to show the progression of the legislative and judicial reasoning in regard to peer to peer sexual harassment.

Data Analysis

A computer search was conducted in order to locate secondary sources of law such as law review journals which contained articles that addressed the issue of sexual harassment and peer to peer sexual harassment in particular. The articles were examined to identify relevant federal legislation and case law. The researcher reviewed congressional debate wherein the applicable federal legislation was discussed in order to discover the legislative history of Title IX of the Civil Rights Act of 1972 and U.S.C. 42 Section 1983. The judicial reasoning of each federal court decision was analyzed in order to ascertain what factors influenced the courts' legal reasoning. Particular attention was paid to
dissenting arguments in cases of peer to peer sexual harassment where the majority decision ruled that administrators could not be held legally responsible or liable. It was important to note consistency and inconsistencies between cases and prior rulings and to analyze the effect these decisions would have for school systems and school administrators.

**Standards of Adequacy for Legal Research**

Because commentaries in legal research do not follow the formats of other analytical research, the criteria for judging a study as adequate differ somewhat.\(^{22}\) A reliable appraisal and criticism of sources is one major concern of accurate legal research.\(^{23}\) In all types of legal writing, whether by scholars or by practitioners, it is customary to cite an authority or authorities to show support for a legal or factual proposition or argument. Therefore, to ensure accuracy of the sources used, the researcher authenticated each source through the use of the established legal standard for citations.\(^{24}\) The basic purpose of legal citation is to allow the reader to locate a cited source accurately and


\(^{23}\) Ibid., 446-50.

efficiently.  

Additional criteria for judging legal adequacy included a clearly stated issue with scope and limitations explained, commentary organized logically for analysis, a location and use of sources appropriate to answer the legal questions posed, treatment of the topic in an unbiased manner, and conclusions related logically to the analysis.  

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25 Id. at 4.

CHAPTER III
LITERATURE REVIEW

A review of the literature addressing sexual harassment and peer to peer sexual harassment in particular provided background information for this study. This review focused on several major areas including a brief history of sexual harassment; gender roles as they relate to sexual harassment; sexual harassment of students in the schools; and the legal framework addressing sexual harassment as a constitutional and federal statutory violation.

A Brief History of Sexual Harassment

Sexual harassment is a phenomena which received relatively little public attention until the Supreme Court confirmation hearings of 1991 when Anita Hill alleged that Clarence Thomas had beleaguered her with unwanted attention of a sexual nature. Following the hearings, sexual harassment became a household term for many who had otherwise been ignorant to its meaning.

Although the term sexual harassment is a relatively new one in our vocabularies, the concept is quite old. References to sexual harassment, though not labeled as such, abound in novels, plays, diaries, folktales, and other chronicles of human experience. The verb to harass was used in old English, meaning literally "to set a dog on someone." The viciousness and power aspect
of harassment is inherent in its etymology.¹

In colonial days, women in the United States protested against unwanted sexual attention and, in the nineteenth century, women labor organizers raised sexually harassing behavior as an important concern of women in the workplace.² Until the late 20th century, victims of sexual harassment had no recourse unless the attack rose to the level of an assault and battery. As early as 1875 in Croaker v. Chicago and Northwestern Railway³, a court awarded a woman $1000 in damages in an assault and battery claim for both mental suffering and "being wronged" when a male train conductor thrust his soiled hand into the muff she wore to keep her hands warm and then kissed her several times.⁴

Within the past two decades, the term sexual harassment has surfaced to


³ 36 Wis. 657 (1875).

describe both non-contact and contact sexual abuse. Emerging from the
discourse of feminist "consciousness raising" groups of the late 1960s and
1970s, its name underscores the seriousness of its effects.⁵ Lin Farley first
coined the term "sexual harassment" in 1974. While speaking to many women
about their work experiences, Farley noted an unmistakable pattern—many had
quit or been fired from positions because they had been made to feel very
uncomfortable by the behavior of men. She documented the history of sexual
harassment, furnished case studies and discussed applicable case law.⁶ She
also provided the first definition of sexual harassment:

Sexual harassment is best described as unsolicited nonreciprocal male
behavior that asserts a woman's sex role over her function as a worker.
It can be any or all of the following: staring at, commenting upon, or
touching a woman's body; requests for acquiescence in sexual behavior;
repeated nonreciprocated propositions for dates; demands for sexual
intercourse; and rape. These forms of male behavior frequently rely on
superior male status in the culture, sheer numbers, or the threat of
higher rank at work to exempt compliance or levy penalties for refusal.⁷

⁵ Charol Shakeshaft and Audrey Cohan, "In Loco Parentis: Sexual Abuse of
Students in Schools. What Administrators Should Know," (ERIC

⁶ Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job

⁷ Ibid., 14-15.
In 1979, Catharine MacKinnon investigated the legal domain of sexual harassment and introduced the theory that sexual harassment of working women is a widespread social problem which constitutes illegal discrimination based on sex.\textsuperscript{8} MacKinnon broadly defined sexual harassment as "the unwanted imposition of sexual requirements in the context of unequal power."\textsuperscript{9}

MacKinnon's legal theory became the basis for categorizing sexual harassment as illegal behavior and opened the door to legal action and remedies for victims. MacKinnon presented the argument that sexual harassment could be considered sex discrimination on the basis of two approaches: the "differences" approach and the "inequality" approach.\textsuperscript{10}

The differences approach to equal opportunity law maintains that illegal sex discrimination has occurred when individuals who are otherwise similarly situated are dispensed burdens or rewards according to their gender classifications.\textsuperscript{11} This classification can be applied to a woman if she is


\textsuperscript{9} Ibid., 1.

\textsuperscript{10} Ibid., 4.

\textsuperscript{11} Ibid., pp. 4, 6, 192-208.
perceived as being intentionally singled out and made the victim of unwelcome sexual advances solely because of her sex. For example, in *Barnes v. Train (Costle)*, the Washington, D.C. District Court originally found against the plaintiff, a woman who was first denied promotion and then fired for having refused the sexual advances of her supervisor, the director of the Environmental Protection Agency's Equal Employment Opportunities Division. The suit was initially rejected on the grounds that sexual harassment does not constitute sex discrimination. The court contended that the female plaintiff had been denied promotion not because of her sex, but because of her refusal to accede to the director's sexual demands. On appeal, the D.C. Circuit Court reversed, declaring that discrimination was involved, since the declined invitation had been issued only because the plaintiff was a woman.

\[\text{13 Here the courts use the term sex to refer to what most term gender.}\]
\[\text{14 The court conceded that the supervisor's behavior was inexcusable, but insisted that the behavior did not constitute an "arbitrary barrier to continued employment based on plaintiff's sex." Id. at 123, 124.}\]
\[\text{15 Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977). At 992, n.68 Judge Robinson said for the court: "But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she}\]
MacKinnon's legal viewpoint points to sexual harassment as a result of the inequality of power between the sexes. Her "inequality" approach is based on the assumption that the social situation of the sexes is inherently unequal.\textsuperscript{16} The social situation of women is "a structural problem of enforced inferiority" in which every case of sexual harassment is "but one example" and "an integral part of an institutionally grounded system of social stereotyping which disadvantages women not simply as individuals but as a group."\textsuperscript{17} According to the "inequality" approach, the harm that results from this classification is based on the effect of the classification in maintaining a group in a socially disadvantaged position.\textsuperscript{18}

MacKinnon's legal theory was effectual in establishing sexual harassment as a judicial claim of action. She indicated that:

The law against sexual harassment is a practical attempt to stop a form of exploitation. It is also one test of sexual politics as feminist

\textsuperscript{16} MacKinnon, \textit{Sexual Harassment of Working Women}, pp. vii, xi, 4-6.

\textsuperscript{17} Ibid., 5.

\textsuperscript{18} Ibid., pp. 4-5, 116-118.
jurisprudence, of possibilities for social change for women through law. The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system. The sexually harassed have been given a name for their suffering and an analysis that connects it with gender. They have been given a forum, legitimacy to speak, authority to make claims, and an avenue for possible relief. Before, what happened to them was all right. Now it is not.19

While many studies and cases of sexual harassment have examined the workplace, only recently has attention been turned to K-12 school settings.

This area will be reviewed later in this chapter.

*Gender Roles, Power and Sexual Harassment*

In the less-than-perfect world in which we live, there is a tendency to accept certain behaviors that promote ridicule and abuse of individuals as normal for children and adults. The teasing and harassing of girls about their bodies by boys is perceived as "just part of growing up" rather than a prelude to more dangerous and violent behavior. Teachers' joking with students about sexual matters may be perceived as "just their sense of humor" rather than sexist and harassing behavior.20

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Sexual harassment is about power and control and the harasser's need to exert them over a victim. Economically, socially and politically, harassment works to protect turf and provide a power differential--sometimes physical and sometimes psychological--that makes it difficult for victims to refuse unwelcome advances. In addition, the sex roles that males and females learn to play early in life socialize them to rationalize sexual aggression and coercion on the part of males as permissible and their excuses for such behavior as acceptable.\textsuperscript{21}

While gender is the most defining aspect of sexual harassment, all forms of status, such as race, ethnicity, language group, physical or sensory disabilities, socioeconomic and job role status, size, and age, frequently interact in occurrences of sexual harassment to heighten the perceived vulnerability of some individuals. For example, when students with limited English proficiency laugh uncomfortably at the sexually explicit remarks hurled at them by their English-speaking classmates, it is the fear of further ethnic harassment that keeps them from reporting the incident. When high school males harass each other,

\textsuperscript{32}

\textsuperscript{21} Ibid., 35. Excuses can range from perceived notions of owing or asking such as "She made me mad," "I spent a lot of money on that date," "She asked for it," etc.
other with homophobic epithets, it is heterosexism and gender that overlap and serve as underlying forces for the power differential that defines hostile peer relationships.\textsuperscript{22}

Learning Traditionally Accepted Gender Appropriate Behaviors

At a very early age, children learn gender appropriate behaviors through the assignment of household tasks and childhood toys, through adult expectations for their dress and demeanor and particular ways of being, seeing and doing. Girls learn to relate to themselves and to be related to by others as passive, emotional and nurturing, while boys are related to as active, aggressive, rational and unemotional. By the time they are three or four years old, children are remarkably knowledgeable about what it means to be a "real girl" and a "real boy." The toys they play with, the clothes they wear, the way they talk and communicate, the friends they choose, and how they express their emotions both reveal and determine who they are.\textsuperscript{23}

Michael Kimmel describes sexuality as a product of the meanings we attach to biological urges rather than the biological urges in isolation. These

\textsuperscript{22} Linn, Stein and Young with Davis, "Sexual Harassment in Schools," 107.

meanings vary dramatically across cultures, over time and among a variety of social groups within any particular culture. Kimmel cites John Gagnon's support of this theory:

People learn when they are quite young a few of the things that they are expected to be, and continue slowly to accumulate a belief in who they are and ought to be through the rest of childhood, adolescence, and adulthood. Sexual conduct is learned in the same ways and through the same processes; it is acquired and assembled in human interaction, judged and performed in specific cultural and historical worlds.\(^\text{24}\)

Carol Gilligan's work in 1982 was initiated as a much-needed corrective to classic psychological theories which either regarded women's development as inferior to men's or ignored it completely. Gilligan claimed that women and men have two different moralities, implying that they live in two separate but overlapping realities created by sociocultural conditions. Women are socialized to an ethic of caring and men to an ethic of reason.\(^\text{25}\) She argued that women are not stunted as several traditional theorists purported, but merely


\(^{25}\) Carol Gilligan, In a Different Voice (Cambridge, MA: Harvard University Press, 1982): 70.
Peggy Orenstein's extensive research of adolescents led her to believe that Gilligan's concept of "difference" has been transformed into a function of biology. In a familiar set of stereotypes, reconstituted as "feminist," the work of Gilligan and others has been used to support the notion that women are not just different, but actually morally superior to men--more caring, more connected and more empathic simply by dint of being women. This portrayal of a "caring nature" as a chromosome-linked characteristic rather than a universal human trait encourages a disregard for those characteristics in men and ignores a woman's capacity and necessity for autonomy. This theory is supported again and again in children's perceptions of what is acceptable and

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26 See Celia Morris, **Bearing Witness: Sexual Harassment and Beyond** (Boston, MA: Little, Brown and Company, 1994): 218. Morris describes Sigmund Freud's argument that:

"all reforming action in law and education would break down in front of the fact that, long before the age at which a man can earn a position in society, Nature has determined woman's destiny through beauty, charm, and sweetness." The position of women, Freud expected, would always be what it was at present: "in youth an adored darling and in mature years a loved wife."

what is inevitable and the view that "boys will be boys." When Orenstein spoke with a middle school male student who had been suspended for grabbing a female classmate's breast, the student expressed difficulty in understanding the charges against him:

"I was puzzled by the punishment. I don't remember doing it, but maybe I did. All the guys do that stuff, it's no big deal. The girls don't mind. I mean, they don't do anything about it. I'd beat the crap out of someone if they touched me like that. But girls are different, they don't really do anything, so I guess it's okay to do."²⁸

Attitudes about gender and power provide the impetus for many aspects of students' behavior in schools. One example is female students' resistance to entering nontraditional classes, programs, and occupations such as mathematics, science, technology, engineering and skilled trades. When trailblazing females do enter these classes, they are often harassed for having greater opportunities to "move up" and act unfemale. Their male classmates resent the competition for their "rightly deserved" space, feel threatened and fear loss of power. As they experience an uninvited role reversal of female over male, they employ sexual harassment as a convenient mechanism for keeping females down "in their place."²⁹

²⁸ Ibid., 128-129.

²⁹ Linn, Stein, and Young with Davis, "Sexual Harassment in Schools," 108.
Sexual harassment has proven to be highly resistant to change, the existence of both legal and other strategies notwithstanding. In part, at least, this may be because sexual harassment works. Socially, politically and economically, sexual harassment protects male turf by intimidating and humiliating those who would threaten it, putting them in their place, and keeping them there.\textsuperscript{30}

**Sexual Harassment of Students**

Although sexual harassment in the workplace is now widely recognized as a serious issue that must be addressed, the nature and extent of sexual harassment in elementary and secondary schools is not as pervasively recognized. Sexual harassment in schools is different from sexual harassment in the workplace because: (1) students are required by law to remain in school and (2) because of their age, students are more vulnerable than adults.\textsuperscript{31}

It is only within the past few years that researchers have begun to

\textsuperscript{30} Bogart and Stein, "Breaking the Silence: Sexual Harassment in Education," 155-156. In Sexual Harassment of Working Women, Catherine MacKinnon states that: "Gender is a power division and sexuality is one sphere of its expression. One thing wrong with sexual harassment...is that it eroticizes women's subordination. It acts out and deepens the powerlessness of women as a gender, as women," 220-221.

\textsuperscript{31} Ibid., 14.
document incidents of sexual harassment in the public schools and to
determine the effects of such harassment. The next section will address the
incidence and consequences of sexual harassment in the public school setting.

The American Association of University Women’s Study of Sexual Harassment
in Schools

The American Association of University Women (AAUW) published
the first nationally representative study of sexual harassment in schools and
confirmed that sexual harassment is a major problem for many students.\textsuperscript{32} The
AAUW commissioned Louis Harris and Associates, a well respected survey
research firm, to ensure that the survey’s methodology, implementation, and
questionnaire would meet the highest standards of the survey research
community.\textsuperscript{33} They polled a random sample of 1,600 boys and girls who were
representative of Hispanic, white and African-American students in grades
eight through eleven in schools across the United States. According to the
results of the survey, 81 percent of students in grades eight through eleven
have been the subject of unwelcome sexual behavior at least once in their
school lives.

\textsuperscript{32}AAUW, \textit{Hostile Hallways}, 2-25.

\textsuperscript{33}Ibid., 4.
The survey was designed to provide a profile of the problem and extent of sexual harassment in the schools. For purposes of the study, sexual harassment was defined as "unwanted and unwelcome sexual behavior which interferes with your life. Sexual harassment is not behaviors that you like or want (for example: wanted kissing, touching, or flirting)."\(^{34}\)

Results of the survey indicated that both boys and girls had been harassed according to the survey's definition; however, girls' responses revealed

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\(^{34}\) Ibid., 6. A list of 14 types of harassment was presented with the following question:

During your whole school life, how often, if at all, has anyone (this includes students, teachers, other school employees, or anyone else) done the following things to you when you did not want them to?

- Made sexual comments, jokes, gestures, or looks.
- Showed, gave, or left you sexual pictures, photographs, illustrations, messages or notes.
- Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.
- Spread sexual rumors about you.
- Said you were gay or lesbian.
- Spied on you as you dressed or showered at school.
- Flashed or "mooned" you.
- Touched, grabbed, or pinched you in a sexual way.
- Pulled at your clothing in a sexual way.
- Intentionally brushed against you in a sexual way.
- Pulled your clothing off or down.
- Blocked your way or cornered you in a sexual way.
- Forced you to kiss him/her.
- Forced you to do something sexual, other than kissing. Ibid., 5.
they were harassed with more frequency and many more girls than boys reported they had been touched, grabbed, pinched intentionally, brushed up against, or had their way blocked in a sexual manner.

A student's first experience of sexual harassment is most likely to occur in the middle school/junior high years of grades six through nine: 47 percent of the students who reported having been harassed fell into this group. However, one third of those students (32 percent) who had been harassed reported experiencing the harassment prior to seventh grade (34 percent of girls and 32 percent of boys), and 6 percent first experienced unwanted advances before third grade.\textsuperscript{35}

Of the 81 percent of students who have been targets of sexual harassment in school, 18 percent said they were harassed by a school employee such as a teacher, coach, bus driver, teacher's assistant, security guard, principal or counselor.\textsuperscript{36} As disturbing as these numbers may be, they are far outweighed by reports of peer to peer harassment. Of those who say they have been harassed, nearly 4 out of 5, or 79 percent, have been targeted by a former

\textsuperscript{35} Ibid., 7.

\textsuperscript{36} Ibid., 10.
or current student at school.\textsuperscript{37}

When 4 out of 5 students indicate they have been sexually harassed at school, it's not surprising to find that, when asked about their experiences as perpetrators, 66 percent of boys and 52 percent of girls admitted having sexually harassed someone in the school setting. Of the 59 percent who said they sexually harassed someone in the school setting, 94 percent claimed that they themselves had been harassed. Forty-nine percent of student harassers targeted someone of the opposite sex and 11 percent harassed someone of the same sex. This was more common of male harassers (15 percent versus 5 percent of females).\textsuperscript{38}

\textbf{The Impact of Sexual Harassment on Students}

Students who have experienced sexual harassment report an array of consequences that have direct and indirect effects. Among the immediate effects were feelings of embarrassment, fear or retaliation, anger, powerlessness, loss of self-confidence, and cynicism about education and teachers. Students also identified physical symptoms, including insomnia and listlessness. The effect on their education included a reduced ability to perform schoolwork,

\textsuperscript{37} Ibid., 11.

\textsuperscript{38} Ibid., 11-12.
excessive absenteeism and tardiness. Students also indicated that sexual harassment led them to transfer from a particular course or course of study and, in some cases, to transfer to another school.39

When the AAUW Educational Foundation commissioned their survey, they wanted to determine how sexual harassment affects students educationally, emotionally and behaviorally. Their findings indicated that although a hostile learning environment has serious implications for both girls and boys, girls report greater problems as a result of sexual harassment.

More subtle experiences of harassment produced less tangible consequences. Students felt betrayed, discredited, or compromised by peers and unsupported by school staff. In general, they grew less trusting of people and less enthusiastic about pursuing their education.40

The next section will consider the legal framework and history of sexual harassment as a federal statutory and constitutional violation.

**Legal Framework of Sexual Harassment**

Sexual harassment is unlawful under existing federal and state laws and, since the late 1970s, has been acknowledged by the courts as a viable cause of

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39 Linn, Stein and Young with Davis, "Sexual Harassment in Schools," 116.
40 Ibid.
action under a number of legal provisions, including the Due Process Clause of the Fourteenth Amendment to the Constitution,\textsuperscript{41} Section 1983 of the Civil Rights Act of 1871,\textsuperscript{42} Title VII of the Civil Rights Act of 1964,\textsuperscript{43} Title IX of the Educational Amendments of 1972,\textsuperscript{44} and numerous state civil and criminal statutes.

\textbf{Section 1983 and the Due Process Clause of the Fourteenth Amendment}

Section 1983 of the Civil Rights Act of 1871 [§1983] is a major piece of post-Civil War legislation developed with a primary purpose to aid in enforcement of the due process and anti-discrimination provisions of the


\textsuperscript{42} See D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992), cert. denied, 113 S.Ct. 1045 (1993) and Bosley v. Kearney.


\textsuperscript{44} See Alexander v. Yale University, 459 F.Supp. 1 (D.Conn. 1977), 631 F.2d 178 (2nd Cir. 1980) and Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990) revd, 112 S.Ct. 1028, 117 L.Ed.2d 208, 1992) and Doe v. Petaluma City School District, 830 F.Supp. 1560 (N.D.Cal. 1993), 54 F.ed 1447 (9th Cir. 1995).

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

The term "under color of law" has been interpreted, since \textit{Monroe}, to view individuals and entities such as school districts, which are not arms of the state, liable for misuses of power. The misuse of power arises because the wrongdoer is clothed with the authority of state law and the action, then, is taken "under color of state law."

laws.\textsuperscript{48}

Claims under § 1983 involve securing substantive rights under the federal Constitution and under federal statutory law, a complex process. In every case it is first necessary to look for the underlying constitutional or statutory violation or deprivation of rights and to show that the violation was inflicted “under color of state law.”\textsuperscript{49} Therefore, § 1983 is closely related to enforcement of the Due Process Clause of the Fourteenth Amendment.

