

SEXUAL HARASSMENT BETWEEN STUDENTS: WHETHER TO TURN A BLIND OR WATCHFUL EYE

I. INTRODUCTION

Title IX of the Education Amendments of 1972 states, in part, that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"¹ Title IX covers two types of sexual harassment that may occur in a school environment: (1) teacher to student harassment and (2) peer to peer harassment.² Peer to peer sexual harassment occurs when a student is sexually harassed by another student or students. When a teacher sexually harasses a student, teacher to student harassment exists. In both types of harassment courts have often utilized standards of Title VII of the Civil Rights Act of 1964³ as a guide to interpreting the situations that arise in the education context under Title IX.⁴

Case law interpreting Title VII has established that two forms of sexual harassment violate the statute's prohibitions against workplace inequality: (1) *quid pro quo* harassment and (2) hostile work environment harassment.⁵ The type of claim at issue

1. 20 U.S.C. §§ 1681-1686 (1988). The purpose of Title IX is to end discrimination based on gender in any education program or activity receiving federal financial assistance. *Id.* at § 1681(a). *See also* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 n.36 (1979) ("[I]t is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers" (quoting Sen. Birch Bayh, 118 CONG. REC. 5806-07 (1972))).

2. *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992). Sexual harassment involves "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a) (1997).

3. 42 U.S.C. §§ 2000e-2000e-17 (1988). Congress enacted Title VII to prevent discrimination in the workplace on the basis of race, sex, religion, color, and national origin. *Id.* at § 2000e-2(a)(1)-(2).

4. *Franklin*, 503 U.S. at 72-76. The Court opined that "the same rule that applies when a supervisor sexually harasses a subordinate under Title VII should apply when a teacher sexually harasses and abuses a student." *Id.* at 75. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 (11th Cir. 1996) (Title VII standards governing hostile working environment are applicable to Title IX claim against school for knowingly failing to act to remedy hostile school environment); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) ("In reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII"); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (Even though Title VI "served as the model" for Title IX, the court found Title VII to be the true model used in regards to substantive standards); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896-99 (1st Cir. 1988) (Title VII standard for proving discriminatory treatment applies to claims arising under the equal protection clause and Title IX); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards")

5. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 62 (1987). *Quid pro quo* sexual harassment links sexual harassment "to the grant or denial of" specific economic employment benefits. *Id.* at 65. Hostile environment sexual harassment occurs when sexual harassment creates a hostile or offensive work environment even without any affect on economic benefits. *Id.*

in this article is a Title IX sexually "hostile learning environment" claim that is derived from Title VII's hostile work environment harassment.⁶

In a Title VII hostile work environment case, an employer is subject to liability if she had actual or constructive notice of co-worker sexual harassment that occurred in the workplace. The Ninth Circuit extended that notice standard to peer to peer sexual harassment in a hostile learning environment. The Second and Eighth Circuits, however, apply only the actual notice standard to harassment in a hostile learning environment and abandon school district liability arising out of constructive notice.

II. DISCUSSION OF THE CIRCUIT SPLIT

A. How the Notice Standard Issue Arose

To establish a *prima facie* case of sexual harassment under Title IX for a hostile learning environment, taking into account Title VII standards, a plaintiff must demonstrate:

(1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) 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 some basis for institutional liability has been established.⁷

This test requires "an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victim's subjective perception that the environment is abusive."⁸

A circuit split exists as to the fifth requirement of a student's *prima facie* case: the Title IX standard of liability applicable to an educational institution or school district when a sexually hostile learning environment allegedly harms a student. The split is limited to this legal standard in regard to peer to peer sexual harassment. Specifically, the circuits are split over whether a school district must have actual notice or constructive notice in order to be held liable.

Under Title VII, the notice standard for liability is clear. When an employer knowingly fails to take action to remedy a hostile environment caused by one co-worker's sexual harassment of another, the employer "discriminate[s] against . . . an[] individual."⁹ Employers are held liable for a hostile environment under the agency theory of respondeat superior when a plaintiff shows "the employer knew or should have known of the harassment in question and failed to take prompt remedial action."¹⁰

6. Although this article focuses on hostile environment harassment, *quid pro quo* harassment could also exist in a school. This would occur, for example, if a teacher threatened a grade or if a fellow student threatens a position in a club or committee held by a student in conjunction with the harassment.