\textbf{Due Process}

The Fourteenth Amendment to the federal Constitution provides, in part, that no state shall deprive a person of his life, liberty, or property without due process of law.\textsuperscript{50}

There are two types of due process. Procedural due process refers to the prescribed constitutional procedure that must be followed if a person is to be deprived of life, liberty or property.\textsuperscript{51} To provide an individual with procedural

\textsuperscript{48} Gail P. Sorenson, “Civil Rights Violations,” 313.

\textsuperscript{49} Ibid.

\textsuperscript{50} U.S. CONST. amend. XIV (1868).

due process, three basic factors must be present: proper notice must be given
that a deprivation of life, liberty or property is to occur; he must have an
opportunity to be heard; and a fair hearing must be conducted.\textsuperscript{52}

When the Supreme Court heard the case of\textit{Carey v. Piphus},\textsuperscript{53} the Court
said, “Because the right to procedural due process is “absolute” in the sense
that it does not depend upon the merits of a claimant’s substantive assertions,
and because of the importance to organized society that procedural due process
be observed...we believe that the denial of procedural due process should be
actionable for nominal damages without proof of actual injury.”\textsuperscript{54}

The second type of due process, substantive due process, requires that
the state have a valid objective and use means reasonably calculated to achieve
that objective to deprive a person of his life, liberty or property.\textsuperscript{55} The essence
of substantive due process is protection from arbitrary and unreasonable action

\textsuperscript{52} Ibid.

\textsuperscript{53} 98 S.Ct. 1042 (1978)(two students suspended from school for disciplinary
causes brought suit alleging that their right to due process under the
Fourteenth Amendment was denied).

\textsuperscript{54} Id. at 1054.

\textsuperscript{55} Ibid.
or inaction by the state.\footnote{56}

The Supreme Court related substantive protection of the Due Process Clause of the Fourteenth Amendment to education in its decision in \textit{Meyer v. Nebraska}.\footnote{57} The Court held that a Nebraska statute forbidding the teaching of foreign languages to pupils below the eighth grade in private or public schools was unconstitutional. Since the United States Constitution provided no express relief for violating the statute, the Court extended the Due Process Clause to protect the teacher.\footnote{58}

When the Supreme Court addressed the issue of corporal punishment in the case of \textit{Ingraham v. Wright},\footnote{59} it noted that “among the liberty interests ‘long recognized at common law as essential to the orderly pursuit of happiness of free man’” is the “right to be free from, and obtain judicial relief for unjustified intrusions on personal security,” including “bodily restraint and

\footnote{56} \textit{Black's Law Dictionary} 6th ed. at 1429.

\footnote{57} 262 U.S. 390, 43 S.Ct. 625 (1923).

\footnote{58} Alexander and Alexander, \textit{American Public School Law}, 289.

\footnote{59} 430 U.S. 651, 97 S.Ct. 1401 (1977). (Florida junior high school students alleged that they had been subjected to exceptionally harsh disciplinary corporal punishment in violation of their constitutional rights).
punishment. The Court failed to address the issue of severity of punishment and concluded that ordinary corporal punishment does not violate substantive rights.

Following the Ingraham decision, both the Fourth Circuit and the Tenth Circuit sought a more definitive standard in regard to punishment and maintained that punishment may be so severe as to constitute a violation of substantive due process interests.

Student victims of peer sexual harassment have alleged that they were deprived of their constitutional right of bodily integrity, personal integrity

60 Id. at 1413.

61 Id. at 1427.

62 Hall v. Tawney, 621 F.2d 909 (4th Cir. 1980) (a female elementary school student was paddled by a teacher and alleged resulting violations of her constitutional rights as secured by the Fourteenth Amendment).

63 Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987) (a female student was restrained and paddled on two separate occasions resulting in a deep cut and severe bruises to her buttocks).

64 See D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992).
and security,\textsuperscript{65} and liberty, privacy and security\textsuperscript{66} in violation of their substantive due process rights under the Fourteenth Amendment. The crucial problem under substantive due process, however, is finding that schools have an affirmative duty to act to prevent injury by private parties. To prevail in a § 1983 case, a plaintiff must sufficiently allege that a state actor deprived the plaintiff of substantive due process rights secured by the Fourteenth Amendment of the United States Constitution.\textsuperscript{67}

\textbf{Section 1983 Liability and Immunity}

Section 1983 was disregarded for almost 100 years until the Supreme Court expanded its scope and power in the case of \textit{Monroe v. Pape}.\textsuperscript{68} The

\textsuperscript{65} See Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993).

\textsuperscript{66} See Spivey v. Elliot, 29 F.3d 1522 (11th Cir. 1994), 41 F.3d 1497 (11th Cir. 1995).


\textsuperscript{68} 365 U.S. 167, 81 S.Ct. 473 (1961). Thirteen Chicago police officers broke into James Monroe’s apartment in the early morning without a search warrant. They routed all family members from bed, ransacked every room and took Mr. Monroe to the police station where he was held in custody for 10 hours and interrogated about a two day old murder. He never saw a judge, no charges were filed against him, and he was not allowed to call his family or an attorney.
Court ruled that plaintiffs could bring "damage suits against state officers."  

However, the Court also ruled that damages were available only against individuals and that a municipality did not qualify as a "person" under § 1983. This holding essentially exempted municipalities from liability for damages under § 1983.

Seventeen years later, the Supreme Court overturned the Monroe rule in the case of Monell v. Department of Social Services, and broadened the scope of § 1983 liability. The Court held that § 1983 also applied to acts of "persons" such as municipal corporations and other local government units, including school districts, whose official policies (exercised pursuant to state-created authority) caused a deprivation of rights protected under § 1983. Liability also may attach when government engages in "permanent or well settled" customs or practices that violate § 1983. Liability attaches upon the

The Monroes brought suit claiming that their civil rights had been violated under § 1983. Id. at 169.

69 Id. at 187.

70 Id. at 191.

71 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Female employees of the Department of Social Services and the Board of Education of New York City brought a class action suit. These women had been forced to take unpaid leaves of absences before such leaves were medically necessary.
“execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy...”\textsuperscript{72} However, the Court held that district liability cannot be based on a respondeat superior\textsuperscript{73} theory, even though employees in supervisory positions may be subject to personal liability.\textsuperscript{74}

Under § 1983, a person in an individual capacity, such as a teacher, principal, school employee or school board member, can be sued as a “person” if the plaintiff shows that the action taken by that individual violated a clearly established law, and that the individual exhibited “callous indifference” for the rights of the plaintiff. Employees and officials, in their individual capacities, are immune from liability under § 1983 unless they have exhibited a “callous indifference” to an individual’s constitutional rights and have demonstrated “a

\textsuperscript{72} Id. at 694, 98 S.Ct. at 2037.

\textsuperscript{73} Respondeat superior means the master is liable for the acts of his servants. Applied to a school district, this theory means that the school district is responsible for the illegal acts of its employees. In this case, the Court ruled that the Dept. of Social Services and the School Board were not responsible for the acts of the employees. However, the Court did say they could be held liable under § 1983 if they adopt an unconstitutional policy or acquiesce in an unconstitutional custom. Id. at 703, S.Ct. at 2046.

\textsuperscript{74} See Sorenson, “Civil Rights Violations,” 314.
lack of objective good faith."\textsuperscript{75} The good faith doctrine relies heavily on the discovery of facts in a case to determine both the official's intent and the reasonableness of his conduct and intent.\textsuperscript{76}

The Supreme Court acknowledged in the case of \textit{Wood v. Strickland}\textsuperscript{77} that "[T]he nature of immunity from awards of damages under § 1983 available to school administrators and school board members is not a question which the lower federal courts have answered with a single voice."\textsuperscript{78} The Court expressed the opinion that,

"...in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."\textsuperscript{79}


\textsuperscript{77} 95 S.Ct. 992 (1975).

\textsuperscript{78} \textit{Id.} at 997.

\textsuperscript{79} \textit{Id.} at 1001.
Addressing the issue of good faith immunity, the Court held that officials should be excused from liability for action under a statute that was reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.\textsuperscript{80}

Using precedent established in the Supreme Court's interpretation of § 1983 in Monell, it is actually a municipality that is sued and responsible for general damages when a municipal employee is sued in an official capacity for his or her actions. Courts may assess damages against either the government agency or an individual official of government if it or they suppress one's civil rights.\textsuperscript{81}

The Eleventh Amendment of the U.S. Constitution was conceived with the intent of protecting state treasuries from monetary liability to private parties.\textsuperscript{82} Therefore, a municipality does not receive protection under the Eleventh Amendment if it is not an arm of the state.\textsuperscript{83} The classification of

\textsuperscript{80} Id. at 998.

\textsuperscript{81} Alexander and Alexander, American Public School Law, 488.

\textsuperscript{82} Ibid., 546.

\textsuperscript{83} Robert L. Phillips, "Peer Abuse in Public Schools," 244. The Eleventh Amendment to the U.S. Constitution prevents a private party from receiving monetary remedy from a state treasury for a liability judgment against the
school districts is, however, far from definitive. In *Mt. Healthy City School District Board of Education v. Doyle*, the Supreme Court held that a school board in Ohio is a local agency, distinct from a state agency, and not entitled to Eleventh Amendment immunity. This demarcation between state and local agencies is consistent with the Court's ruling in *Monell*. The immunity of local school boards is dependent on application of the Supreme Court’s criteria to determine immunity status:

1. Whether state statutes and case law characterize the local school district as an arm of the state;
2. The source of funds to operate the schools;
3. The degree of autonomy enjoyed by the school district;
4. Whether the school district is concerned primarily with local, rather than statewide problems;
5. Whether the school district has authority to sue and be sued in its own name; and
6. Whether the school district has the right to hold and use property.\(^5\)

Municipal liability and immunity under § 1983 is particularly important


to entities such as schools and school districts since the issue of immunity of school officials is frequently the first level of defense used by defendant school districts. 86

Cases brought against school officials usually include school boards, central office administrators and building level administrators as defendants. A key legal question often addressed is whether the conduct of the officials violated clearly established statutory or constitutional rights of which a reasonable person would have known. 87

Although the focus of this study is building level administrators’ liability for constitutional or civil rights violations of students harassed by other students, it is important to understand the issues of liability and immunity and their application at the top levels of school district governance.


87 See Stoneking v. Bradford Area School Dist., 856 F.2d 594 (3rd Cir. 1988) and Doe v. Taylor, 15 F.3d 443 (5th Cir. 1994).
Peer to Peer Sexual Harassment Cases Brought Under Section 1983 and the Due Process Clause of the Fourteenth Amendment

Cases of peer to peer sexual harassment brought under § 1983 have generally been unsuccessful for plaintiffs due to the third party/private actor status relegated to student harassers. However, because plaintiffs have used § 1983 as a means of seeking redress, it is important to review this area of law to determine the legal basis on which plaintiffs have argued their cases and why they have been unsuccessful.

Students seeking remedy from school districts and officials have used three different arguments under § 1983 and the Due Process Clause: a functional custody or special relationship argument, a state-created danger argument, and a policy or custom which establishes deliberate indifference argument.89

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Functional Custody or Special Relationship Theory

The theory of functional custody entails the allegation of a special relationship *in loco parentis* between the institution and the students which imposes affirmative duties of care and protection upon the institution with respect to its students' health, safety and welfare. This duty allegedly arises out of a special custodial relationship created by truancy laws which has been likened to children held in foster care and prisoners held by their jailers.90

Students arguing that they were in a school's custody when they were injured have asserted that "compulsory attendance and the school defendants' exercise of *in loco parentis* authority over their pupils so restrain school children's liberty that plaintiffs can be considered to have been in state 'custody' during school hours for Fourteenth Amendment purposes."91

The Supreme Court firmly planted a stumbling block in the paths of plaintiffs alleging *in loco parentis* in *DeShaney v. Winnebago County*

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Department of Social Services. At the age of four, Joshua DeShaney was beaten so severely by his father that he entered a life-threatening coma. As a result, he is expected to be profoundly retarded for the remainder of his life, which he will likely spend confined in an institution. His mother brought a civil rights action under § 1983 against Winnebago County, the Winnebago County Department of Social Services (DDS), and various employees of DDS. The boy's mother claimed that the defendants deprived Joshua of his liberty interest without due process of law in violation of the Fourteenth Amendment because they did not intervene to protect him from his father, who defendants knew or should have known posed a threat to Joshua. The Court held that the defendants were not liable because the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other." The Court acknowledged, however, that in "limited circumstances the Constitution imposes upon the State affirmative


\[93\] Id. at 193.

\[94\] Id.

\[95\] Id. at 196.
duties of care and protection with respect to particular individuals.\textsuperscript{96} The Court cited cases in which it had held that the State is required to provide incarcerated prisoners with adequate medical care\textsuperscript{97} and involuntarily committed mental patients with enough services to ensure their "reasonable safety" from themselves and others.\textsuperscript{98} The Court stated:

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.\textsuperscript{99}

If Joshua had been placed in a foster home by the State at the time of his injuries, he would have been considered to be in the custody of the government who would have had an affirmative duty to protect him.\textsuperscript{100} Chief Justice Rehnquist, writing for the majority, noted that the government played no part in creating the dangers Joshua faced, nor did it render him more

\textsuperscript{96} Id. at 198.

\textsuperscript{97} Id. See generally Youngberg v. Romeo, 457 U.S. 307 and Estelle v. Gamble, 429 U.S. 97.

\textsuperscript{98} Id. at 199.

\textsuperscript{99} Id. at 200.

\textsuperscript{100} Id. at 201.
vulnerable to them.\textsuperscript{101} Courts have interpreted this statement as meaning that creating a danger by putting a plaintiff in a more vulnerable position creates a special relationship between the municipality and the child. Basing their arguments on this theory, attorneys for student victims have asserted that schools are responsible for protecting students despite the outcome in \textit{DeShaney}.\textsuperscript{102}

In \textit{Stoneking v. Bradford Area School District} (\textit{Stoneking I}),\textsuperscript{103} the Third Circuit found that a schoolchild who was sexually assaulted by a teacher was in the functional custody of school authorities because she was commanded to attend school by a compulsory education statute.\textsuperscript{104} On appeal, the Supreme

\begin{flushright}
\textsuperscript{101} Id.
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\textsuperscript{102} Davis, "Reading, Writing and Sexual Harassment," 1134.
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\textsuperscript{103} 856 F.2d 594 (3rd Cir. 1988), \textit{vacated sub nom.}, Smith v. Stoneking, 489 U.S. 1062, \textit{affd on other grounds}, 882 F.2d 720 (3rd Cir. 1989), \textit{and cert. denied}, 493 U.S. 1044 (1990). Kathleen Stoneking, a graduate of Bradford High School, was coerced into engaging in various sexual acts with the band director at the high school, on school trips and in his home from her sophomore year until two years after she graduated. Other students had complained of sexual assaults by the band director prior to and during this time period. The principal had key personal records at his home regarding the band director, including complaint reports of sexual misconduct filed by female band members. The principal had also advised the band director to avoid "one-on-one" contact with female students.
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\textsuperscript{104} 856 F.2d at 601.
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Court vacated the decision and directed the Third Circuit to reconsider the case in light of *DeShaney*. Since the Court stated in *DeShaney* that not every tort committed by a state actor is transformed into a constitutional violation, it is not clear whether the Court objected to the finding of custody, or if it was merely concerned with the fact that the Third Circuit also grounded liability on state tort laws.\(^{105}\) The Court did not grant certiorari to resolve the question.

On rehearing of *Stoneking*, the Third Circuit said that finding functional custody in a school setting was not out of line with *DeShaney*.\(^ {106}\) However, the court thought it more expedient to find liability based on the theory that school authorities caused plaintiff's injuries by establishing and maintaining a policy, practice, or custom that directly caused her constitutional harm.

When the Seventh Circuit heard *J.O. v. Alton Community Unit School*

\(^{105}\) *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 202 (1989).

**District 11**, 107 it held that a girl abused by a teacher did not have a cause of action under the functional custody theory because the school had not rendered her unable to care for herself. 108 The court stated that "only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise." 109 The court went on to state that the government, acting through local school administrators, has not rendered students so helpless that an affirmative constitutional duty to protect them arises. 110

Using DeShaney as a backdrop, other federal courts in numerous jurisdictions, including the Third, Fifth, Eighth and Ninth Circuits, have held that school districts owe no constitutional duty to protect school children from acts of other students or adults under a special relationship. These courts have also rejected the notion that compulsory attendance laws create a special

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107 909 F.2d 267 (7th Cir. 1990). This case involved the alleged molestation of middle school female students by one male teacher, "Lester the Molester," as he was known to students and a variety of staff members. He participated in verbal sexual harassment and child sexual and physical abuse in the public arena of the school cafeteria while on cafeteria duty. Id.

108 Id.

109 Id. at 272 citing DeShaney, 489 U.S. at 199-200, 109 S.Ct. at 1005.

110 Id.
relationship between students and school officials.\textsuperscript{111}

\textbf{State Created Danger Theory}

In \textit{DeShaney}, the Supreme Court provided an available argument that, when a state creates a danger or makes someone more vulnerable to danger, it has an affirmative duty to protect that individual.\textsuperscript{112} Several federal appellate courts have recognized the state-created danger theory, including the

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\textsuperscript{111} Stoneking v. Bradford Area School, 882 F.2d 720 (3rd Cir. 1989), D.R. v. Middle Bucks Area Vocational and Technical School, 972 F.2d 1364 (3rd Cir. 1992), Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993), Doe v. Petaluma, 54 F.3d 1447 (9th Cir. 1995), and Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995). These cases are discussed in detail in Chapter 4.

\textsuperscript{112} DeShaney v. Winnebago, 489 U.S. 189, 201 (1989).
Eleventh, Ninth, Eighth, and Seventh circuits. As courts have heard cases of peer to peer harassment, an emphasis has been put on the fact that the state created danger theory is predicated on the states' affirmative acts which may expose or cause the plaintiff to be exposed to danger. However, the Seventh Circuit's opinion when it heard Bowers v. DeVito in 1982 was that “the line between action and inaction, between inflicting and failing to prevent

113 Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) (denying summary judgment to the government when inmate laborers abducted and held a town clerk hostage for three days), cert. denied, 494 U.S. 1066 (1990).

114 Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989)(holding state liable for injuries caused by rape when a trooper impounded a woman's car and left her to find her way home on foot), cert. denied, 498 U.S. 938 (1990).

115 Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990)(holding that plaintiff could maintain a constitutional claim if plaintiff alleged that the police chief, a close personal friend of a man who killed his wife and her daughter, stopped the police officers from enforcing a restraining order issued in response to the wife's complaints).

116 Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983)(stating that if a public officer had knowingly directed traffic away from a burning car because he did not want the occupants to be saved, he would be liable under § 1983 for depriving plaintiffs of their lives without due process, but holding that an allegation that officer negligently failed to rescue does not constitute a claim under the Constitution), cert. denied, 465 U.S. 1049 (1984).

117 Davis, “Reading, Writing and Sexual Harassment,” 1138.

118 686 F.2d 616 (7th Cir. 1982).
the infliction of harm" is not a clearly drawn one.\textsuperscript{119} The court further stated that "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."\textsuperscript{120}

Nevertheless, according to Davis,\textsuperscript{121} the courts’ application of the theory after \textit{DeShaney} demonstrates great reluctance to find that a school or a school official has placed a student in a position of danger.\textsuperscript{122}

\textbf{The Policy, Custom and Deliberate Indifference Argument}

The courts have noted that a § 1983 action based on a policy or custom of deliberately indifferent administrators or other state actors must first establish an underlying constitutional deprivation in order to stand.\textsuperscript{123} When

\textsuperscript{116} Id. at 618.

\textsuperscript{120} Id.

\textsuperscript{121} Davis, "Reading, Writing and Sexual Harassment," 1139.

\textsuperscript{122} \textit{See generally} D.R. v. Middle Bucks Area Vocational and Technical School, 972 F.2d 1364 (3rd Cir. 1992) and Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993). These cases will be discussed in depth in Chapter 4.

\textsuperscript{123} \textit{See} Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989), B.M.H. by C.B. v. The School Board of Chesapeake, VA, 833 F.Supp
the Supreme Court heard the case of *City of Canton v. Harris.* \(^{124}\) the Court reiterated the importance of causation in § 1983 claims. The Court held that the “first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.” \(^{125}\) The Court made clear that deliberate indifference can be shown where “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.” \(^{126}\)

Phillips maintains that inadequately training teachers could be a policy of deliberate indifference if the inadequacy was so obvious that it would likely lead to constitutional deprivations in the classroom. \(^{127}\) However, the proof

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\(^{125}\) Id. at 385, 109 S.Ct. at 1203.

\(^{126}\) Id. at 390, 109 S.Ct. at 1205.

\(^{127}\) Robert L. Phillips, “Peer Abuse in Public Schools: Should Schools be Liable for Student to Student Injuries Under Section 1983?” 249.
necessary to establish an official policy, custom and practice of reckless or deliberate indifference to sexual harassment is fairly onerous. For example, claims of deliberate indifference have been rejected where complaints that a bus driver kissed a boy and used foul language were ignored by the school.

When Kathleen Stoneking was sexually abused by her band director, she argued that the school district was liable for causing her constitutional harm. She claimed that by concealing and discouraging her claims of abuse, the school district created a climate which allowed teachers to abuse students and that a causal relationship existed between this policy and the director's repeated sexual assaults. The Third Circuit said that "[l]iability of municipal policy makers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed." The Third Circuit held that the

128 Lewis and Hastings, Sexual Harassment in Education, 32.

129 Jane Doe v. Special Sch. Dist. of St. Louis County, 901 F.2d 642 (8th Cir. 1990).


131 Id.

132 Id. at 725.
plaintiff could maintain a § 1983 claim because the defendant's policy, practice and custom directly caused her constitutional harm.\textsuperscript{133}

Actual or constructive knowledge of prior instances of misconduct on the part of a school employee appears to be an essential element in establishing supervisory liability under the deliberate indifference standard.\textsuperscript{134} If a school district does not have knowledge of abuse or harassment, it may avoid liability. For example, in \textit{Thelma D. v. Board of Education},\textsuperscript{135} the school board and school officials were not liable for five complaints documented by school officials about a teacher's sexual abuse of students over a 16 year period because the board had no knowledge of the complaints and the complaints were too isolated to establish a pattern of indifference.

Sorenson has noted that it is well established that a municipal entity and its employees acting in their official capacities (when they evidence deliberate indifference) may be held liable under § 1983 when their customs, policies, or practices cause a violation of a student's substantive due process

\textsuperscript{133} Id.


\textsuperscript{135} 737 F.Supp. 541, \textit{aff'd}, 934 F.2d 929 (8th Cir. 1991).
rights.\textsuperscript{136} Perhaps the most notable § 1983 case to illustrate this liability was the Fifth Circuit's decision in \textit{Doe v. Taylor Independent School District} in late 1994\textsuperscript{137} involving the sexual harassment and molestation of a young girl during her freshman and sophomore years by a biology teacher and assistant coach. The Fifth Circuit developed a three prong test to determine if a school official's action or inaction demonstrates a deliberate indifference to a student's constitutional rights. The test requires the plaintiff to establish that:

1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
3) such failure caused a constitutional injury to the student.\textsuperscript{138}

When the court considered these legal principals in the context of qualified immunity, it stated that school officials could not be held liable under conditions described above.


\textsuperscript{137} 15 F.3d 443 (5th Cir. 1994) \textit{en banc}.

\textsuperscript{138} \textit{Id.} at 454.
§ 1983 unless:

(1) Jane Doe's liberty interest under the substantive due process component of the Fourteenth Amendment, and
(2) administrator's duty with respect to Jane Doe's constitutional right were "clearly established" at the time these events took place.\textsuperscript{139}

The court determined that "No reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." Further, "Not only was the underlying violation clearly established in 1987, but Lankford's (principal) and Caplinger's (superintendent) duty with respect to that violation was also clearly established at that time."\textsuperscript{140}

When a plaintiff can allege sufficient facts to show that school officials acted with deliberate indifference, courts will refuse to grant officials' request for qualified immunity.\textsuperscript{141}

\textbf{Title VII}

In 1964, Congress passed legislation to protect employees in the workplace. Title VII of the Civil Rights Act of 1964 [Title VII] was originally

\textsuperscript{139} Id.

\textsuperscript{140} Id. at 455.

\textsuperscript{141} Lewis and Hastings, \textit{Sexual Harassment in Education}, 33.
intended to abolish job discrimination based on race or national origin. The classification of "sex" was added to the law at the last minute on the floor of the House of Representatives in an effort to derail passage of the act. It was an addition made without forethought based on investigation of the problem of sex-based discrimination. Title VII prohibits employment discrimination on the basis of race, color, religion, national origin and sex. The law provides, in part, that:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex or national origin or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII has been interpreted to encompass behaviors as diverse as assaults,


143 Eisaguirre, Sexual Harassment, 15.

144 The original act prohibited an employer from discriminating against an employee because of race, color, or sex, but did not specify religion. The 1972 Amendments incorporated religion. See Alexander and Alexander, American Public School Law, 627.

leers, sexual innuendo, displays of sexually suggestive materials and harassment which is nonsexual in nature but still offensive.\textsuperscript{146}

In 1980 the Equal Employment Opportunity Commission [EEOC], the office charged with the enforcement of Title VII, ruled that sexual harassment was considered an unlawful employment practice under Title VII of the Civil Rights Act of 1964.\textsuperscript{147} Guidelines were issued recognizing that sexual harassment in the workplace is a form of discrimination prohibited by Title VII.\textsuperscript{148} The EEOC defined sexual harassment as including two types of


\textsuperscript{148} 29 C.F.R. § 1604.11(a) (1992) defines sexual harassment as:

[unwelcome 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 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.
harassment—quid pro quo and hostile environment.\textsuperscript{149} Under early case law, Title VII covered only situations involving forced submission to some kind of sexual bargaining. This give and take form of sexual harassment was appropriately termed "quid pro quo."\textsuperscript{150}

The quid pro quo theory required that plaintiffs demonstrate a sufficient relationship between the rejection of unwelcome sexual advances and the loss of tangible job benefits. Retaliatory measures, such as termination, loss of favorable job evaluations, loss of promotions, or other concrete losses relating to the employment, were actionable under this theory.\textsuperscript{151}

Initially, courts were unwilling to support a claim of sexual harassment under Title VII. In 1975, in \textit{Corne v. Bausch and Lomb, Inc.}, the court held that the repeated sexual advances of a supervisor toward two female employees was "nothing more than a personal proclivity, peculiarity or mannerism" that

\textsuperscript{149} 29 C.F.R. § 1604.11(a) (1980).


\textsuperscript{151} ibid.
was "satisfying a personal urge" and was unrelated to employment.152

In Williams v. Saxbe, however, the U.S. Court of Appeals of the District of Columbia renounced the previous philosophy of Corne and sustained a claim of sexual harassment as sex discrimination prohibited under Title VII.153 Williams, a female federal employee, alleged that she was dismissed from her job because she refused her male supervisor's requests for sexual favors. The court rejected the employer's argument that the alleged harassment was a personal rather than an employment occurrence. The court held that sexual harassment was a distinct type of discrimination based on sex that produced barriers to employment for one gender and, accordingly, was actionable under Title VII.154 Although the court remanded the case back to the district court for further proceedings,155 the final decision by the district court was that


154 Id. at 657-58.

evidence established that submission to sexual advances of a supervisor was
"term and condition of employment" violative of equal employment
discrimination within prohibitions of the Civil Rights Act of 1964 and sex

In 1977, the District of Columbia Court of Appeals became the first
appellate court to uphold a claim of \textit{quid pro quo} sexual harassment under
Title VII. In \textit{Barnes v. Costle},\footnote{561 F.2d 983 (D.C. Cir. 1977). \textit{See supra} note 15.} a female employee claimed her job was
eliminated when she rejected her supervisor's repeated sexual advances. The
court ruled that the woman became the target of her supervisor's desires solely
because of her sex.\footnote{\textit{Id.} at 990.} The court interpreted Title VII as providing a remedy for
sexual harassment that has adverse employment consequences such as
termination, demotion, or denial of other job benefits. On the issue of
employer liability, the court cautioned that, while usually an employer is liable
for the discriminatory practices of supervisory personnel, "should a supervisor
contravene employer policy without the employer's knowledge and the
consequences are rectified when discovered, the employer may be relieved from
responsibility under Title VII."\textsuperscript{159}

Similarly, in \textit{Tomkins v. Public Service Electric & Gas Co.},\textsuperscript{160} the Third Circuit ruled that sexual harassment constituted discrimination under Title VII when a supervisor made sexual advances toward a female employee and conditioned her employment on a favorable response to his advances. The court reasoned that the employee's female status was the motivating factor in the supervisor's sexual advances. The court stated that the employer must have had "actual or constructive knowledge" of the harassment and then failed to take prompt, corrective action in order to be held liable.\textsuperscript{161}

In 1981, courts expanded the parameters of legal protection under Title VII. Coverage extended to include sexual harassment that makes working conditions unbearable, signaling a recognition of a wider range of women's real life experiences in the workplace. This shift legitimized objections to sexually disparaging treatment which courts formerly considered to be inevitable, beyond regulation, and, by implication, sanctioned behavior.\textsuperscript{162}

\textsuperscript{159} \textit{Id.} at 993.

\textsuperscript{160} 568 F.2d 1044 (3rd Cir. 1977).

\textsuperscript{161} \textit{Id.} at 1048.

\textsuperscript{162} LeClair, "Sexual Harassment Between Peers Under Title VII and Title IX,"
In *Bundy v. Jackson*, the D.C. Circuit found that the defendant had discriminated against the plaintiff Sandra Bundy with respect to the "terms, conditions and privileges" of her employment even though she lost no tangible job benefits. ¹⁶³ Bundy's supervisors had subjected her to sexual advances, requests for sexual favors, and questions as to her sexual proclivities. ¹⁶⁴ The supervisor to whom she complained invited her to engage in a sexual relationship and trivialized her complaints by stating that "any man in his right mind would want to rape" her. ¹⁶⁵

The *Bundy* court observed that sexual insults and humiliating propositions caused Bundy needless anxiety and "illegally poisoned" her work environment. ¹⁶⁶ The court held that an employer who created an abusive work environment, in which an employee was subjected to sexual insults and demeaning propositions, was liable under Title VII. In redefining the term "conditions of employment," the court ruled that Title VII protected an

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¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Id. at 944.
employee from psychological harm which could lead to a loss of economic
benefits or a decline in the employee's productivity.¹⁶⁷

_Bundy_ served as a wake-up call to the courts to recognize a wider range
of women's experiences in the workplace as sexual harassment. When the
Eleventh Circuit heard the case of _Henson v. City of Dundee_ in 1982 they said
that "sexual harassment which creates a hostile or offensive environment for
members of one sex is every bit the arbitrary barrier to sexual equality at the
workplace that racial harassment is to racial equality."¹⁶⁸ The court formulated
different standards of employer liability for _quid pro quo_ sexual harassment
and "hostile environment" sexual harassment. In distinguishing between these
two types of cases, the court concluded that since an employer bestows
decision-making powers upon a supervisor regarding hiring, firing, and
promoting, the employer should be held strictly liable for sexual harassment by

¹⁶⁷ _Id._ at 946.

¹⁶⁸ _Henson v. City of Dundee_, 682 F.2d 897, 902 (11th Cir. 1982). In this case,
later cited with approval by the U.S. Supreme Court in 1986, the U.S. Court
of Appeals for the Eleventh Circuit went on to note that "surely, a requirement
that a man or woman run a gauntlet of sexual abuse in return for the privilege
of being allowed to work and make a living can be as demeaning and
disconcerting as the harshest of racial epithets."
the supervisor when his behavior results in the loss of an economic benefit.\textsuperscript{169}

Conversely, the court stated that the supervisor's conduct is beyond the limits of his authority as a supervisor when he institutes an abusive work environment by sexually insulting and demeaning an employee.

The \textit{Henson} court developed a five criteria test for a prima facie case of sexual harassment based on an offensive work environment under Title VII:

1. the employee must belong to a protected group;
2. the employee must have experienced unwelcome sexual advances, requests for sexual favors, or other verbal or physical sexual conduct that the employee did not solicit and that she found offensive;
3. the harassment complained of must have been based on sex (gender); and
4. the harassment must have influenced a "term, condition, or privilege of employment"; specifically the harassment must have been so pervasive that it changed the conditions of employment and created an offensive environment.\textsuperscript{170}

The fifth criterion was \textit{respondeat superior}. In a \textit{quid pro quo} case, the strict liability standard would be used because the supervisor depends on the authority granted him by the employer to coerce sexual favors from the employee. However, in a hostile environment case, the employee must show that the employer knew or should have known of the sexually offensive work

\textsuperscript{169} \textit{Id.} at 910.

\textsuperscript{170} \textit{Id.} at 903.
environment and failed to take remedial action before the employer can be held responsible.\textsuperscript{171}

The Supreme Court issued its first decision regarding a claim of sexual harassment in \textit{Meritor Savings Bank FSB v. Vinson.}\textsuperscript{172} In this landmark case, the Court recognized that sexual harassment creating an unbearable work environment is illegal under Title VII.\textsuperscript{173} \textit{Vinson} was an important step in sexual harassment litigation because it accepted the EEOC guidelines and decisions made by lower courts.\textsuperscript{174}

The plaintiff in this case, Michele Vinson, was sexually harassed by the bank manager for whom she worked as a teller. In fear of losing her job, Ms. Vinson submitted to sexual relations with him. She also testified that the bank manager fondled her in the presence of other employees, harassed her in the women's bathroom, exposed himself to her at work, and forcibly raped her.\textsuperscript{175}

\textsuperscript{171} \textit{Henson v. City of Dundee}, 682 F.2d 897, 903 (11th Cir. 1982).

\textsuperscript{172} 106 S.Ct. 2399 (1986).

\textsuperscript{173} \textit{Id.} at 67-68.

\textsuperscript{174} \textit{LeClair}, "Sexual Harassment Between Peers Under Title VII and Title IX," 314.

The Court rejected the notion that a sexual harassment claim is limited to situations involving "economic' or 'tangible' discrimination." The Court stated that "sexual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic quid pro quo" and noted that the EEOC guidelines specifically define sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... when... 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." Noting sexual harassment precedent, the Court declared "employees [have] the right to work in an environment free from discriminatory intimidation, ridicule and insult."  

Emphasizing that courts historically had utilized the hostile environment theory of discrimination to determine Title VII violations in cases where employees have been compelled to withstand racial, ethnic, or religious abuse on the job, the Court decided that nothing "suggests that a hostile environment based on discriminatory sexual harassment should not be likewise

176 Meritor, 106 S.Ct. at 2404.

177 Id. at 2405-6. (quoting EEOC Guidelines, 29 C.F.R. 1604.11 (a) 1985).
prohibited." The Court warned, however, that for sexual harassment to be actionable it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."\textsuperscript{178}

Writing for the majority, Judge Rehnquist declined to issue a definitive statement on employer liability, and instead proposed different standards of employer liability for \textit{quid pro quo} and hostile environment sexual harassment. The Court also noted that the mere existence of a policy against sexual harassment was not enough to protect an employer from liability. Employers must publicize grievance procedures that "contain sufficient flexibility to allow and encourage a harassed employee to approach management with a complaint...at any level chosen by the employee."\textsuperscript{179}

The decision in \textit{Meritor} is significant because the Supreme Court affirmed the standard first established in \textit{Bundy} and held that plaintiffs have a legal remedy for a sexually hostile work environment under Title VII. The Court also acknowledged that although a plaintiff must show that the advances were "unwelcome," a claim is not thwarted by the plaintiff's voluntary

\textsuperscript{178} Id. at 2405.

\textsuperscript{179} Id. at 2405-9.
submission to the advances.\textsuperscript{180}

During the 1980s, the courts also recognized that the hostile environment theory of sex discrimination included the more specific problem of co-worker sexual harassment.\textsuperscript{181} The first case acknowledging co-worker sexual harassment was \textit{Continental Can Co. v. State}.\textsuperscript{182} Although the plaintiff stated her claim under Minnesota’s Human Rights Act,\textsuperscript{183} the provision on sex discrimination was parallel to that in Title VII.\textsuperscript{184} In \textit{Continental Can}, Willie Ruth Hawkins was one of only two female employees at Continental’s plant.\textsuperscript{185} Ms. Hawkins and her female co-worker both testified that male co-workers sexually harassed them with abusive language and that both complained to no

\textsuperscript{180} LeClair, "Sexual Harassment Between Peers Under Title VII and Title IX," 315.


\textsuperscript{182} 297 N.W. 2d 241 (Minn. 1980).


\textsuperscript{184} Id. §363.03-1(2)(c)(Supp. 1991). This section provides, in pertinent part, that it is a violation “for an employer, because of...sex,...to discriminate against a person with respect to...compensation, terms,...[or] conditions...of employment.” Id.

\textsuperscript{185} Continental Can Co., 297 N.W. 2d at 244.
avail. The harassment against Hawkins escalated, including frequent pats on her buttocks. This treatment culminated in an incident where a male co-worker grabbed Hawkins between the legs from behind.186

The court tailored its decision to conform to the EEOC guidelines, which make co-worker sexual harassment actionable where the employer knew or should have known of the conduct.187 The court’s decision made it clear that an employer has a duty to take prompt and appropriate action where conduct amounts to illegal sex discrimination.188

In 1991, the Ninth Circuit reversed a case that was originally dismissed at the circuit level as “isolated and trivial.”189 Ellison was an IRS agent who had a lunch date with a male employee, Mr. Gray. When he asked her out again, she declined. He then began sending love letters which scared her, and

186 Id. at 244-246.

187 Id. The regulations explicitly address co-worker sexual harassment. 29 C.F.R. § 1604.11(d) (1980). “With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”

188 Id.

189 Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
she filed a complaint with her employer. Gray was transferred to another office; however, three months later he was allowed to return without any notification to Ellison. When she learned of his return, Ellison requested and was granted a transfer. Her district level suit was dismissed; however, the Ninth Circuit reversed that decision and ordered a trial, ruling that a hostile work environment must be judged from the perspective of the victim, in this case, the "reasonable woman."\(^{190}\) Recognizing that many women share common concerns that men do not necessarily share, the majority accepted the reasonable woman standard, one of the most significant points to emerge from the Ellison opinion. The Ninth Circuit also said that a plaintiff need not suffer sexual harassment to the point of psychological debilitation in order to recover because Title VII should protect such a plaintiff before that would occur.\(^{191}\)

\(^{190}\) Wetherfield, "Sexual Harassment," 23. The court in Ellison determined that (1) an understanding of the victim’s perspective requires an analysis of the different perspectives of men and women; (2) a female employee may state the basis of a case of hostile environment sexual harassment by alleging conduct that a reasonable woman would consider sufficiently severe; however, the employer does not have to accommodate the idiosyncrasies of a hypersensitive employee; (3) the reasonable woman standard is not static, but will change over time as the views of reasonable women change; and (4) there can be unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.

\(^{191}\) Ellison at 878.
Some courts have adopted a reasonable woman standard on the grounds that the reasonable person standard fails to account for the wide divergence between men's and women's views of appropriate sexual conduct. For example, in Robinson v. Jacksonville Shipyards, Inc., the district court used a reasonable woman standard in holding that pervasive pornographic pictures, sexual comments, verbal harassment, abusive graffiti, and unwelcome touching of some of the plaintiff’s female coworkers created a hostile working environment.

The effect of Title VII has been significant in the workplace as the courts have recognized many aspects of sexual harassment and taken steps to equalize opportunities for males and females. Title VII has also had a profound effect on cases of sexual harassment heard in the educational setting. Courts have applied the prevailing theories and guidelines of Title VII, specifically those issued by EEOC, to Title IX cases in the educational

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194 Id. at 1524.
setting.\textsuperscript{195} Therefore, Title VII is an important foundation for a discussion of
Title IX.

**Title IX**

In 1972, Congress responded to the issue of sex discrimination in
educational programs by enacting Title IX of the Education Amendments of
1972.\textsuperscript{196} In structuring the new bill, Congress used language identical to that
of Title VI of the Civil rights Act of 1964.\textsuperscript{197} In both statutes, Congress
expressly created a protected class of beneficiaries, but did not establish a
private cause of action or any remedies for individuals. As a result, it has been

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\textsuperscript{195} See Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992) and
Doe v. Petaluma City School District, 54 F.3d 1447 (9th Cir. 1995).

\textsuperscript{196} 20 U.S.C. §§ 1681-1683, 1685, 1686 (1976). Section 901 of Title IX, which
outlines the general prohibition against sex discrimination, provides that:

No person in the United States shall, on the basis of sex, be
excluded from participation in, be denied the benefits of, or be
subjected to discrimination under any program or activity
receiving Federal financial assistance.


No person in the United States shall, on the ground of race, color,
or national origin, be excluded from participation in, be denied
the benefits of, or be subjected to discrimination under any
program or activity receiving Federal financial assistance.
up to the courts to determine whether a private cause of action or an individual remedy exists.\footnote{198}

Title IX was conceived with the intent that it have a comprehensive effect on sex discrimination in educational institutions. It emphasizes two general objectives: restricting federal funds to institutions that support discriminatory practices and providing individuals protection against such discriminatory practices. Instead of simply prohibiting certain conduct within the Act, Congress expressly emphasized the victim's rights and a general prohibition against sex discrimination.\footnote{199} Legislative history shows a determination to remedy "access factors," such as admission standards which had historically denied women the opportunity to even enter academic institutions, and hiring procedures.\footnote{200} In 1972, gender discrimination and sexual harassment were not areas of frequent litigation. These were problems


\footnote{199}{Ibid., 560.}

that would emerge in society, but which were not definitively within the scope of the legislative intent of Title IX.\textsuperscript{201}

Title IX is administered by the United States Department of Education's Office of Civil Rights [OCR]. OCR has implemented guidelines to enforce Title IX but has not issued guidelines on sex-based harassment. However, OCR informally maintains that sexual harassment is prohibited under Title IX.\textsuperscript{202} OCR's primary means of enforcing Title IX is to monitor federally funded educational institutions and withhold federal funds from institutions that discriminate on the basis of sex.\textsuperscript{203}

**Parameters of Title IX Defined: Congress v. the Supreme Court**

In 1979, the Supreme Court held that Title IX was enforceable by an individual through a private action.\textsuperscript{204} However, various rulings have

\textsuperscript{201} Ibid., 380.


\textsuperscript{203} Ibid., 280.

\textsuperscript{204} Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946 (1979)
produced procedural barriers to the effectiveness of Title IX. For example, in 1982, the Supreme Court held in *North Haven Board of Education v. Bell*\(^{205}\) that Title IX only applied to specific programs receiving federal aid. Therefore, an educational institution was not required to conform all of its programs or the entire institution to Title IX merely because one or a few programs received

\begin{quote}
(reversing and remanding 559 F.2d 1063 (7th Cir. 1977)). Cannon, an experienced surgical nurse over thirty years of age in the fall of 1974, applied for admission to the 1975 entering class at every medical school in the state of Illinois. She was completing her baccalaureate degree at this time. All of the medical schools denied Cannon admission. Her academic qualifications, including her college grade point average and her score on the Medical College Admission Test (MCAT), were competitive with students who were accepted to the medical schools. Cannon filed suit in the summer of 1975 against two of the schools (U. of Chicago and Northwestern U.) alleging sex discrimination in violation of Title IX of the Ed. Amend. of 1972, 20 U.S.C. § 1681. Specifically, Cannon claimed that her application was denied pursuant to a published admissions policy that discouraged applicants over thirty years of age. She asserted that this policy had an adverse impact on women and failed validly to predict success either in medical school or in practice.
\end{quote}

\(^{205}\) 456 U.S. 512, 102 S.Ct. 1912 (1982). The major rulings in this case were (1) that employment discrimination comes within Title IX's prohibition, and (2) subpart E regulations promulgated in connection with Title IX are valid. At 1926, n. 4, the Court quoted Senator Bayh from 118 CONG. REC. 5807 (1972) who observed that the amendment "prohibits discrimination on the basis of sex in federally funded education programs," and that "[t]he effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found..."
federal assistance. Two years later, in *Grove City College v. Bell*, 206 the Supreme Court shortened the reach of Title IX by narrowly defining a "program." The Court put limitations on Title IX once again in 1985 in *Atascadero State Hospital v. Scanlon*, 207 by holding that mere acceptance of federal funds does not waive a state's sovereign immunity under the Eleventh Amendment.

In the Civil Rights Remedies Equalization Amendment of 1986, Congress expressly abrogated the states' Eleventh Amendment immunity under Title IX, thereby allowing plaintiffs to file suit against states and state institutions. 208 Additionally, in response to the Court's decision in *Grove City* and in *Atascadero*, Congress passed the Civil Rights Restoration Act of

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206 465 U.S. 555, 109 S.Ct. 1211 (1984) at 1213, no. 2, stating, "[t]he receipt of Basic Educational Opportunity Grants (BEOG's) by some of the College's students does not trigger institutionwide coverage under Title IX...The fact that federal funds eventually reach the College's general operating budget cannot subject it to institutionwide coverage."


1987, which expanded the jurisdiction of Title IX to cover an entire institution if any part receives federal money.

**Title IX and Sexual Harassment**

In 1980, *Alexander v. Yale University*, the first case recognized as sexual discrimination in the form of sexual harassment under Title IX, was heard after five female students brought claims of sexual harassment against Yale University. The Court of Appeals for the Second Circuit analyzed the harm inflicted in terms of quid pro quo sexual harassment. One student alleged that her instructor “offered to give her a grade of ‘A’ in the course in exchange for her compliance with his sexual demands.” Because she refused to submit, she received a low grade. Although the court deemed this claim justiciable, it affirmed the lower court’s decision which dismissed the claims of co-

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The Congress finds that...(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendment of 1972...and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

210 *Alexander v. Yale Univ.*, 631 F.2d 178 (2nd Cir. 1980).

211 Id. at 182.

212 Id.
plaintiffs. The court reasoned that this plaintiff was within the class Title IX was designed to protect. The court further stated that the allegations, if proven, would constitute sex discrimination under Title IX. The court commented:

> It is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment.

All the plaintiffs alleged injury from "deprivation of an educational environment free from condoned harassment." The Court of Appeals found


The first co-plaintiff asserted that she abandoned playing the flute because her flute instructor made repeated sexual advances towards her. The court found the injury was "too speculative" and did not amount to deprivation of an educational benefit under Title IX. The second co-plaintiff asserted that she left her field hockey team manager position because the coach sexually harassed her. The court found that this allegation did not specify an injury. The third co-plaintiff asserted that her knowledge of the sexual harassment of other students caused her emotional harm, and the fourth co-plaintiff asserted that, in the absence of a grievance procedure for sexual harassment complaints, she expended time, effort and money pressing the complaints herself. The lower court found that "no judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong." Id. at 3.

\[\text{Id. at 4.}\]

\[\text{Alexander v. Yale Univ., 631 F.2d 178, 184 (2nd Cir. 1980).}\]
all these claims moot because the students had graduated and that “none of these plaintiffs at present suffers from the alleged injury.” Because the plaintiffs sought an order requiring Yale to institute a grievance procedure, the court’s assistance would not benefit them personally. Therefore, none of the plaintiffs had a standing.

The Third Circuit also ruled on a case of sexual harassment at the university level under Title IX a few years later. Moire, a female medical student, alleged that her supervisor sexually harassed her, sanctioned a hostile environment and gave her a failing grade. The plaintiff brought a sexual harassment charge under Title IX and a due process charge under the Fourteenth Amendment. The Third Circuit affirmed the decision of the District Court which implied, for the first time, that the EEOC Guidelines on Sexual Harassment are also applicable to Title IX. Although the court

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Id. To have standing “the injury must be suffered personally by the party...and the relief requested must redound to that party’s personal benefit.” Id. at 183.

Id.

Moire v. Temple University School of Medicine, 613 F.Supp. 1360 (E.D. Pa. 1985), aff’d, 800 F.2d 1136 (3rd Cir. 1986).

Id. at 1366, n. 2.
dismissed the plaintiff's sexual harassment claims, it recognized hostile
environment sexual harassment in a purely educational context.\textsuperscript{220}

The First Circuit explicitly extended the "Title VII standard for proving
discriminatory treatment...to [the plaintiff's] claims of sex discrimination
arising under Title IX" in the case of Lipsett \textit{v. University of Puerto Rico}.\textsuperscript{221}
Annabelle Lipsett was a surgery resident at the University of Puerto Rico
School of Medicine. She alleged that she was sexually harassed while in the
medical program and that she was dismissed from the program because of her
sex.\textsuperscript{222} Incidents of sexual discrimination ranged from gender based comments
regarding male surgeons contempt for women in the profession, a desire to
eliminate women from the program, offers to protect her in return for sex,
sexual remarks, sexual nicknames, close physical contact and displays of
\textit{Playboy} centerfolds in an area where residents congregated for meals and
meetings. Male doctors also prevented Lipsett from operating and refused to

\textsuperscript{220} Monica L. Sherer, "No Longer Just Child's Play: School Liability Under Title

\textsuperscript{221} 864 F.2d 881 (1st Cir. 1988).

\textsuperscript{222} \textit{Id.} at 884.
assign her appropriate tasks. Complaints to supervisors about the sexual harassment were dismissed and no action taken. No investigation was conducted and the harassers were not reprimanded. In fact, Ms. Lipsett was dismissed for behavioral problems.

The court’s application of Title VII standards to Title IX was based on the fact that Lipsett was both a student and an employee in the program. Thus, the First Circuit only established that sex discrimination standards developed under Title VII apply to employment related claims under Title IX. The court limited its discussion on discriminatory treatment to a “mixed employment-training” context, never addressing the situation where the victim was solely a student.

In 1992, the Supreme Court ruled in the landmark case of Franklin v. Gwinnett County Public Schools that monetary damages are available for a

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223 Id.

224 Id. at 892.

225 Id. at 897. As a resident in the program, Ms. Lipsett was receiving both training and a salary.

private action brought to enforce Title IX. The decision overturned a ruling by a federal appeals court in Atlanta that had dismissed a Title IX suit against the Georgia school district. The case was brought by a former female high school student who charged that school officials had failed to stop a teacher from sexually harassing and abusing her.

The Supreme Court held that, absent clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

\textsuperscript{227} \textit{Id.} at 1038.


Christine Franklin claimed Andrew Hill, a sports coach and teacher, started harassing her in 1986 when she was a high school sophomore. She claimed he asked her about her sexual experiences with her boyfriend and whether she would have sex with an older man, forcibly kissed her on the mouth in the school parking lot, and called her at home to ask her out. Three times in her junior year, Franklin alleged, Hill interrupted a class to ask that the teacher excuse Franklin, then took her to a private office where he had sex with her. Franklin said school teachers and administrators were aware of Hill's harassment of her and other female students but did nothing to halt it and discouraged her from pressing charges against Hill. \textit{See} Franklin, 112 S. Ct. at 1031.

\textsuperscript{230} \textit{Id.} at 1033 (citing Bell v. Hood, 327 U.S. 678 (1946)). The Court acknowledged that equitable remedies such as reinstatement and back pay would do nothing for Franklin because she was a student when the alleged
Additionally, the Court directly addressed the viability of a hostile environment sexual harassment claim in the following manner:

Unquestionably, Title IX placed on the Gwinnett County 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. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe. 231

**Title IX and Peer to Peer Sexual Harassment**

In an August 1981 policy memorandum, the Office for Civil Rights [OCR] 232 of the U.S. Department of Education adopted its own definition of sexual harassment. 233 Although OCR, which is charged with enforcing Title

discrimination occurred, she no longer attended the school, and Hill no longer taught at the school. Id. at 1038.

231 Id. (citing Vinson, 477 U.S. 57 at 64 (1986)).

232 OCR has been delegated the responsibility of reviewing complaints and investigating institutional compliance with Title IX by the Dept. of Education. See 20 U.S.C. § 3413 (1988).


“sexual harassment consists of verbal or physical conduct of a sexual
IX's prohibition on sex discrimination in education, has not promulgated regulations or guidelines on sexual harassment, it maintains that sexual harassment is prohibited by Title IX.\textsuperscript{234} Strauss suggests that this creates a presumption that sexual harassment of students by peers as well as faculty members is prohibited.\textsuperscript{235} Additionally, even though Title VII applies strictly to employment, a persuasive argument can be made for applying the guidelines developed by the EEOC in a refined form to sexual harassment claims in the educational environment. These guidelines have proven workable in the employment context and have been used in the analysis of professor-student harassment.\textsuperscript{236} Elizabeth Gant argues that a Title VII analysis of co-worker sexual harassment should be applied to peer harassment under Title IX. She cites the Supreme Court's comparison of students to subordinates and teachers

\begin{center}
\emph{nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.}
\end{center}

\textsuperscript{234} Id.


\textsuperscript{236} Ibid., 173.
to supervisors when a teacher sexually harasses a student and suggests that cases of sexual harassment in the schools should be analyzed using the same theories applied in the workplace.237

Summary

The history and litigation of sexual harassment covered in this study traces a progression of social awareness and legislative and legal action that spans a period of approximately twenty years. Lin Farley's coining of the term in 1978 followed a year later by the introduction of Catharine MacKinnon's theory that sexual harassment is a widespread social and workplace problem which constitutes illegal behavior based on sex facilitated greater awareness and legal action as victims sought remedy. Studies and surveys such as that conducted by the American Association of University Women (AAUW) in 1993 also made it obvious that sexual harassment is a phenomena that exists in the hallways and classrooms of our schools and impacts the attitudes and school success or failure of school age students.

Courts have consistently refused to apply § 1983's analytical framework in the school setting when addressing the issue of peer to peer sexual harassment. Given the trend of court decisions in applying the standards of

237 Gant, "Sexual Harassment in the Schools," 506.
special relationship, deliberate indifference and state created danger in cases of sexual harassment, this area of relief has proven to be an arduous path that holds little promise for peer victims.

The passage of Title VII of the Civil Rights Act in 1964 began a promising course of action against sexual harassment. However, it's important to note that the ban on discrimination on the basis of sex was added to the act at the last minute in hopes of derailing its passage. The courts were slow to recognize a claim of sexual harassment under Title VII and it was not until 1976 that female plaintiffs began to experience rulings in their favor. Cases heard from 1976 until 1981 under Title VII were predicated on a *quid pro quo* theory involving supervisors and employees.

In 1972, prior to the emergence of court action for workplace sexual harassment under Title VII, Congress responded to the issue of sex discrimination in educational programs by enacting Title IX of the Education Amendments of 1972. The primary concern and impetus for enacting the bill was to address the issues of access to educational institutions and employment.

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238 Title VII was originally conceived with the purpose of protecting race. "Sex" was added on the floor by Representative Howard Smith of Virginia who opposed Title VII. He thought that northern liberal proponents would not favor passage of Title VII with the inclusion of sex.
In 1980 Title VII and Title IX received added impetus and attention as means of addressing the issue of sexual harassment. The Equal Employment Opportunity Commission (EEOC) ruled that sexual harassment was considered to be unlawful practice under Title VII and defined two types of harassment—quid pro quo and hostile environment. The courts expanded the parameters of legal protection under Title VII and recognized hostile environment as sexual harassment. The courts also recognized the more specific problem of co-worker sexual harassment under Title VII and the first Title IX case of sexual harassment in an educational institution, *Alexander v. Yale*,\(^{239}\) was heard.

In 1982, the court in *Henson v. City of Dundee*\(^{240}\) established employer liability for the actions of employees, or *respondeat superior*, when the case constitutes a hostile environment and the employer knew or should have known of the offensive environment and took no steps to remedy the situation. This Title VII case was followed three years later by the Title IX case of *Moire v. Temple University School of Medicine*.\(^{241}\) The Third Circuit’s decision in *Moire* confirmed that EEOC guidelines on sexual harassment in Title VII are

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\(^{239}\) 631 F.2d 178 (2nd Cir. 1980).

\(^{240}\) 682 F.2d 897 (11th Cir. 1982).

applicable to Title IX cases. The Supreme Court substantiated EEOC guidelines and previous decisions by lower courts when it heard the case of Meritor Savings Bank FSB v. Vinson\textsuperscript{242} in 1986 and handed down a ruling that sexual harassment that creates an unbearable work environment is illegal under Title VII.

In 1991, the Ninth Circuit recognized the differing perspectives of men and women in the case of Ellison v. Brady.\textsuperscript{243} The reasonable woman standard was created and recognized by other courts (Robinson v. Jacksonville Shipyards, Inc.\textsuperscript{244}).

The Supreme Court decision in 1992 in the case of Franklin v. Gwinnett County Public Schools\textsuperscript{245} made monetary damages available to an individual under Title IX. The Court used a comparison of students to subordinates and teachers to supervisors in their analysis of this teacher to student sexual harassment case.

Peer harassment has been recognized as illegal under Title IX by the

\textsuperscript{242} 106 S.Ct. 2399 (1986).

\textsuperscript{243} 924 F.2d 872 (9th Cir. 1991).

\textsuperscript{244} 760 F.Supp. 1486 (M.D. Fla. 1991).

\textsuperscript{245} 112 S.Ct. 1028 (1992).
Office of Civil Rights of the United States Department of Education. At the federal judicial level, suit has been brought for peer to peer sexual harassment under a number of federal laws and constitutional provisions. All of these avenues have produced a variety of results for plaintiffs and, in the process, have provided clues significant to the success of future claims.
Table 1
§ 1983 Legislation and Legal History

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<th>YEAR</th>
<th>STANDARD</th>
<th>SECTION 1983</th>
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<td>1871</td>
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<td>Section 1983 passed as section 1 of the Civil Rights Act of 1871 in response to the growing terrorism of the Klu Klux Klan. It was passed without amendment and with relatively little debate.</td>
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<td>1978</td>
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<td>Monell <em>v.</em> Department of Social Services - Supreme Court held that §1983 applied to acts of “persons” including municipal corporations and government units such as school districts whose policies caused a deprivation of rights. Court ruled out respondeat superior theory.</td>
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<tr>
<td>1982</td>
<td>State Created Danger</td>
<td>Bowers <em>v.</em> DeVito - 7th Cir. emphasized the tenuous nature between action and inaction in preventing harm.</td>
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<tr>
<td>1988</td>
<td>Special Relationship Policy or Custom of Deliberate Indifference</td>
<td>Stoneking <em>v.</em> Bradford Area School District - 3rd Cir. reversed an initial finding of special relationship in light of <em>DeShaney</em>. The Court found that administrators were liable for policy and custom of deliberate indifference to teacher sexual harassment of a student.</td>
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<td>YEAR</td>
<td>STANDARD</td>
<td>SECTION 1983</td>
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<td>1989</td>
<td>Special Relationship</td>
<td><em>DeShaney v. Winnebago County</em> Department of Social Services - Supreme Court ruled that state did not have an affirmative duty to protect a child from a non-state actor, his father. Therefore, a special relationship did not exist between the child and the state.</td>
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<td>State Created Danger</td>
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<td></td>
<td>Policy or Custom of Deliberate Indifference</td>
<td><em>City of Canton v. Harris</em> - Supreme Court emphasized importance of causation (direct link between policy/custom and deprivation) in § 1983 claims.</td>
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<td>1990</td>
<td>Special Relationship</td>
<td><em>J.O. v. Alton Community Unit School District</em> 11 - 7th Cir. ruled that female student abused by a teacher was not in the functional custody of the school since the state had not rendered her unable to care for herself.</td>
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<td>1991</td>
<td>Special Relationship</td>
<td><em>Thelma by Delores A. v. Board of Education</em> - 8th Cir. found school board and school administrators not liable for five documented complaints about a teacher over a 16 year span of time.</td>
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<td>Policy or Custom of Deliberate Indifference</td>
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<td>1994</td>
<td>Policy or Custom of Deliberate Indifference</td>
<td><em>Doe v. Taylor Independent School District</em> - 5th Cir. found a principal to be liable for a custom or policy of deliberate indifference when a teacher sexually harassed a student.</td>
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<tr>
<td>YEAR</td>
<td>TITLE VII</td>
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<td>1964</td>
<td>Congress passed legislation to protect employees in the workplace.</td>
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<td>1972</td>
<td></td>
<td>Congress passed legislation to address sex discrimination in educational programs. Focus on access and employment.</td>
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<tr>
<td>1975</td>
<td><em>Corne v. Bausch and Lomb, Inc.</em> - Court did not support claim of sexual harassment.</td>
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<td>1976</td>
<td><em>Williams v. Saxbe</em> - Court held that sexual harassment was a distinct form of discrimination based on sex.</td>
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<td>1977</td>
<td><em>Barnes v. Castle</em> - Court upheld a claim of quid pro quo.&lt;br&gt; <em>Tomkins v. Public Service Electric and Gas Co.</em> - 3rd Cir. upheld a claim of quid pro quo. Both courts found that employers must have knowledge of sexually harassing behavior to be liable.</td>
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<td>1979</td>
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<td>Cannon v. Univ. of Chicago - Supreme Court held that Title IX was enforceable by an individual through a private action.</td>
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<td>1980</td>
<td>EEOC ruled that sexual harassment was unlawful practice and defined quid pro quo and hostile environment. Continental Can Co. v. State Court ruled that employer is responsible for stopping co-worker harassment of which it knew or should have known.</td>
<td>Alexander v. Yale - First case of sex discrimination in the form of sexual harassment under Title IX.</td>
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<td>1981</td>
<td>Bundy v. Jackson - D.C. Cir. recognized hostile environment sexual harassment.</td>
<td>OCR adopts definition of sexual harassment and maintains that it is prohibited under Title IX.</td>
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<td>1982</td>
<td>Henson v. City of Dundee - 11th Cir. developed 5 criteria test for offensive work environment including respondeat superior.</td>
<td>North Haven v. Bell - Supreme Court rules that Title IX applies to specific programs receiving federal aid and prohibition of employment discrimination.</td>
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<td>1984</td>
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<td>Grove City College v. Bell - Supreme Court narrowly defines “program.”</td>
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<td>YEAR</td>
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<td>1985</td>
<td>Atascadero State Hospital v. Scanlon - Supreme Court rules that acceptance of federal funds does not waive state's sovereign immunity. Moire v. Temple U. - 3rd Cir. affirmed that EEOC guidelines are applicable to Title IX.</td>
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<td>1986</td>
<td>Meritor Savings Bank FSB v. Vinson - Supreme Court ruled that hostile environment is illegal and accepted EEOC guidelines.</td>
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<td>1987</td>
<td>Congress passed civil Rights Restoration Act - expanded Title IX to cover entire educational institution if any part receives federal funds.</td>
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<td>1988</td>
<td>Lipsett v. U. of Puerto Rico - 1st Cir. applied Title VII standards to Title IX due to plaintiff's status as employee/student.</td>
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<td>YEAR</td>
<td>TITLE VII</td>
<td>TITLE IX</td>
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<tr>
<td>1992</td>
<td></td>
<td>Franklin v. Gwinnett - Supreme Court ruled that remedy was available under Title IX.</td>
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CHAPTER IV
ANALYSIS OF CASES OF PEER TO PEER SEXUAL HARASSMENT

The purpose of this study was to examine relevant case law to determine if a legal argument exists that holds school administrators legally responsible for protecting students from peer to peer sexual harassment, particularly under federal law. A second purpose of this study was to determine if a theoretical and/or regulatory base is available to support the argument. This chapter analysis addresses the first of the two research questions posed: Does an argument emerge from an analysis of appropriate case law and legislation that finds peer to peer sexual harassment to be sex discrimination that school administrators may be legally responsible for preventing?

This analysis begins with a cluster of peer to peer sexual harassment cases brought under § 1983 and alleging violations of constitutional rights. These cases were heard in the early 1990's following the successful outcome of adult to student sexual harassment cases that were decided in favor of student victims.¹ These first efforts to bring peer to peer sexual harassment into the

¹ Stoneking v. Bradford Area Sch. Dist., 856 F.2d 594 (3rd Cir. 1988), cert. denied, 493 U.S. 1044 (1990), and Doe v. Taylor, 975 F.2d 137 (5th Cir. 1992), cert. denied, 113 S.Ct. 1066 (1993), and vacated, 987 F.2d 231 (5th Cir. 1993), aff'd in part, rev'd in part, 15 F.3d 443 (5th Cir. 1994).
legal arena through the federal courts using § 1983 and the Due Process Clause of the Fourteenth Amendment proved to be fruitless for plaintiffs; however, these cases are important to the study in representing early efforts to seek redress for peer to peer sexual harassment.

Plaintiffs in cases heard under § 1983 have employed a variety of arguments. The § 1983 cases to be discussed in this study were premised on one or more of three different theories or arguments: a functional custody or special relationship argument, a state-created danger argument, and a policy or custom which establishes deliberate indifference argument. The cases are presented in chronological order from 1989 to 1995 to illustrate the reasoning of the courts over time in determining the extent, if any, of administrators’ liability for constitutional violations stemming from peer to peer sexual harassment.

Pagano by Pagano v. Massapequa Public Schools

Less than four months after the Supreme Court’s decision in DeShaney,² the Eastern District Court of New York heard the case of Pagano by Pagano v.

Massapequa Public Schools. ³ Sean Pagano, a student at Lockhart Elementary School, alleged he was the target of physical and verbal abuse on 17 occasions by other students during his fifth grade year and part of his sixth grade year. He claimed physical and mental injury. Sean also alleged that defendant school officials knew of the attacks and had promised to stop them.⁴

Citing the number of alleged incidents of physical and verbal abuse, the court ruled that conduct is under color of law if it is committed while executing official policy or state custom.⁵ The court also stated that,

“We consider elementary school students who are required to attend school, the truancy laws still being in effect, to be owed some duty of care by defendants which may or may not rise to the level required...”⁶

The court determined that school is a custodial environment and that a custodial relationship exists between a teacher and student.⁷ Consequently, constitutional liability attaches.

Pagano is the only case heard at the federal district court level to find a

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⁴ Id. at 642.
⁵ Id. at 643.
⁶ Id.
⁷ Id. at 643.
special relationship between public schools and their students, and has not been influential on peer harassment cases that followed.

**D.R. by L.R. v. Middle Bucks Area Vocational Technical School**

On an appellate level, the Third Circuit, in sharp contrast to the district court decision in **Pagano**, took a stand against the theory that compulsory attendance laws create a special relationship which imposes a responsibility for protecting students when they heard the case of **D.R. by L.R. v. Middle Bucks Area Vocational Technical School**. The students alleged that they were repeatedly molested over a period of several months by other students while attending an art class. This conduct took place in a unisex bathroom and a darkroom that were part of the graphics art classroom in the school. The class was supervised by a student teacher who could not control the class and who allegedly witnessed the student defendants use obscene language, gestures, and physical, though not sexual, offensive touching of females in the class, including herself. According to plaintiffs, the teacher generally ignored unpleasant activities or walked away. Additionally, they asserted that L.H. informed an assistant director of the school that a boy tried to force her into

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9 Id. at 1378.
the bathroom to engage in sexual conduct, but the assistant director took no action. The plaintiffs claimed that school defendants endangered them or increased their risks of harm by

(1) failing to report to parents or other authorities the misconduct resulting in abuse to plaintiffs; (2) placing the class under the control of an inadequately trained and supervised student teacher; (3) failing to demand proper conduct of the student defendants; and (4) failing to investigate and put a stop to the physical and sexual misconduct.\textsuperscript{11}

The Third Circuit, sitting en banc, held that school defendants did not restrict the special education student's freedom "to the extent that she was prevented from meeting her basic needs."\textsuperscript{12} Basing its decision primarily upon the student's intermittent presence at school, the court rejected the plaintiff's analogy of a schoolchild and prisoner, or an involuntarily committed mental patient, and said, "The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help."\textsuperscript{13}

The court examined liability under the state-created danger theory and explained that this theory is predicated upon the states' affirmative acts which

\textsuperscript{10} Id. at 1366.

\textsuperscript{11} Id. at 1373.

\textsuperscript{12} Id. at 1372.

\textsuperscript{13} Id.
work to plaintiffs' detriments in terms of exposure to danger. Though the court in Middle Bucks "[f]ound this to be an extremely close case and certainly a tragedy" after reviewing the events alleged to have occurred, it held that the school defendants did not "create plaintiffs' peril, increase their risks of harm, or act to render them more vulnerable to the student defendants' assaults." When the Third Circuit addressed the issue of policy, custom and deliberate indifference in Middle Bucks, the court said plaintiffs' argument did not apply because the case "lacks the linchpin of Stoneking II, namely, a violation by state actors. Sexual molestation committed by an agent of the state is readily distinguishable from the situation present here since the Due Process Clause itself imposes limitations on the state's conduct. Thus, § 1983 liability may not be predicated upon a Stoneking II type theory because private actors committed the underlying violative acts."

Although the court acknowledged the "[a]pparent passivity of at least some school defendants under the circumstances," they ruled that, "they show nonfeasance but they do not rise to the level of a constitutional violation."
Dorothy J. v. Little Rock School District

A year later in 1993, the Eighth Circuit ruled similarly to the Third Circuit’s decision in Middle Bucks in the case of Dorothy J. v. Little Rock School District. 19

Brian B. was a student in the Little Rock School District’s (LRSD) community-based instruction (CBI) program for educable mentally handicapped students at Hall High School. He alleged that he was sexually assaulted and raped by Louis C., another student, on October 26 and 27, 1989. Louis C., a ward of the Arkansas Department of Human Services (DHS), had been placed in a foster care program with the Centers for Youth and Families (Centers). DHS and Centers defendants were aware of Louis C.’s disposition for violence and sexually assaultive behavior and enrolled him in the CBI program without taking precautions to ensure the safety of the other students. The alleged rapes occurred at least two years after Louis C. was placed with the Centers and enrolled in the CBI program. 20

The Eighth Circuit ruled that school officials did not have a duty arising from a special relationship to protect Brian B. from the sexual assaults


20 7 F.3d at 731.
perpetrated by Louis C. after clarifying what was really at issue:

"The Due Process Clause protects against state action...Louis C. cannot be considered a state actor. Thus, plaintiff's due process claim is that defendants as state actors failed to protect Brian B. from assault by another private actor."\(^{21}\)

Concluding that the public school setting is markedly different from that of the prison environment, the court said,

"We agree with...Middle Bucks...that state-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates..."\(^{22}\)

The court also rejected the argument of a state created danger despite the social service agency's and school defendants' knowledge that Louis C. was disposed to violent and sexually violent behavior. Because the attack occurred two years after Louis C. was enrolled in the CBI program, the court ruled that the assault on Brian B. was "too remote a consequence" of enrolling Louis C. in the program two years earlier.\(^{23}\)

The court stated its opinion regarding the plaintiffs' claim that the defendants affirmatively created a danger when they left the two boys alone

\(^{21}\) Id.

\(^{22}\) Id. at 732.

\(^{23}\) Id. at 733.
unsupervised when it said,

"Our rejection of plaintiff's custodial relationship theory means that DeShaney's general rule—that the State's failure to protect against private violence does not violate the Due Process Clause—defeats this claim."24

B.M.H. v. School Board of Chesapeake, Virginia

Plaintiffs' arguments were rejected once again by the district court who heard the case of B.M.H. by C.B. and P.B. v. The School Board of Chesapeake, Virginia.25 A male student in B.M.H.'s history class threatened her with sexual assault. She reported the threat to school officials who did not take any action to discipline the student for his remark. Three days after this reported threat, the student sexually assaulted B.M.H. on school grounds.26 B.M.H. brought an action against the school district and various teachers, arguing that the school district had an affirmative duty to protect her due to the "special relationship" that existed between her and the school, particularly through Virginia's compulsory attendance statute. The district court found that as a matter of law:

24 Id. at 734.


26 Id. at 562.
“No special relationship under the Fourteenth Amendment was created in those circumstances on which B.M.H. can maintain an action for constitutional deprivation.” 27

B.M.H. also argued that various statutes regarding the reporting of child abuse created a special duty to protect. However, the court also rejected this argument by stating:

“Even if public schools have some duty under state law to protect students, that is not enough to place the affirmative burden of the Fourteenth Amendment Due Process Clause upon teachers, principals and administrators to protect each student from possible harm by third parties.” 28

**Walton v. Alexander**

The case of *Walton v. Alexander* 29 is distinguished from previous peer harassment cases by the residential nature of the school setting and the initial and eventual rulings of the Fifth Circuit. The events of the case took place during the later part of 1987 at the Mississippi School for the Deaf, a residential school. Walton, a student at the school, was sexually assaulted by a fellow student. This assault was reported to school officials, including Alexander, the school’s superintendent, who filed a report with the Mississippi

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27 Id. at 565.

28 Id. at 571.

29 20 F.3d 1350 (5th Cir. 1994), reh’g, 44 F.3d 1297 (1995).
Department of Welfare. Both the school and Department of Welfare conducted investigations, both students were suspended for 3 days, both were provided psychological counseling upon their return, and were placed in separate dormitories. However, budgetary constraints required closing all but one male dormitory in the fall of 1988. Consequently, Walton and his assailant were placed in the same dormitory, although Walton was assigned a special room with a private bath. Walton was assaulted by the same student who Walton claimed had unrestricted access to him.

In reaching its initial decision the Fifth Circuit stated,

"There are several factors that exist in this residential special education school which distinguish this case from those cases involving students who attend day classes, as in D.R. by L.R. v. Middle Bucks Area Voc. Tech. Sch. For example, the school had twenty-four hour custody of Walton, a handicapped child who lacks the basic communication skills that a normal child would possess."\(^{30}\)

The court went on to state that,

"The residential special education program provided by the State of Mississippi had a significant custodial component wherein Walton was dependent on the school for his basic needs and lost a substantial measure of his freedom to act. Therefore, we find that Walton falls within a category of persons in custody by means of "similar restraints of personal liberty," thereby establishing the existence of a "special relationship" between Alexander and Walton sufficiently clear by law in 1987 and 1988 to impose Alexander with a duty to provide Walton

\(^{30}\) Id. at 1355.
with reasonable conditions of safety.\textsuperscript{31}

However, this case was appealed and, on rehearing,\textsuperscript{32} the Fifth Circuit reconsidered its ruling of a special relationship based on \textit{DeShaney}.\textsuperscript{33} In its discussion of the issue of loss of liberty, the court said,

"...we can agree that Walton forfeited a portion of his autonomy when he became a resident of the School...the record also reflects that Walton attended the school through his own free will (or that of his parents) without any coercion by the state...Consequently, we hold that no "special relationship" existed between Walton and Alexander."\textsuperscript{34}

By reversing its initial decision, the Fifth Circuit left intact the sequence of failures that plaintiffs were experiencing as they sought relief for peer sexual harassment under § 1983.

\textbf{Spivey v. Elliot}

In \textit{Spivey v. Elliot},\textsuperscript{35} another case of peer sexual harassment in a residential school, the Eleventh Circuit followed the same course taken by the

\begin{flushleft}
\textsuperscript{31} Id.
\textsuperscript{32} 41 F.3d 1497 (11th Cir. 1995).
\textsuperscript{33} DeShaney, 109 S.Ct. 1003.
\textsuperscript{34} 44 F.3d 1297 (5th Cir. 1995) at 1305.
\textsuperscript{35} Spivey, 29 F.3d 1522 (11th Cir. 1994), \textit{on sua sponte reconsider}, 41 F.3d 1497 (1995).
\end{flushleft}
Fifth Circuit in reaching its final decision in *Walton v. Alexander*. Tremain Spivey was an eight year old hearing impaired residential student at the Georgia School of the Deaf. Tremain resided at the Georgia School for the Deaf Sunday through Thursday and spent weekends at home with his mother. Tremain alleged he was sexually assaulted on numerous occasions by a thirteen year old schoolmate.

Using reasoning analogous to the Fifth Circuit, the court stated that,

"While the state did not affirmatively reach out and take Tremain into its custody against his will as it does with the prisoner, the involuntarily committed mental patient, or the foster child, the outcome of the case cannot turn on that distinction. Otherwise, the state could treat differently a foster child whose parents admit they cannot properly care for the child and willingly turn the child over to foster care from a child who is taken from unwilling parents. Whether the plaintiff willingly enters state custody is not determinative. The question is not so much how the individual got into state custody, but to what extent the state exercises dominion and control over that individual."\(^{36}\)

The court went on to state that,

"It is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization or other similar restraint of personal liberty...that triggers the protections of the Due Process Clause..."\(^{37}\)

However, the court ruled that the defendants were entitled to qualified

\(^{36}\) *Id.* at 1526.

\(^{37}\) *Id.* at 1526 citing *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1006.
immunity since Tremain's right to protection from harm was not clearly established at the time the suit was brought.\textsuperscript{38}

Circuit Judge Cox dissented on the ruling that a special relationship existed, arguing that Tremain was voluntarily enrolled in the residential school and his mother retained discretion to remove him from school.\textsuperscript{39} On an appeal for rehearing,\textsuperscript{40} the Eleventh Circuit said,

"...in the interest of efficiency and collegiality on this court, where there are differing views as to the substantive right, this panel has chosen to withdraw all of its prior opinion which relates to whether the complaint alleges a constitutional right so that the opinion will serve as no precedent on that issue."\textsuperscript{41}

The Fifth Circuit's decision in \textit{Walton} and the Eleventh Circuit's decision in \textit{Spivey} demonstrate some interesting legal reasoning that may serve plaintiffs under §1983 in the future. However, as the cases to date have shown, this has been an unsuccessful avenue for students plaintiffs seeking relief.

\textsuperscript{38} \textit{Id.} at 1527.

\textsuperscript{39} \textit{Id.} at 1528.

\textsuperscript{40} 41 F.3d 1497 (11th Cir. 1995).

\textsuperscript{41} \textit{Id.} at 1499.
Peer to Peer Sexual Harassment Cases Heard Under Title IX of the Education Amendments of 1972

The Supreme Court’s landmark decision in Franklin v. Gwinnett County Public Schools to permit a damages remedy, as well as equitable relief under Title IX for a student sexually harassed by a school employee, opened the door wider for plaintiffs to test whether or not such remedy is also available to students harassed by peers. With the Gwinnett decision as an encouragement, Title IX cases appeared to replace § 1983 actions which were proving unsuccessful as a strategy in peer to peer harassment cases. Therefore, the next section will address cases heard in district and circuit courts under Title IX of the Education Amendments of 1972 decided from 1993 to May of 1996.

The First Case of Peer to Peer Sexual Harassment to Be Heard in Federal Court

Until Doe v. Petaluma City School District, no federal court had addressed the question of whether peer to peer sexual harassment is actionable under Title IX. At the time of her harassment, Jane Doe was a student at Kenilworth Junior High School in Sonoma County, California. Throughout

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43 830 F.Supp. 1560 (N.D. Cal. 1993), 54 F.3d 1447 (9th Cir. 1995).
her seventh and eighth grade years, she was verbally harassed about “having a
hot dog in her pants or [having] sex with hot dogs.” She was repeatedly
called “hot dog,” “hot dog bitch,” “slut,” and “hoe” by both boys and girls; she
was physically threatened and at times assaulted; and so much graffiti appeared
in the bathroom that Jane would not go there. Late in her eighth grade year,
Jane transferred to another public school where the comments continued,
eventually forcing Jane to transfer to a private school. In addition to the
payment of private-school tuition, Jane’s parents became responsible for on-
going medical and psychological treatment. As for the actions of school
employees, despite repeated requests for assistance from Jane and her parents,
insufficient action was taken. This lack of action hinged, in part, on counselor
Richard Homrighouse’s belief that “boys will be boys” and his conclusion that
the harassment was not important.45

The major legal issue in the case was the school district’s potential
monetary liability for peer harassment as a form of sex discrimination under
Title IX. The district court stated that:

“[N]o damages may be obtained under Title IX (merely) for a school

44 830 F.Supp. at 1564.

45 Id. at 1565.
district's failure to take appropriate action in response to complaints of student to student sexual harassment. Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex. The school's failure to take appropriate action...could be circumstantial evidence of intent to discriminate. Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student to student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex."

When Doe appealed to the Ninth Circuit, her claim was against the school for Title IX violations. The district court had ruled that the school counselor, Homrighouse, could not be sued as an individual under Title IX, but could be sued for Title IX violations through § 1983, and that he was not entitled to qualified immunity.47

In reaching their decision, the Ninth Circuit clarified exactly what was being addressed:

"To bring this appeal into focus, it is important to identify what is not before us. The question we must decide is whether it was clearly established under Title IX that Homrighouse had a legal duty to do something about the peer harassment."48

The fall of 1990 to February 1992 time frame of Homrighouse's alleged

46 Id. at 1576.
47 54 F.3d 1447 (9th Cir. 1995) at 1449.
48 Id. at 1450.
inaction led the court to conclude,

"...the law was not clearly established at the time...that he had a duty to prevent sexual harassment from occurring...Thus, the outcome of this case is clear. We must focus on the right Doe alleges was violated...that pursuant to Title IX, Homrighouse was required to prevent harassment by Doe's peers. As of February 1992, there was no clearly established right."\(^{49}\)

Although the plaintiff lost this decision, the Ninth Circuit gave clear warning for the present and future to school officials in stating,

"If Homrighouse engaged in the same conduct today, he might not be entitled to qualified immunity...It might be that today a Title VII analogy likening Homrighouse to an employer and Doe to an employee might provide an argument to consider in a similar Title IX case."\(^{50}\)

Additionally, Circuit Judge Pregerson dissented against the majority decision, arguing that "specific binding precedent is not required to show that a right is clearly established for qualified immunity purposes."\(^{51}\) Pregerson argued that the court should have applied the same argument applied in *Bator v. State of Hawaii*,\(^ {52}\) and concluded that, "Applying the same analysis we

\(^{49}\) *Id.* at 1451.

\(^{50}\) *Id.* at 1452.

\(^{51}\) *Id.* at 1453.

\(^{52}\) 39 F.3d 1021 (9th Cir. 1994). The court held that supervisors who failed to stop the plaintiff's co-workers from sexually harassing her were not entitled to qualified immunity. Pregerson stressed that the court had concluded that the
employed in Bator to the instant case, I believe that the unlawfulness of
student to student sexual harassment would have been apparent to a
reasonable school official.\textsuperscript{53}

**Title IX Cases Heard in District Level Federal Courts**

Following in the wake of the Ninth Circuit's decision in Doe \textit{v.}
Petaluma, several district courts addressed the issue of peer to peer sexual
harassment under Title IX. While Doe \textit{v.} Petaluma was the impetus for
increased hearings at the district level, it was not until 1996 that any of these
cases reached the appellate level with Davis \textit{v.} Monroe\textsuperscript{54} and Rowinsky \textit{v.}
Bryan Independent School District.\textsuperscript{55} These cases will be addressed at the end
of this chapter.

Specific legal principles addressed by the district courts have included:
individual liability under Title IX\textsuperscript{,56} enforcement of Title IX under § 1983,\textsuperscript{57}
right to be free of harassment perpetrated by one's peers was clearly established
in 1988. Id.

\textsuperscript{53} Id.

\textsuperscript{54} 74 F.3d 1186 (11th Cir. 1996).

\textsuperscript{55} 80 F.3d 1006 (5th Cir. 1996).

\textsuperscript{56} Mennone \textit{v.} Gordon, 889 F.Supp. 53 (D.Conn. 1995).

\textsuperscript{57} Oona R-S. by Kate S. \textit{v.} Santa Rosa City Schools, 890 F.Supp. 1452 (N.D.Cal
and application of Title VII principles to Title IX.\textsuperscript{58} As courts and attorneys grappled with the issues at question in these cases, they each referred back to the Ninth Circuit decision in \textit{Doe v. Petaluma} and the Supreme Court's decision in \textit{Franklin v. Gwinnett}.

\textbf{Individual Liability Under Title IX}

Individual liability under Title IX was addressed in the 1994 case of \textit{Seamons v. Snow},\textsuperscript{59} when Brian Seamons' parents brought suit against the Sky View High School principal (Benson) and coach (Snow) after Brian was sexually harassed by four teammates in the locker room after football practice. They taped Brian, who was nude, to a towel rack with athletic tape and brought a girl Brian had taken to the homecoming dance a few weeks earlier in to see him.\textsuperscript{60} When Benson and Snow were informed of the incident, no disciplinary action was taken against the students and Brian was eventually suspended and then dismissed from the football team. District Superintendent


\textsuperscript{60} Id. at 1115.
Jensen canceled the remainder of Sky View High's football season after Brian was dismissed as a direct result of the taping incident. Brian later moved a considerable distance from his parents' home to reside with an uncle.\footnote{Id.}

The District Court of Utah dismissed the Title IX claim brought by Brian's parents on the basis that individuals cannot be held liable under Title IX; that his parents, as plaintiffs, were not discriminated against with respect to education programs or activities; and that allegations in the complaint did not support the claim that defendants were motivated by an intent to discriminate on the basis of sex.\footnote{Id. at 116-17.} The court opined that it would be inappropriate to apply Title VII principles to a Title IX claim of hostile environment since Title IX did not expressly create a right of action based on negligence for hostile environment sexual harassment. The court also said that the plaintiffs had failed to set forth any factual allegations supporting the sexual harassment claim.\footnote{Id. at 1118.}

The Tenth Circuit sent the case back to the district court for further hearing, ruling that Seamos had stated a claim that his speech was entitled to
First Amendment protection, and said that it was not clear that the principal and coach should be shielded from liability.\textsuperscript{64} The court dismissed Seamos's sex bias claim under Title IX and said that Coach Snow's locker room customs and comments did not constitute sex discrimination.\textsuperscript{65}

In contrast, the District Court of Connecticut made a groundbreaking decision in the 1995 case of \textit{Mennone v. Gordon}\textsuperscript{66} with the determination that Title IX does not exclude individuals as potential defendants. This case involved the on-going harassment of Johna Mennone, a female senior enrolled in James Bouchard's environmental science class during the 1990-91 school year. Early in the semester, another student, Scott Randall, began to sexually harass Johna in class on an almost daily basis.\textsuperscript{67} He insulted and physically assaulted her with inappropriate touching, and threatened to rape her. Despite requests from Johna to intervene, Bouchard did nothing to stop Randall's actions.\textsuperscript{68} After continued incidents, Johna learned through a guest speaker in

\textsuperscript{64} Seamos v. Snow, 84 F.3d 1226 (10th Cir. 1996).

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} 889 F.Supp. 53 (D.Conn. 1995).

\textsuperscript{67} \textit{Id.} at 54.

\textsuperscript{68} \textit{Id.} at 55.
a law class that Randall's behavior was inappropriate and, in some instances, criminal. She consulted with counselors and administrators who advised her to file a complaint with the police. The school administration took no action against Randall who, after Johna went to the police, was arrested and charged with sexual assault in the fourth degree and breach of peace.  

The court denied a move to dismiss Johna's Title IX claims against Superintendent Gordon and Bouchard. Looking to Title IX language for a definition of recipient, the court said,

"The plain language of the statute broadly refers to discrimination occurring "under an education program or activity." This language does not restrict the potential class of defendants based on their nature of identity (i.e. individuals, institution, etc.)."

The court emphasized that Title IX demands that a defendant exercise some level of control over the program or activity under which the discrimination occurs. Despite previous decisions to the contrary, the court said,

"We are unconvinced by these decisions. The plain language of Title IX does not reveal any indication that Congress intended to exclude

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69 Id.

70 Id. at 56.
individuals as potential defendants."71

The court found Bouchard to be a proper defendant but granted qualified immunity since his failure to protect Johna did not violate a clearly established constitutional or statutory right.

Enforcement of Title IX under § 1983

The case of Oona R-S. By Kate S. v. Santa Rosa City Schools72 raised the issues of student teacher to student and peer to peer sexual harassment. Oona was a sixth grade student during the 1992-93 school year in the class of Patricia McCaffrey at J.C. Fremont Elementary School. Drew Ibach, a student teacher assigned to the class, sexually assaulted and harassed Oona and other female students on more than one occasion. After repeated phone calls of complaint by parents to Principal Hill, Ibach was removed from the class although requests by Oona's parents for verification of his removal were never answered.73

During the same school year, Oona alleges that unimpeded peer to peer harassment occurred in the class. Boys made lewd comments of a sexual nature

71 Id. at 57.

72 890 F.Supp. 1452 (N.D.Cal. 1995).

73 Id. at 1457.
about women while watching MTV, a teacher condoned activity. They also referred to girls' body parts as “beavers” and “melons” and specifically called Oona a “ho” and “lesbian.” Despite repeated calls from Oona’s parents to Hill and to the Director of Elementary Education, Lundy, no disciplinary action was taken.\textsuperscript{74}

In April of 1992 Oona’s mother filed a tort claim against defendants Santa Rosa City Schools, McCaffrey, Ibach, Hill and Lundy and a discrimination complaint with OCR. In May she filed a complaint against Ibach with the Santa Rosa Police. After what Oona alleges to be acts of retaliation by McCaffrey, Oona’s parents removed her from the school system and home schooled her.\textsuperscript{75}

On October 20, 1993, the school district was informed by OCR that tentative findings indicated peer to peer harassment had occurred in McCaffrey’s classroom, that the harassment had created a hostile environment for Oona, and that officials at the school knew or should have known of the harassment but failed to take timely, effective action to prevent it from

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\textsuperscript{74 Id.}

\textsuperscript{75 Id. at 1458.}
Meanwhile, the Northern District Court of California examined the issue of enforcement of Title IX under § 1983 and, citing Franklin v. Gwinnett,
reasoned that Title IX could be enforced under § 1983:

"...the Supreme Court still would not consider the enforcement structure of Title IX to be sufficiently comprehensive to preclude the enforcement under section 1983 of rights created by Title IX. Therefore, the court finds that a section 1983 action may properly be based on alleged violations of Title IX."  

The court cited Doe v. Petaluma when addressing the issue of peer to peer sexual harassment and said,

"The court believes that Doe... stands for the proposition that the right created by Title IX may be violated when female students are subjected to sexual harassment by their male peers at school and school officials discriminate against female students on the basis of sex in encouraging or failing to appropriately respond to such harassment."  

The court denied McCaffrey, Hill and Lundy’s motion to dismiss and stated that it was confident that a reasonable school official would have known

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76 Id.


78 890 F.Supp. 1452 at 1461.

79 54 F.3d 1447 (9th Cir. 1995).

80 890 F.Supp. 1452 at 1469.
in 1992 and 1993 that the actions alleged by the plaintiffs would unquestionably violate Oona's federal statutory and constitutional rights.\textsuperscript{81}

**Application of Title VII Principles to Title IX**

The Western District Court of Missouri found it appropriate to apply Title VII principles to Title IX in \textit{Bosley v. Kearney R-I School District},\textsuperscript{82} a case involving the alleged sexual harassment of a female elementary student by male students on the bus. Although an investigation by OCR resulted in findings that the school district's response in each case was both prompt and reasonable, the court determined that the Title IX claim was a genuine issue for trial.\textsuperscript{83} The court reviewed the facts regarding sexual harassment of Jennifer Bosley and her mother's attempts to have the harassment stopped by school officials, and expert testimony regarding the lack of an adequate district policy to address peer harassment.\textsuperscript{84} The court concluded that school officials had ample notice from March through May of 1992 of potential liability for damages for its failure to take adequate remedial measures to prevent

\textsuperscript{81} Id. at 1472.

\textsuperscript{82} 904 F.Supp. 1006 (W.D.Mo. 1995).

\textsuperscript{83} Id. at 1025.

\textsuperscript{84} Id.
continued peer sexual harassment of Jennifer.\textsuperscript{85}

\textbf{A Landmark Case for Peer to Peer Sexual Harassment under Title IX}

On February 14, 1996, the Eleventh Circuit ruled on the second case\textsuperscript{86} of peer to peer sexual harassment to be heard in a U.S. Court of Appeals. \textit{Davis v. Monroe County Board of Education}\textsuperscript{87} involved the sexual harassment of LaShonda, a fifth grade student, by a fifth grade boy (G.F.) for a period of six months between December 1992 and May 1993. During this period G.F. attempted to fondle LaShonda, did fondle her, and directed offensive language towards her. One incident included G.F.'s attempts to fondle LaShonda's breasts and vaginal area and telling her, "I want to get in bed with you," and "I want to feel your boobs."\textsuperscript{88} Two similar incidents occurred in January and, in February, G.F. put a doorknob in his pants and acted in a sexually suggestive manner toward LaShonda. G.F.'s actions increased in severity until he finally

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} The first case was Doe v. Petaluma, 830 F.Supp. 1560 (N.D.Cal. 1993), 54 F.3d 1447 (9th Cir. 1995).

\textsuperscript{87} 74 F.3d 1186 (11th Cir. 1996).

\textsuperscript{88} \textit{Id.} at 1189.
was charged with and pled guilty to sexual battery in May 1993.\footnote{Id.}

LaShonda reported G.F. to her teachers and informed her mother after each of the incidents. After all but one of the incidents, LaShonda’s mother called the teacher and/or principal to see what could be done to protect her daughter. Her requests for protection went unfulfilled.\footnote{Id.}

After LaShonda told her mother she “didn’t know how much longer she could keep him off her” following another incident, her mother called Principal Query and asked what action would be taken to protect LaShonda. He responded, “I guess I’ll have to threaten him [G.F.] a little bit harder.”\footnote{Id.}

LaShonda was not allowed to move her seat away from G.F. despite her request to do so until she had complained for over three months. School officials never removed or disciplined G.F. in any manner for his sexual harassment of LaShonda. LaShonda’s ability to concentrate on her schoolwork lessened, resulting in lower grades. The harassment also had a debilitating effect on her mental and emotional well-being, causing her to write a suicide note in April
1993.\textsuperscript{92} When this case was initially heard at the district court level, the school board was granted a dismissal by the district court.\textsuperscript{93} That court held that students were not in state custody during school hours; therefore, the school did not owe the student a duty of protection from harassment by a fellow student which could form the basis of a constitutional violation or federal civil rights claim.

The Eleventh Circuit reversed the district court ruling emphasizing the court’s failure to recognize the nature of the claim for hostile environment sexual harassment.\textsuperscript{94} It noted that

\begin{quote}
"The evil Davis sought to redress through her hostile environment claim was not the direct act of a school official demanding sexual favors, but rather the officials’ failure to take action to stop the offensive acts of those over whom the officials exercised control."
\end{quote}

The Eleventh Circuit noted the appropriateness of applying Title VII principles to Title IX by citing the case law history that led to that conclusion.

\textsuperscript{92} Id.

\textsuperscript{93} \textit{Aurelia D. v. Monroe County Bd. of Educ.}, 862 F.Supp. 363 (M.D.Ga. 1994).

\textsuperscript{94} \textit{Davis v. Monroe County Bd. of Educ.}, 74 F.3d at 1193.

\textsuperscript{95} Id.
They referred to the Supreme Court's recognition of a private right of action under Title IX for injunctive relief and compensatory damages in Franklin v. Gwinnett,96 and the Ninth Circuit's note in Doe v. Petaluma97 that Title IX legislative history suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII, including a sexually hostile environment.

Using the language of Gwinnett, the court said that the application of Title VII principles of hostile environment to Title IX claims by students recognizes that a student should have the same protection in school that an employee has in the workplace.98

"The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children


97 54 F.3d 1447 (9th Cir. 1995).

98 Davis v. Monroe, 74 F.3d at 1192, citing Franklin v. Gwinnett, 112 S.Ct. at 1042.
to leave their assigned school."  

The Eleventh Circuit in *Davis* concluded that Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student when the supervising authorities knowingly fail to act to eliminate the harassment, just as Title VII encompasses a claim for damages due to such an environment created by co-workers and tolerated by the employer. The court noted that: "...a female should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education."  

Having determined that Title IX encompasses a claim for a hostile learning environment created by peer sexual harassment, the court iterated the elements of proof required to succeed in a sexual harassment case: 1) that she is a member of a protected group; 2) that she was subjected to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and 5) that

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99 *Id.* at 1193.

100 *Id.*

101 *Id.* at 1194.
some basis of institutional liability has been established.\textsuperscript{102}

Considering the fifth element, the court noted that the principal was told of the harassment on several occasions and that at least three separate teachers had factual and repetitive knowledge of the incidents, yet they failed to take prompt and remedial action to end the harassment. The court also noted that the Board had no policy prohibiting the sexual harassment of students in its schools and had not provided any policies or training to its employees on how to respond to peer to peer sexual harassment.\textsuperscript{103}

One notable difference in this case is the lack of an “intentional” requirement that was so prominent in \textit{Doe v. Petaluma.}\textsuperscript{104} The Ninth Circuit clearly defined intentional for school officials’ purposes as omitting to perform an act which he is legally required to do that causes the [rights] deprivation.\textsuperscript{105}

In the instant case, the need to meet the intentional standard has been bypassed. The court simply stated that:

“...when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student’s sexual harassment

\textsuperscript{102} Id.

\textsuperscript{103} Id., n. 7.

\textsuperscript{104} 54 F.3d 1447 (9th Cir. 1995).

\textsuperscript{105} Id. at 1450.
of another, the harassed student has “be[en] denied the benefits of, or be[en] subjected to discrimination under” that educational program in violation of Title IX, 20 U.S.C. § 1681 (a).\textsuperscript{106}

\textbf{The Fifth Circuit Disagrees}

On April 2, 1996, the Fifth Circuit issued a ruling in direct contradiction to that of the Eleventh Circuit when it heard the case of \textit{Rowinsky v. Bryan Independent School District}.\textsuperscript{107} During the 1992-93 school year, Jane and Janet Doe (pseudonyms) were eighth grade students at Sam Rayburn Middle School in the Bryan Independent School District [BISD]. They rode the bus daily and were required, as girls, by the bus driver, Bob Owens, to sit on opposite sides of the bus from boys. During the course of the year, Jane was sexually harassed by several male students on the bus including G.S., L.H. and F.F. Incidents included swats on the bottom, grabbing of her breasts and genital area and lewd and obscene remarks such as, “When are you going to let me fuck you?”, “What bra size are you wearing?”, and “What size panties are you wearing?”\textsuperscript{108}

Janet and Jane complained no less than eight times to bus driver Owens

\textsuperscript{106} Davis, 74 F.3d at 1194.

\textsuperscript{107} 80 F.3d 1006 (5th Cir. 1996).

\textsuperscript{108} \textit{Id.} at 1008.
and Mrs. Rowinsky, Janet and Jane's mother, contacted Assistant Principal Randy Caperton, Assistant Director of Transportation, Jay Anding, Director of Secondary Education, Tom Purifoy, Vice Principal Sandra Petty, and Superintendent Sarah Ashburn about the incidents throughout the year. The harassing students received no more than a one to three day suspension from the bus or from school, and one administrator told Mrs. Rowinsky that the conduct was not considered to be sexual. 109 Mrs. Rowinsky filed suit, alleging that BISD and its officials condoned and caused hostile environment sexual harassment. 110

The Fifth Circuit reviewed the district court's ruling that Rowinsky had failed to state a claim under Title IX because there was no evidence that BISD had discriminated against students on the basis of sex. 111 The court ruled that Rowinsky had failed to provide evidence that sexual harassment and misconduct was treated less severely toward girls than toward boys. 112 When the case was appealed, the Fifth Circuit addressed the issue of whether a school

109 Id. at 1009.
110 Id. at 1010.
111 Id.
112 Id.
district may be liable under Title IX when one student sexually harasses another. They also questioned the broader issue of whether the recipient of federal funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents.\textsuperscript{113} In a footnote, the court noted the decision in \textit{Monroe v. Davis}\textsuperscript{114} and disagreed with the Eleventh Circuit's statutory construction and selective use of legislative history.\textsuperscript{115}

The circuit court addressed the factors which led to an interpretation of Title IX that imposed liability only for the acts of grant recipients: the scope and structure of the title itself; the legislative history of Title IX; and agency interpretations of the statute.\textsuperscript{116} The court found that imposing liability on third parties would be incompatible with the purpose of a spending condition, that legislative history limits the statute to practices of grant recipients, and that OCR's Letters of Findings should be accorded very little deference.\textsuperscript{117}

In closing, the court said,

\begin{quote}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} 74 F.3d 1186 (11th Cir. 1996), suggestion for rehearing en banc filed.
\textsuperscript{115} 80 F.3d at 1010, no. 8.
\textsuperscript{116} \textit{Id.} at 1012.
\textsuperscript{117} \textit{Id.} at 1013-15.
\end{quote}
“In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys. As the district court correctly pointed out, however, Rowinsky failed to allege facts to support such a claim.”\textsuperscript{118}

Circuit Judge Dennis dissented with the majority opinion, stating that he believed that the plaintiffs stated valid claims for relief under Title IX and were entitled to proceed to trial.\textsuperscript{119}

Judge Dennis drew an analogy between the reasoning used in Franklin v. Gwinnett and the instant case and criticized his colleagues for failure to remand the case back to district court for further proceedings.

“Apparently underlying the majority’s conclusion...is the incorrect assumption that, in general, school boards have no duty with respect to students’ safety and no power of discipline to control educationally pernicious student conduct.”\textsuperscript{120}

Summary

Research question 1 was posed as follows: Does an argument emerge from an analysis of appropriate legislation and case law that finds peer to peer

\textsuperscript{118} Id. at 1016.

\textsuperscript{119} Id. at 1017.

\textsuperscript{120} Id.
sexual harassment to be sex discrimination that school administrators should be legally responsible for preventing? A careful analysis of peer to peer sexual harassment cases brought under Section 1983 of the Civil Rights Act of 1871 and Title IX of the Educational Amendments of 1972 reveals distinct and very different patterns of outcomes for plaintiffs and defendants.

The history of peer to peer sexual harassment cases shows attempts by plaintiffs to test all available possibilities for redress with an emphasis on § 1983 and the Due Process Clause of the Fourteenth Amendment and Title IX.

As the analysis of § 1983 cases has shown, although courts have considered the issue of a “special relationship” between school officials and students, the special relationship argument has been an unsuccessful one for plaintiff students seeking redress for peer to peer sexual harassment. The courts repeatedly rely on a counter argument that compulsory attendance laws do not deny students and their families freedom to act on their own behalf. Similarly, the arguments of state created danger and a policy, custom or practice of deliberate indifference have been unsuccessful in proving school administrators’ liability, particularly when the violation is perpetrated by a third party and not by a state actor. The primary reason for the failure of this argument is that the student must prove that the affirmative acts of the school
or its employees played a part in creating the harassment and, in effect, placed the student in a worse position than that in which she would have been had they not acted at all. If such conduct is coupled with deliberate indifference to the plight of the student who is placed in danger, school officials could find themselves liable for a violation of the student’s constitutional rights because of their failure to protect her from third party harassment.\footnote{121}

An examination of cases heard under Title IX reveals a different pattern of decisions and prevailing theories. Following the Ninth Circuit’s decision in the case of \textit{Doe v. Petaluma}, courts at the district level addressed the issues of individual liability under Title IX, § 1983 liability under Title IX and application of Title VII principles to Title IX. As shown in Table 3 at the end of this chapter, their decisions range from a finding no liability in \textit{Seamons v. Snow} to finding individual liability under Title IX,\footnote{122} Title IX to be actionable under § 1983,\footnote{123} and application of Title VII principles to Title IX to be


\footnote{122} See Mennone v. Gordon, (cite omitted).

\footnote{123} See Oona R.S. v. Santa Rosa City Schools, (cite omitted).
appropriate.\textsuperscript{124}

As shown in Table 4 at the end of this chapter, the progression of decisions by higher courts reveals a pattern of increased recognition of administrators' liability for peer to peer sexual harassment through an application of Title VII principles to Title IX. This approach is consistent with the decision of the Supreme Court in the case of \textit{Franklin v. Gwinnett} and the Court's application of Title VII principles to Title IX. Most notable are the two recent circuit case decisions: the Eleventh Circuit's ruling in \textit{Davis v. Monroe} which applied Title VII principles to Title IX and puts administrators on notice that they are responsible for stopping peer to peer sexual harassment in their schools and are liable for damages if they fail to do so; and the Fifth Circuit ruling in \textit{Rowinsky v. Bryan Independent School District} that Title IX does not impose liability on a school district for peer to peer hostile environment sexual harassment absent allegations that the school district itself directly discriminated on the basis of sex.

The Ninth Circuit's decision in \textit{Doe v. Petaluma} provides a backdrop for the court's decision in \textit{Davis v. Monroe}. The court ruled that a sexually hostile educational environment created by fellow students should be prevented by

\textsuperscript{124} See Bosley v. Kearney, (cite omitted).
administrators who know of the harassment and fail to stop it, and is actionable under Title IX. The Davis court emphasized that the victim's continued harassment was not at the hands of school officials, but, rather, due to their failure to take action to stop the offensive acts of those students over whom they exercised control.

The majority in Rowinsky v. Bryan reached their decision with little reference to Doe v. Petaluma and opposition to application of Title VII principles used in the decision reached by the Davis court. Rather than assign responsibility to school officials for failure to act to stop harassment, the Rowinsky court defined the 'recipient' of Title IX funds and rejected the opinion that anyone other than the recipient should be held liable for violations of Title IX. The court also emphasized that Title IX was enacted pursuant to Congress's spending power since it prohibits discriminatory acts only by grant recipients. Therefore, imposing liabilities for the acts of third parties would be incompatible with the purpose of the spending condition since grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX.

The basic disagreement over who discriminates on the basis of sex is at the fore of these two cases. The Davis case found discrimination by school
officials through a Title VII application to Title IX analysis. The Rowinsky court ruled that Title IX does not impose liability on school districts for peer hostile environment sexual harassment absent the allegation that the school district or officials themselves directly discriminated based on sex. The Rowinsky court stated that "the mere existence of sexual harassment does not necessarily constitute sexual discrimination." The Davis court, in contrast, ruled that failure by school officials to take prompt and remedial action to end the sexually hostile environment perpetrated by peers is sufficient to establish a prima facie claim under Title IX for sexual discrimination.  

The debate and contradictions that arise from the variety of court decisions, particularly those of the Eleventh and Fifth Circuits, provide grist for the grinding of a Supreme Court decision on the issue of school administrator liability for preventing peer to peer sexual harassment. 

Chapter V will address Research Question 2 by discussing regulations and the theoretical basis that exists, including scholarly writings, regulatory documents and case law dissents, to support administrators' legal responsibility for preventing peer to peer sexual harassment.

125 80 F.3d at 1016.

126 74 F.3d at 1195.
# Table 3

**Title IX Cases of Peer to Peer Sexual Harassment Heard in District Level Courts**

<table>
<thead>
<tr>
<th>CASE</th>
<th>LEGAL QUESTION(S)</th>
<th>FINDINGS</th>
<th>REASONING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seamos v. Snow Student to Student Sexual Harassment</td>
<td>Title IX Hostile educational environment and sexual discrimination § 1983 deprivation of constitutional rights</td>
<td>No discrimination on the basis of sex No hostile environment No cognizable constitutional claims</td>
<td>Plaintiffs were unable to allege facts supporting causes of action under Title IX or § 1983 and § 1985.</td>
</tr>
<tr>
<td>Bosley v. Kearney R-1 School District Student to Student Sexual Harassment</td>
<td>14th Amendment Due Process and Equal Protection under § 1983 Special Relationship and duty to protect Negligence and failure to act Title IX sexual discrimination</td>
<td>Constitutional claims were not supported and motion to dismiss was granted. State claims were dismissed including negligence charge. Motion to dismiss Title IX claim was denied</td>
<td>The court used Title VII principles to address the Title IX claim and found that the school system discriminated on basis of sex by not adequately addressing the peer harassment suffered from March through May 1992.</td>
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<tr>
<td>CASE</td>
<td>LEGAL QUESTION(S)</td>
<td>FINDINGS</td>
<td>REASONING</td>
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<tr>
<td>Mennone v. Gordon Student to Student Sexual Harassment</td>
<td>Sexual discrimination under Title IX - individual teacher liability</td>
<td>Individual can be liable under Title IX.</td>
<td>Language of Title IX does not restrict class of defendants.</td>
</tr>
<tr>
<td></td>
<td>14th Amendment Due Process under § 1983</td>
<td>Foreclosed § 1983 claim since Title IX has a comprehensive enforcement scheme.</td>
<td>Immunity granted teacher because behavior did not violate clearly established constitutional statutory right.</td>
</tr>
<tr>
<td>Oona R.S. v. Santa Rosa City Schools Student Teacher to Student and Student to Student Sexual Harassment</td>
<td>Title IX rights enforceable under § 1983</td>
<td>Title IX is actionable under § 1983 when violation of Title IX rights and discrimination on the basis of sex can be shown.</td>
<td>Plaintiffs stated sufficient facts to support § 1983 claim alleging violation of Oona’s Title IX rights. Defendants failed to stop harassment and provide adequate supervision of the student teacher and male peers. Qualified immunity denied on basis that reasonable officials should know their actions were discriminatory in 1992 and 1993.</td>
</tr>
<tr>
<td>890 F.Supp. 1452 (N.D. Cal. 1995)</td>
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<tr>
<td>CASE</td>
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<tr>
<td>Doe v. Petaluma Student to Student Sexual Harassment 54 F.3d 1447 (9th Cir. 1993)</td>
<td>Title IX hostile environment sexual harassment Intentional sexual discrimination Individual Title IX liability under § 1983</td>
<td>Granted qualified immunity to the guidance counselor</td>
<td>The law was not clearly established at the time of the events to hold the individual counselor liable for not preventing or addressing peer harassment under Title IX.</td>
</tr>
<tr>
<td>Davis v. Monroe County Board of Education Student to Student Sexual Harassment 74 F.3d 1186 (11th Cir. 1996)</td>
<td>Title IX sexual discrimination by individuals and school board</td>
<td>Title IX encompasses claim for peer harassment. Sufficient claim against school board for damages for hostile environment sexual harassment.</td>
<td>Title IX encompasses claim for damages due to sexually hostile environment created by peers when supervising authorities knowingly fail to act to eliminate harassment pursuant to Title VII standards.</td>
</tr>
<tr>
<td>CASE</td>
<td>LEGAL QUESTION(S)</td>
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<tr>
<td>Rowinsky v. Bryan Indep. Sch. Dist. Student to Student Sexual Harassment</td>
<td>School district liability for peer harassment under Title IX</td>
<td>School district and officials are not liable for hostile environment sexual harassment when the perpetrator is not a recipient of federal funds.</td>
<td>Title IX does not impose liability on a school district for peer hostile environment sexual harassment absent allegations that school district directly discriminated based on sex.</td>
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</tbody>
</table>
CHAPTER V
ANALYSIS OF REGULATIONS, SCHOLARLY THEORIES
AND CASE DISSENTS

The purpose of this study was to examine relevant case law to determine if a legal argument exists that holds school administrators legally responsible for protecting students from peer to peer sexual harassment, particularly under federal law. If such an argument emerged, a second purpose of this study was to determine if a theoretical and/or regulatory base is available to support the argument. This chapter analysis addresses the second of the two research questions posed: In addition to case law and legislation, what support can be found in the language and reasoning of scholarly writings, regulatory documents and case law dissents to forecast expanded judicial reasoning to hold school administrators responsible for protecting students from peer to peer sexual harassment?

New law does not emerge in isolation from societal trends and happenings. During societal changes, new perceptions evolve and courts respond with decisions of what is and is not remedial. As groups of people request or demand legal protection, public opinion interacts with lawmaking to ensure that new laws reflect the values of the majority and the prevailing
philosophy of the courts.¹ The current contradiction in the circuit courts regarding the legal status of administrator's responsibility for preventing peer to peer sexual harassment is a prime example of how complex the process is of translating new values into rules for behavior. While some courts are open to providing relief to student victims of peer harassment,² others are resisting assigning liability to administrators for third party violations of law.³ Therefore, developing legal arguments for administrators' responsibility for preventing peer to peer sexual harassment that can be found in certain documents such as case dissents, or memoranda from federal departments such as the United States Department of Education's Office of Civil Rights [OCR], become significant.

Chapter V will focus on the theoretical and/or regulatory base that exists in the form of regulatory documents and procedures, scholarly writings, and case law dissents that contribute to the argument that administrators may be responsible for preventing peer to peer sexual harassment and liable if they


² See Davis v. Monroe, 74 F.3d 1186 (11th Cir. 1996).

³ See Rowinsky v. Bryan, 80 F.3d 1006 (5th Cir. 1996).
do not respond.

**Regulatory Base for Administrator Liability for Failure to Prevent Peer to Peer Sexual Harassment at the State Level**

State statutes such as the Minnesota Human Rights Act, like Title IX, prohibit discrimination on the basis of sex within educational institutions and allow for monetary damages, lawyer's fees, and modest punitive awards as well as termination of state funding. However, these statutes have a short claims period; in Minnesota filing must occur within one year after the occurrence of the harassment. Some also require exhaustion of administrative remedies before civil action can be filed.

Two cases in Minnesota were among the first in the nation to result in successful complaints dealing with peer harassment against a school district by high school students. Both cases were brought under the Minnesota Human Rights Act.

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4 Minn. Stat. § 363.03, subd. 5 (1990).


Rights Statute. Using a definition for sexual harassment which echoes the EEOC definition, the Minnesota State Department of Human Rights investigated the charges and found probable cause for sexual harassment.

In the first case, the charging party alleged that her daughter was the subject of sexually offensive graffiti on the walls in a bathroom in Duluth Central High School and that the school district failed to take timely, appropriate action to remove the graffiti and to eliminate the continuing harassment. Although the school district was notified on repeated occasions between May 1988 and August 1989 to request that the graffiti be removed, it

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Minn. Stat. § 363.03, subd. 5 (1990) provides:

It is an unfair discriminatory practice: (1) to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance or disability, or to fail to ensure physical and program access for disabled persons...

Id. Section 363.01, subd. 14 (1990) defines “discriminate”: “[F]or purposes of discrimination based on sex, it includes sexual harassment.”

8

Minn. Stat. § 363.01, subd. 41. (1990). Once a charge has been filed with the commission, an investigation of the allegations will be made. A finding of probable cause is necessary for the charge to move either to conciliation or a hearing. A decision that no probable cause exists is not appealable to the Minnesota Court of Appeals.
remained. The Human Rights Department found that even if some of the graffitis was removed in a timely manner, vestiges of it remained or reappeared on numerous occasions.⁹

The Department found that the school district did not take sufficient measures to totally remove, monitor or discourage the sexual harassment until formal charges were filed, and that the school district had a responsibility to respond in a

"timely and increasingly aggressive manner to investigate and remedy manifested sexual harassment and to affirmatively act to halt the continuing sexual harassment."¹⁰

It was also found that the school district should have taken steps to educate its employees to respond to sexual harassment involving students.¹¹ A settlement was reached through the Minnesota Attorney General's Office and included both remedial action by the district and monetary compensation ($15,000) for the victim.¹²

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¹⁰ Id. at 3.

¹¹ Id.

¹² Id. The remedial action included the district's adopting and posting a sexual
The second case involved a charge filed by a high school student in Chaska who charged that the school district failed to take adequate action regarding complaints of sexual harassment and that this lack of action contributed to an offensive educational atmosphere. The Department of Human Rights found probable cause and noted that:

"[t]he student events and program activities complained about by the Charging Party in the above investigation and the Respondent in its inappropriate response to these complaints and other complaints, creates an offensive atmosphere that promotes sexual harassment in general, in the Respondent's school's programs and activities; and thus is in violation of Minnesota Statutes 363.03 subd. 5(1)."

The charging party brought three specific charges that were found sufficient to create an offensive educational environment. The school district harassment policy. The remedial action also required the district's aggressive commitment to eliminating and preventing sexual harassment by providing staff development for identification and prevention, classroom curriculum and instruction, student services, and student, staff and community participation.

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13 Minnesota Department of Human Rights, Ref: ED360 (1991) (Gorman, Supervisor). In January 1990, a list was circulated by some male students rating 25 female students and how "fuckable" they were. The list also included descriptions of the students' anatomy and other sexual comments. When the dean was given the list and asked by a parent what would be done, he replied, "Nothing. We don't want to make a big deal out of this." She was also told that the list had been thrown away. Id. at 1-7.

14 Id. at 11.
was found not to have taken appropriate action on a specific student skit\textsuperscript{13} and not to have consistently taken effective action to eliminate activities and presentations of a discriminatory and offensive nature.\textsuperscript{16} The school district was found not to have taken appropriate action involving an offensive list of female students circulated by male students.\textsuperscript{17} A third charge was found to be insufficient.\textsuperscript{18}

The Minnesota Department of Human Rights ruled that the school district did not take timely and appropriate action and that there was reluctance on the part of the school district to intervene in all of the situations

\textsuperscript{15}
\begin{quote}
\textit{Id.} at 6. A skit performed in 1989 involved a scene between a male student who had a mirror on his shoe and a female student character who said something to the effect of, ‘Oh, don’t look up my dress, I don’t have any panties on.’ The charging party complained to the principal who took no disciplinary action.
\end{quote}

\textsuperscript{16}
Other presentations and activities at the school included a lip sync contest with female students dressed in teddies making undulating movements on stage in response to male catcalls, a “slave day” which involved students being led around by leash and collar by students who had bought them, and a skit in which the opposing football team was composed of gay men with bare chests, bows around their necks and effeminate behavior. \textit{Id.} at 5-6.

\textsuperscript{17}\textit{Id.} at 2. See supra note 13.

\textsuperscript{18}\textit{Id.} at 1.
mentioned in the charges. The Department said that the district’s “hush, hush” attitude did nothing to educate the general school population and that the district’s actions confirmed the students’ perceptions that the sexual harassment policy was vague and without tangible consequences. This attitude promoted confusion, rumors and uncertainty among students about what is offensive behavior. The school district settled with the student and agreed to pay her $40,000.

The Minnesota cases show a willingness to transfer the definition of sexual harassment used in the employment context into the educational

\[\text{19 Id. at 7-8.}\]

\[\text{20 Id. at 7.}\]

\[\text{21 1980 EEOC guidelines define the circumstances under which an employer may be held liable and suggest affirmative steps an employer should take to prevent sexual harassment. The definition of harassment is key to the guidelines:}\]

\[\text{Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when (1) submission to such conduct is made explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.}\]

\[\text{29 C.F.R. § 1604.11(a) (1991).}\]
context when a state statute includes sexual harassment as a form of sex
discrimination. In both the Duluth and the Chaska cases, the finding of
probable cause rested on the creation of an offensive environment and on the
inaction of the school administrators to take affirmative action to end the peer
sexual harassment.

Title IX Complaints Filed Through the Office of Civil Rights of the
Department of Education

In the early 1990's before the Supreme Court's decision in Franklin v.
Gwinnett, plaintiffs sought remedy primarily by filing complaints through the
Department of Education’s Office of Civil Rights (OCR).\textsuperscript{22} Any person
concerned about sexual harassment or any other form of discrimination can file
a complaint through a school's internal grievance procedure when such a policy
exists, or directly with the OCR. In cases of sexual harassment, complaints
may be filed with the OCR by students who allege they have personally been
harassed, by groups of persons on behalf of a class of individual students, and
by persons concerned that a recipient has failed to comply with the procedural

\textsuperscript{22} C.F.R. § 100.7(b) (1992). There are certain time restrictions on filing (180
days from the time of the alleged discriminations); however, complainants are
not required to exhaust any internal grievance procedure before filing with the Dept. of Education.
requirements of the regulations. Therefore, complaints relating to sexual harassment can claim either procedural violations of the regulations, actual sexual harassment, or both.

Complaints are reviewed by the OCR who investigates the alleged violations and makes a determination as to whether the recipient failed to comply with Title IX. If no violation is found, the case will be closed. If the OCR determines that a Title IX violation has occurred, it will seek to remedy that violation through informal means, such as negotiations for voluntary compliance by the school and/or school district. When voluntary compliance cannot be obtained, the OCR and the Department of Education will require compliance with Title IX, generally through administrative proceedings which include an administrative hearing, a review by the Department’s Civil Rights Reviewing Authority, and a final review by the

23 See id. § 100.7(b)-(c).

24 See id. § 100.7 (d)(1).

25 See id. § 100.7 (d)(2).

26 See id. § 100.7(d)(1)(stating that “the matter will be resolved by informal means whenever possible”).
Secretary of Education.\textsuperscript{27} If all the decision makers rule against the school, all federal financial assistance to that educational program may be terminated.\textsuperscript{28} In lieu of administrative proceedings, the Department of Education may refer the case to the Department of Justice to seek enforcement in the courts.\textsuperscript{29} It is important to note that the regulations do not provide any specific remedies for the complainant.

At age seven, Cheltzie Hentz was the youngest person and the first elementary school student in the United States to file a peer sexual harassment complaint with the Department of Education.\textsuperscript{30} An elementary school student in Eden Prairie, Minnesota in 1992, Cheltzie accused boys of sexually harassing her on the bus. In her complaint she stated that she was subjected to “multiple or severe acts” of harassment, including name-calling and unwelcome touching. The complaint alleged that,

\begin{quote}
“...boys riding the bus with Cheltzie subjected girls to a pattern of overt sexual hostility accompanied by actual or threatened aggressive physical contact and the repeated use of obscene or foul language, including offensive sexual slurs and epithets and other obscene sex-neutral words
\end{quote}

\textsuperscript{27} See id. § 100.8.

\textsuperscript{28} See id. § 100.8(a)-(c).

\textsuperscript{29} See id. § 100.8(a).

\textsuperscript{30} Shoop and Edwards, \textit{How to Stop Sexual Harassment in Our Schools}, 92.
or expressions directed at girls in a hostile manner."\textsuperscript{31}

At no time did the district treat the complainant’s correspondence as alleging a violation of the district’s sexual harassment policy. Reported incidents were treated as instances of inappropriate language or behavior and responded to in that manner.\textsuperscript{32} The OCR found that the district had failed to respond properly to a “sexually hostile environment.”\textsuperscript{33} The OCR’s Letter of Finding stated:

“From the standpoint of a reasonable female student participating in district programs and activities in these locations, the sexually offensive conduct was sufficiently frequent, severe, and/or protracted to impair significantly the educational services and benefits offered.”\textsuperscript{34}

The OCR also determined that the district’s response during the period of complaint

“was flawed by its failure to treat the incidents as possible sexual harassment and to follow the related procedures.”\textsuperscript{35}

The OCR found that the district lacked guidelines that would assist


\textsuperscript{32} Id. at 5-6.

\textsuperscript{33} Id. at 13.

\textsuperscript{34} Id. at 12.

\textsuperscript{35} Id. at 13.
building administrators to determine when a pattern of sexual harassment or injury requires that more stringent sanctions be imposed since the district’s actions were not sufficient to eliminate the sexual harassment that had occurred.\textsuperscript{36} In addition, the OCR determined that, based on the evidence as a whole, as of the end of the 1991-92 school year, the district had sufficient notice to conclude that a sexually hostile environment had arisen.\textsuperscript{37} Although the district did not admit any wrongdoing, it entered into a settlement with the federal government and agreed to be more vigilant in fighting sexual harassment.\textsuperscript{38}

In 1992, Tawnya Brawdy, an eighth grade student in Petaluma, California at the same school attended by Jane Doe,\textsuperscript{39} sued her district over "emotional distress" and collected $20,000 in an out-of-court settlement. Tawnya, because she was well developed, was the target of sexual harassment at her school including yells of "moo moo" and vulgar references to her breasts and other body parts by a group of boys. The harassing behavior went on

\textsuperscript{36} Id. at 16.

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 17.

\textsuperscript{39} See Doe v. Petaluma, 54 F.3d 1447.
before school, during classes, in between classes and during lunch. Her
teachers told her just to put up with it. Boys continued to moo at her all
through high school.\textsuperscript{40}

The OCR investigated and determined that the district was in violation
of Title IX for failing to take prompt and effective action to stop the sexual
harassment. Specifically, the OCR found that (1) the taunts directed at
Tawnya constituted sexual harassment because (a) they were sexual in nature
and (b) they interfered with her ability to benefit from her education and
created an intimidating, hostile, and offensive environment; (2) several
teachers knew about the harassment; (3) the principal’s response, which
included verbally reprimanding the students and assigning a custodian to
watch for the behavior on one day, was insufficient to address the problem;
and (4) a prior victim of sexual harassment at Kenilworth managed to escape
harassment only by transferring out of the school. The Letter of Finding
explicitly specified that “[a] district which is aware that its students are being
subjected to sexual harassment has a duty under Title IX to take prompt and

\textsuperscript{40} Cited in Nancy Burcham, \textit{Combating Sexual Harassment in School}
effective action to stop it."^41

**Administrators’ Liability for Preventing Peer to Peer Sexual Harassment Addressed in Scholarly Writings**

A review of available scholarly writings on the topic of peer to peer sexual harassment indicates that legal scholars are convinced there are legal avenues of redress for victims of peer harassment, and have attempted to show their arguments through their research and analysis. Several commentators who have addressed the issue of peer to peer sexual harassment have argued in favor of applying Title VII principles to Title IX cases involving students harassed by other students,^42 while at least one other commentator^43 looks to


the OCR as the most viable means of finding remedy.

In a commentary describing the state of the law in 1990, Wetherfield argued that educational institutions have a twofold responsibility to prevent and eliminate sexual harassment, and to protect both employees and students.\(^\text{44}\) In 1991, Mango expanded Wetherfield’s argument when she reviewed the history of Title VII and Title IX and commented that, prior to the Gwinnett decision, “Title IX as a statutory remedy has proven to be virtually without bite, despite its legislative foundation that makes it nearly identical to Title VI and significantly similar to Title VII.”\(^\text{45}\) She suggested incorporation of the defining sections of Title VII into Title IX and says, “in the interim, another solution to the disparate treatment of the student-victim of

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\(^\text{44}\) Wetherfield, “Sexual Harassment,” 23.

environmental sexual harassment is for Congress to independently incorporate the Title VII standards into Title IX, or alternatively, for the Office of Civil Rights of the Department of Education to promulgate regulations to that effect.”46 In closing, Mango says,

“When either the legislative branch or the judicial branch seizes the opportunity to act, the result should be the incorporation of the claim of environmental harassment in the educational sector within those parameters already set and working successfully within the employment sector. Little exists to distinguish sexual harassment in the employment sector from sexual harassment in education. Maintaining the dichotomy without justification has served to penalize female students who continue to be harassed during the course of their educational advancement, thereby denying them the equal benefits of education.”47

LeClair recommends that the OCR adopt the following guidelines for controlling sexual harassment between students:

(a) Harassment on the basis of sex is a violation of § 1681 of Title IX. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct has the purpose or effect of unreasonably interfering with an individual’s academic performance or creating an intimidating, hostile, or offensive academic environment.

(b) With respect to conduct between fellow students, a school is responsible for acts of sexual harassment in school or on school grounds where the school board (or teachers or administrators) knows or should have known of the conduct, unless it can show that it took immediate

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46 Ibid.

47 Ibid., 412.
and appropriate corrective action."\textsuperscript{48}

LeClair suggests that this proposal requires no more than a reasonable standard of care and emphasizes that under the proposed Title IX guidelines, teachers would have a duty to prevent peer to peer sexual harassment by regulating the behavior of offending students, an argument that incorporates Title VII principles.\textsuperscript{49} In agreement with LeClair, Sherer says that Title VII case law and standards can provide a basis for developing a framework to evaluate peer to peer sexual harassment. She stresses that schools that do not establish workable sexual harassment policies and procedures and do not respond effectively to peer sexual harassment complaints expose themselves to liability by failing to comply with their legal duty under Title IX.\textsuperscript{50}

Gant noted in 1994 that peer to peer sexual harassment has been recognized as illegal under Title IX by the OCR and that several commentators have argued that a Title VII analysis of co-worker sexual harassment should be applied to peer to peer sexual harassment under Title IX. She argues that the Supreme Court’s comparison of students to subordinates and teachers to

\textsuperscript{48} LeClair, “Sexual Harassment Between Peers,” 337.

\textsuperscript{49} Ibid., 338.

\textsuperscript{50} Sherer, “Peer Sexual Harassment,” 2168.
supervisors in instances where a teacher sexually harasses a student \(^{51}\) justifies analyzing cases of sexual harassment in the schools using the same theories applied in the workplace. She states that

"By taking this analysis one step further, student harassment of other students could be likened to co-worker harassment, a practice for which an employer can be held liable if management-level employees "knew or reasonably should have known" of the offensive behavior."\(^{52}\)

Gant recommends that courts logically turn to the well-developed sexual harassment case law under Title VII and hold administrators responsible for peer harassment in the educational setting just as employers are held responsible for co-worker harassment in the workplace.\(^{53}\)

Roth underscores the fact that applying the principles of employer negligence developed under Title VII would only hold educational institutions liable when they knew or should have known of the harassment and failed to take adequate corrective action.\(^{54}\) She reminds the reader that peer harassment most often occurs in front of agents of the school, whether in class, in the hallway or while working in jobs supervised by school personnel and part of the

\(^{51}\) Franklin v. Gwinnett (cite omitted).

\(^{52}\) Gant, "Sexual Harassment in the Schools," 98.

\(^{53}\) Ibid., 99.

\(^{54}\) Roth, "Sex Discrimination 101: Developing a Title IX Analysis," 517.
school curriculum, and emphasizes that liability can be avoided by an adequate response. Referring to Franklin v. Gwinnett, Roth says,

“If Franklin exposes those institutions to an increased risk of liability resulting from private compensatory damages actions, perhaps educators will finally be forced to take a hard look at the effectiveness of their sexual harassment policies and procedures. Clarifying the outlines of acceptable and unacceptable behavior will benefit members of the academic community of all ages and in every stage of their education.”

Miller reinforces the argument of these scholars when she says,

“Actionable peer harassment can be adequately addressed and potentially remedied only by ultimately enforcing Title IX with a Title VII standard that holds teachers, administrators and school districts liable if they “knew or should have known” about such behavior.”

and Eriksson concurs.

Wolohan calls for the Supreme Court to establish a uniform rule of law for every jurisdiction to follow in student sexual harassment cases. He sees the ideal rule as one that would modify DeShaney and thereby recognize that school administrators have an affirmative duty to protect students. His rule would hold administrators accountable for their failure, or inaction, in

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55 Ibid., 517-18.

56 Ibid., 521.

57 Miller, “Schools & Peer Sexual Harassment,” 725.

preventing sexual harassment of students.\textsuperscript{59}

Sorenson suggests that the most reasonable means of voluntary resolution appears to be through investigation by the OCR since it is administrative in nature and costs nothing.\textsuperscript{60} She sees the pre-collegiate environment differing markedly from the employment context since elementary and secondary students attend school under compulsion of state law; they are intellectually, socially and emotionally less mature than most adults; and, as adolescents, they are uniquely vulnerable to peer pressure and the pull of peer approval. She suggests that all of these factors make the OCR policies, procedures and enforcement guidelines more appropriate and adequate than the wholesale application of principles developed in the context of adult employment.\textsuperscript{61}

Numerous scholars writing primarily in law review journals, support the application of Title VII principles to Title IX which would impose on school administrators legal responsibility for preventing or addressing peer to peer sexual harassment. In their analyses of decisions related to sexual harassment

\textsuperscript{59} Wolohan, "Sexual Harassment of Students by Students," 138.

\textsuperscript{60} Sorenson, "Peer Sexual Harassment," 16.

\textsuperscript{61} Ibid., 17.
and their review of the legislative and judicial history of both laws, legal scholars have shown a correlation between the workplace and the educational environment. They provide logical arguments for applying Title VII principles to Title IX, and their collective research and analysis provides a theoretical argument for holding administrators legally responsible for preventing peer sexual harassment.

The next section will address the dissenting decisions in the two peer to peer sexual harassment cases heard at the circuit court level that ruled against student plaintiffs.

Dissenting Opinions of Circuit Court Judges in Cases Ruling Against Student Plaintiffs

Prior to the Eleventh Circuit’s decision in *Monroe v. Davis*,\(^2\) cases involving peer to peer sexual harassment were overwhelmingly decided in favor of defendant school administrators, counselors and teachers. However, two of these cases included dissents by judges who did not agree with the majority ruling. The content and language of their dissents contribute to the argument that school administrators are legally responsible for preventing and addressing peer to peer sexual harassment.

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\(^{62}\) 74 F.3d 1186 (11th Cir. 1996).
When the Ninth Circuit decided in favor of school officials in *Doe v. Petaluma*, Judge Pregerson dissented against the majority decision, arguing that

"'[N]o case has been cited...holding that a school counselor has any duty to prevent Doe's peer sexual harassment...’ By requiring strict factual similarity between pre-existing case law and the present case, the majority improperly dismisses case law that clearly indicated a school official’s duty to stop peer-to-peer sexual harassment."  

Judge Pregerson argued that the law that would guide school officials to know to stop harassment among students was well established at the time of the incidents, particularly in light of Title VII applications to Title IX in cases such as *Mabry v. State Board of Community Colleges*, *Lipsett v. University of Puerto Rico* and *Franklin v. Gwinnett*. He also noted that the school district had received a letter from the Office of Civil Rights that notified school officials that they had a duty to prevent the kind of peer harassment that

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63 54 F.3d 1447 (9th Cir. 1995).

64 Id. at 1453.


66 864 F.2d 881 (1st Cir. 1988).

occurred against Doe.

"The Office of Civil Rights of the U.S. Department of Education explicitly notified the Petaluma City School District through a Letter of Finding that the failure to stop the very type of harassment to which Jane was subjected violates Title IX. It is undisputed that Homrighouse received a copy of this letter, read it, and placed it in a file marked "Title IX" in his office."68

Judge Pregerson also maintained that pre-existing case law regarding harassment in the school setting was sufficiently analogous.

"Applying the same analysis we employed in Bator to the instant case, I believe that the unlawfulness of student to student sexual harassment would have been apparent to a reasonable school official."69

The decision in Davis v. Monroe70 contains language and legal principles that agree with the arguments used by Judge Pregerson in his dissent.

Therefore, we begin to see agreement between members of the circuit courts as they address the issue of administrators' liability for preventing peer to peer sexual harassment.

68 54 F.3d at 1455.

69 Id. at 1453 citing Bator v. State of Hawaii, 39 F.3d 1021 (9th Cir. 1994). (The court held that supervisors who failed to stop the plaintiff's co-workers from sexually harassing her were not entitled to qualified immunity. The court concluded that the constitutional and statutory rights to be free from sexual harassment perpetrated by one's peers was clearly established in 1988.)

70 74 F.3d 1186 (11th Cir. 1996).
When the Fifth Circuit decided in favor of the defendant school system in *Rowinsky v. Bryan Independent School District*, Circuit Judge Dennis dissented from the majority opinion, stating that he believed the plaintiffs stated valid claims for relief under Title IX and were entitled to proceed to trial.  

Judge Dennis reviewed the Supreme Court history of decisions involving Title VII and Title IX from *Meritor* to *Franklin* and relied on these two cases as he presented his dissenting argument. Citing *Franklin*, he said,

"...[t]he *Franklin* Court's recognition of this type of claim under Title IX necessarily indicates that a student subjected to severe sexual harassment by other students in the school environment may recover for damages sustained thereby from a federally funded educational institution if its board had knowledge of the harassment and failed to take appropriate corrective action."  

Judge Dennis also cites the Supreme Court's reliance on and approval of the EEOC guidelines for sexual harassment in *Meritor* and the uniform application by other courts of the rule expressed by the guidelines pertaining to sexual harassment by non-supervisory co-workers. He argues that Title VII

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71 80 F.3d 1006 (5th Cir. 1996).

72  Id. at 1017.

73  Id. at 1021.

74  Id. at 1022.
principles should be applied to Title IX when determining school officials' responsibility for addressing peer sexual harassment. Judge Dennis further argues that school officials, as supervisory agents, have the control to stop such behavior.

"Apparently underlying the majority's conclusion that summary judgement is appropriate here is the incorrect assumption that, in general, school boards have no duty with respect to students' safety and no power of discipline to control educationally pernicious student conduct. Even if the school board had not accepted federal funds, however, it owes a much higher duty to its students and has far greater powers of control over them than that described in the majority opinion."  

In reaching his conclusion, Judge Dennis said he was in agreement with the only other circuit to "squarely address the issue," and cited the Eleventh Circuit's decision in favor of the plaintiff in Monroe v. Davis. He cites the Supreme Court history of decisions involving Title IX and Title VII and

75 Id.

76 Id. at 1024.

77 Id. at 1017. See note 1 which cites the decision in Davis v. Monroe, 74 F.3d 1186 (11th Cir. 1996).

78 See generally Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (where the Court held that Title IX is enforceable through an implied right of action by certain classes of private parties), Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)(four factors set forth
states,

"...it is clear from the plaintiffs' allegations...that they have stated a claim under Title IX because the facts adduced, viewed most favorably to them, show that the school board (and its agents) had actual knowledge that the plaintiffs were being subjected to sexual harassment and abuse sufficiently severe and pervasive as to create for them a hostile and offensive educational environment, and that the board failed to take appropriate corrective action."\(^80\)

Summary

Question 2 of the study was posed as follows: In addition to case law and legislation, what support can be found in the language and reasoning of scholarly writings, regulatory documents and case law dissents to forecast expanded judicial reasoning to hold school administrators responsible for protecting students from peer to peer sexual harassment?

\(^79\) See Meritor Savings Bank F.S.B. v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)(the employer’s liability for “hostile environment” sex discrimination is based on his failure to take reasonable corrective action after learning of co-worker sexual harassment) and Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)(employer discriminates when his failure to act requires an employee to work in an environment permeated with harassment severe or pervasive enough to alter the conditions of the employee’s employment and create an abusive working environment).

\(^80\) Rowinsky at 1024. (Italics added.)
Regulations and procedures at the state level and through the Office of Civil Rights for the U.S. Department of Education clearly provide support for the argument that administrators are legally responsible for protecting students from peer to peer sexual harassment that they knew about. Decisions at the state level in favor of student plaintiffs have been predicated on a situation where administrators were distinctly aware of cases of blatant harassment and failed to take adequate or any action to stop it. Similarly, investigations by the OCR found that school districts who did not take actions to address peer harassment through policy and procedures were in violation of Title IX and in danger of losing federal funding.

A number of scholars writing in recent times support the argument that administrators are liable for not protecting students from peer to peer sexual harassment through a careful analysis of Title VII history and principles applied to Title IX.

The dissents of circuit court judges in the two decisions of Doe v. Petaluma and Rowinsky v. Bryan are particularly supportive of school officials’ responsibility for preventing or addressing peer to peer sexual harassment and their liability for failure to do so. Both judges argued in favor of applying Title VII principles to Title IX.
While these regulations, scholarly materials and dissents do not carry the weight of court law decisions and legislation, they have significance for future decisions in cases that address the issue of peer to peer sexual harassment.
CHAPTER VI
SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

The purpose of this study was to closely examine relevant case law to determine if a legal argument exists that holds school administrators legally responsible for protecting students from peer to peer sexual harassment, particularly under federal law. A second purpose of the study was to determine if a theoretical and/or regulatory base to support the argument is available.

The research questions specifically addressed whether an argument emerges through case law and legislation that finds peer to peer sexual harassment to be sex discrimination that school administrators may be held legally responsible for preventing, and whether a theoretical and/or regulatory base can be found in scholarly writings, regulatory documents and case law dissents to support the argument. Out of the analyses of law and supporting documents came the conclusions and recommendations presented in this chapter.

Summary of the Legal Analysis

Plaintiffs in early court cases of peer to peer sexual harassment pursued their claims through § 1983 of the Civil Rights Act of 1871 and the Due Process Clause of the Fourteenth Amendment. The judicial history of § 1983 and the Due Process Clause of the Fourteenth Amendment demonstrates that 187
they are not presently viable means of seeking remedy by plaintiffs for peer to peer sexual harassment. Repeatedly, courts have decided in favor of defendant school districts in cases where student plaintiffs seek to hold school administrators liable for failing to prevent their victimization from peer to peer sexual harassment.

*Pagano by Pagano v. Massapequa Public Schools*\(^1\) is the exception to general rulings under § 1983 that school officials do not have an affirmative duty to protect students from other students. Relying on the Second Circuit’s decision in *Doe v. New York City Department of Social Services*,\(^2\) the district court in this case ruled that Sean Pagano’s situation could be more closely analogized to that of a foster child than the situation faced by Joshua DeShaney. The court determined that school is a custodial environment and that a custodial relationship exists between a teacher and student.\(^3\) Consequently, constitutional liability attaches. However, *Pagano* went no further than the district court level.

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2. 649 F.2d 134 (2d Cir. 1981) (the court ruled that a foster home could constitute a custodial environment).
Cases since *Pagano* have found little or no support for a § 1983 claim. In *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, the Third Circuit ruled that school officials did not restrict the student’s freedom to the extent that she or her parents were unable to meet her basic needs. The Third Circuit’s decision echoed the Supreme Court’s ruling in *DeShaney* that the Due Process Clause “was to protect the people from the State, not to ensure that the State protected them form each other.” The concept of government responsibility for acts of private or third party actors was rejected by the Supreme Court in *DeShaney* and subsequently rejected by the Third Circuit in *Middle Bucks*, and the Eighth Circuit in *Dorothy J. v. Little Rock School District*.

Plaintiff’s § 1983 argument was rejected yet again in *B.M.H. v. School Board of Chesapeake, Virginia*, despite Virginia’s compulsory attendance laws.

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4 972 F.2d 1364 (3rd Cir. 1992).

5 *Id.* at 1372.


Notable are the Fifth Circuit's decision in *Walton v. Alexander* and the Eleventh Circuit's decision in *Spivey v. Elliot*, both cases involving plaintiffs who were special education students in residential schools. Although the courts made tentative decisions in favor of a special relationship, both circuits ruled that one did not exist since neither of the students forfeited all of their autonomy.

In contrast with decisions in § 1983 and Due Process cases, the courts' acceptance of a legal parallel between Title VII and Title IX has led to correlations between sexual harassment in the workplace and cases of peer to peer sexual harassment in educational settings. Commentators and judges have argued that if courts recognize both quid pro quo and hostile environment sexual harassment in the workplace under Title VII, it follows that they should do so in the educational setting under Title IX. Additionally, they argue that if a victim of sexual harassment can bring a claim against an employer or co-

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9 20 F.3d 1350 (5th Cir. 1994), rev'd and remanded, 44 F.3d 1297 (5th Cir. 1995).

10 29 F.3d 1522 (11th Cir. 1994).

11 See supra note 42 in Chapter V and dissents in Doe v. Petaluma, 54 F.3d 1447 and Rowinsky v. Bryan, 80 F.3d 1006.
worker in the workplace, it follows that a student should be able to bring a claim against an administrator or a classmate in the educational setting. This correlation has slowly been realized in the courts. While a student has prevailed in bringing a Title IX claim against a teacher,\(^\text{12}\) only recently has a student prevailed in a Title IX claim against an administrator and school district for failing to stop peer to peer sexual harassment.\(^\text{13}\)

The Ninth Circuit set the stage for the decision in *Davis v. Monroe* with its decision in *Doe v. Petaluma*.\(^\text{14}\) Although the court did not assign liability to the school counselor in this case, the court’s closing statement issued strong warning to administrators that if the counselor exercised the same failure to act at the time of trial, he would not be entitled to qualified immunity.\(^\text{15}\) This statement issued notice that perhaps this circuit would be willing to find school officials liable for peer to peer harassment under Title IX in future cases. This first case of peer to peer sexual harassment heard in federal court posed some important issues for school officials. It warns them that more attention must


\(^{13}\) *Davis v. Monroe*, 74 F.3d 1186 (11th Cir. 1996).

\(^{14}\) 54 F.3d 1447.

\(^{15}\) Id. at 1452.
be paid to reports of students being harassed by other students. Failure to investigate peer harassment activities could be used as evidence to build a case against school officials for intentionally discriminating.

Cases heard by district level courts have produced a variety of decisions that have informed the educational public and produced elements of legal principles to be considered in appellate decisions. In Seamons v. Snow,\textsuperscript{16} for example, the district court opined that Title VII principles were not appropriately applied to a Title IX claim of hostile environment sexual harassment based on negligence and that teachers or administrators could not be held individually liable under Title IX.\textsuperscript{17} However, the court in Mennone v. Gordon\textsuperscript{18} handed down a totally different interpretation of Title IX when it ruled that an individual could be classified as a recipient and held liable under Title IX.\textsuperscript{19} This decision, should it stand in an appellate decision, clearly puts school employees on guard regarding their individual responsibility for addressing peer harassment.


\textsuperscript{17} Id. at 1116-17.

\textsuperscript{18} 889 F.Supp. 53 (D.Conn. 1995).

\textsuperscript{19} Id. at 56-57.
The district level decision handed down in the case of *Oona R-S. by Kate S. v. Santa Rosa City Schools*\(^{20}\) supported individual liability for teachers and administrators. The court ruled that Title IX could be enforced under § 1983 in holding a teacher, student teacher and principal responsible for a student's victimization by her peers and the student teacher.\(^{21}\) Even more importantly, the court ruled that school teachers and administrators have a duty under Title IX to take steps to curb peer sexual harassment.\(^{22}\) The decision in this lower court case presents an argument for holding administrators responsible for addressing peer sexual harassment that would be supported by recent circuit court decisions.

The Western District Court of Missouri found it appropriate to apply Title VII standards to enforce antidiscrimination provisions of Title IX in the case of *Bosley v. Kearney R-1 School District*.\(^{23}\) The court noted that hostile environment sexual harassment is actionable under Title VII when it is

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\(^{21}\) *Id.* at 1461.

\(^{22}\) *Id.* at 1469.

\(^{23}\) 904 F.Supp. 1006 (W.D.Mo. 1995).
sufficiently patterned or pervasive. Applying a Title VII analysis, the court determined that once a school district becomes aware of sexual harassment, it must take prompt remedial action which is reasonably calculated to stop the harassment.

The decisions in Oona R-S, and Bosely were reinforced by the recent landmark appellate case of Davis v. Monroe. The Eleventh Circuit took an affirmative stand when it applied Title VII principles to Title IX and held that school officials were legally responsible for failing to address pervasive peer to peer sexual harassment. This decision is a culmination of emerging law in favor of holding administrators legally responsible for student behavior. From Doe v. Petaluma to Memone to Oona R-S, to Bosley to Davis, the courts have increasingly found issue with school officials who learn of or observe students sexually harassing other students and fail to take action to stop the behavior.

In sharp contrast, the Fifth Circuit’s decision in the case of Rowinsky v. Bryan Independent School District is more typical of previous § 1983 case

24 Id. at 1023.

25 Id.

26 74 F.3d 1186 (11th Cir. 1996).

27 80 F.3d 1006 (5th Cir. 1996).
decisions, ruling that administrators are not responsible for acts of sexual harassment perpetrated by a third party. The court emphasized that the students perpetrating the harassment were not recipients of federal funds and underscored their disagreement with the Eleventh Circuit’s decision in *Davis*.\(^{28}\)

The major difference between these two cases is that one clearly applies Title VII principles to Title IX in qualifying the need for administrators to address peer to peer sexual harassment and the other case does not. The court in *Rowinsky* did not recognize the analogy of educational setting to workplace, nor did it lend credence to the opinions of the OCR.\(^{29}\) This opinion presents a sharp contrast to the Eleventh Circuit’s ruling in favor of applying Title VII principles to Title IX, and creates a conflict that the Supreme Court may have to resolve.

**Conclusions Based on the Legal Analysis**

This study has demonstrated, through an analysis of cases that span a seven year period, that case decisions addressing § 1983 and Due Process claims of peer to peer sexual harassment have been decided in favor of defendant school administrators and fruitless for plaintiff victims, while the

\(^{28}\) *Id.* at 1010, no. 8.

\(^{29}\) *Id.* at 1013-15.
case law brought under Title IX has expanded, with several cases supporting the legal argument that peer to peer sexual harassment is sex discrimination that violates Title IX. Title IX has been inextricably intertwined with Title VII and several judicial districts have chosen to follow the substantive patterns set forth in Title VII decisions when assessing Title IX claims. In addition, scholarly writings, regulatory proceedings and two case law dissents provide the seeds of a theoretical and/or regulatory base that supports an application of Title VII principles to Title IX. These factors suggest a picture of emerging law that makes it feasible for courts to consider peer to peer sexual harassment to be a form of sex discrimination that school administrators are legally responsible for preventing. While courts are often slow to adopt untried and emerging theories, the study analysis shows that some judges at the appellate level are willing to consider and beginning to ponder the possibility of administrators' liability for peer to peer sexual harassment.

Recommendations

While significant decisions have been handed down related to peer to peer sexual harassment, as yet, no case has been heard by the Supreme Court. Until the Court addresses the issue of peer harassment, questions remain unanswered, leaving many areas to be researched.
1. This study focused on case law which has been decided between 1989 and April of 1996. A study that addresses federal sex discrimination law as it evolves after April 1996 and tracks future developing law may reveal a more established theory regarding administrators’ liability.

2. The philosophy and politics of the thirteen federal judicial circuits have a strong bearing on decisions that are reached in each circuit. Research to assess the history of decisions in the area of sex discrimination in each of the circuits may be predictive for future decisions.

3. As stated in the research, certain states have enacted civil rights statutes to prohibit sexual harassment in the educational setting. It would be appropriate to research how these statutes have affected the prevalence of peer to peer sexual harassment in the educational setting.

4. The first suit against a school district for failure to protect a gay student from harassment has been appealed to the Seventh Circuit. A study that examines same sex sexual harassment and court decisions in these cases would provide an informative study.

5. Given the changes that have gradually occurred in court decisions in cases that are based on Title IX claims, a viable study could examine initial

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30 Supra Chapter 5 note 8.
cases of sexual harassment claims under Title IX, such as *Alexander v. Yale*,
and project how those previous decisions might differ in today’s courts.

6. Eleventh Amendment immunity has played an important role in
the issue of school board and administrators’ liability in civil rights cases. A
study that examines the effect of immunity on case outcomes involving peer to
peer sexual harassment would provide important information in this area of
legal study.

7. This study focused on building level school administrators’
responsibility and liability for peer to peer sexual harassment. A subsequent
study could focus on school board and superintendent liability and
responsibility.
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VITA

Lois Fran Berlin was born at Ft. Meade, Maryland on March 15, 1952. She spent her first two years living in Baltimore, Maryland with her mother and two sisters while her father fought in the Korean War. Upon his return, her family moved through a series of duty stations that included Fort Benning, Georgia, Honolulu and Schofield Barracks, Hawaii, Fort Monroe, Virginia, Juneau, Alaska and Fort Belvoir, Virginia. Ms. Berlin graduated from Mt. Vernon High School in 1970 and attended Virginia Polytechnic Institute and State University where she earned a Bachelor's degree in Sociology in 1973. She earned a Master's degree in Early Childhood/Special Education from the George Washington University in 1980.

Ms. Berlin began her career as a research analyst in McLean, Virginia in 1974. Making an early life career change, she began teaching in a residential school for special needs students in Aberdeen, Scotland in 1975. Her area of specialty was adolescent emotionally disturbed and learning disabled students. Returning to the United States in 1979, Ms. Berlin began her course work at George Washington University and began teaching in the City of Alexandria Public Schools in 1980. While in the classroom in Alexandria, she taught developmentally delayed preschool students and learning disabled primary age
students.

Ms. Berlin's administrative experience in the Alexandria City Public Schools began in 1988 and includes the positions of Magnet School Coordinator and Assistant Principal at Cora Kelly Magnet School, and principal of Jefferson-Houston Elementary School. She is currently principal of George Mason Elementary School in Alexandria. Ms. Berlin recently co-authored a book with her committee chairperson, Joan Curcio, and Patricia First entitled Sexuality and the Schools: Handling the Critical Issues.

Ms. Berlin is married and lives in Washington, D.C.