7. *Davis*, 74 F.3d at 1194. *Cf. Meritor*, 477 U.S. at 66-73; *see also Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 20-23 (1993).

8. *Harris*, 510 U.S. at 20-21.

9. 42 U.S.C. § 2000e-2(a)(1) (1988).

10. *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1992); *accord, Murray*, 57 F.3d at 249 (knew or should have known of the hostile environment and took insufficient remedial action). *Cf. DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995); *Columbia Univ. v. Karibian*, 14 F.3d 773, 779 (2d Cir. 1994), *cert. denied*, 512 U.S. 1213 (1994); *Nichols v.*

In the Title IX peer to peer sexual harassment situation, courts have decided the notice standard differently. The Second Circuit, in *Bruneau v. South Kortright Central School District*¹¹ held that the standard required is one of actual notice,¹² and the Eighth Circuit similarly held in *Bosley v. Kearney R-1 School District*¹³ that the entity must know of the harassment.¹⁴ Meanwhile the Ninth Circuit, in *Doe v. Petaluma City School District*,¹⁵ maintained that the standard is one of constructive notice, or that liability exists when the school should have known of the hostile learning environment.¹⁶ The Supreme Court has not granted certiorari to resolve this circuit split.

A recognition of the difference between the two notice standards is imperative in order to advance educational equality between the sexes. A constructive notice standard holds a school district accountable for the environment in place at their schools and furthers the purposes behind Title IX. An actual notice standard allows schools to ignore blatant and persistent sexual harassment between students until they are asked to remedy the situation in a particular learning environment. In contrast, a constructive notice standard provides a necessary incentive for schools to maintain a system of learning free from perpetual sexual harassment. Moreover, adopting a constructive notice standard within the educational system benefits society in the long run. If students are socialized through their school environment to believe that lewd acts or language towards women is tolerable, they will proceed to feel that this objectification of women is acceptable.¹⁷ Such attitudes promote the subordination of women in society as a whole.

This article will discuss the differing views of the courts and propose a solution to this split. Congress must articulate the standards courts should implement under Title IX. Students are a most important consideration because, like an employee who experiences harassment and is economically tied to a particular workplace, a student may have little choice but to attend a public school. For this reason, Congress should amend Title IX to specifically state that a constructive notice standard should apply to Title IX peer to peer sexual harassment.

Frank, 42 F.3d 503, 508 (9th Cir. 1994); Carr v. Allison Gas Turbine Div. Gen. Motors, 32 F.3d 1007, 1009 (7th Cir. 1994); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 182, cert. denied, 506 U.S. 1041 (1992); Smith v. Bath Iron Works, 943 F.2d 164, 165-66 (1st Cir. 1991); Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 749 (3d Cir. 1990); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1345-46 (10th Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988).

11. *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162 (N.D.N.Y. 1996).

12. *Id.* at 173.

13. *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995).

14. *Id.* at 1023.

15. *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996) [hereinafter "*Petaluma I*"]. The case follows a motion to reconsider *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd in part on other grounds*, 54 F.3d 1447 (9th Cir. 1995) [hereinafter "*Petaluma I'*"].

16. *Petaluma II* at 1427. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), also held that a constructive notice standard was applicable to peer on peer sexual harassment under Title IX, following standards set forth by Title VII: *Id.* at 1195. However, this decision was vacated and a rehearing en banc was granted on Aug. 1, 1996. See *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996).

17. Though peer to peer sexual harassment may certainly occur to male students, most cases dealing with this issue involve female students harassed by males. An example of a case involving males is *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), in which a gay student, Jamie Nabozny, succeeded in overturning a summary judgment decided in favor of his school district. In his equal protection case, Nabozny alleged his school district failed to protect him from being kicked, beaten and urinated on by other students.

B. The Second and Eighth Circuits Require an Educational Institution to Receive Actual Notice to Incur Hostile Learning Environment Liability

In *Bruneau*, the plaintiff, Eve Bruneau, was a sixth grade student in South Kortright Central School District. She asserted that continual verbal and physical harassment from male students made her feel "unsafe and depressed."¹⁸ Bruneau reported this behavior to a teacher and assistant superintendent and felt that school authorities were aware of it in general.¹⁹ Her claim for relief was based on Title IX's support of a claim where school officials "knowingly fail to act to remedy a sexually hostile learning environment created by fellow students."²⁰ Bruneau asserted that Title VII standards for a sexually hostile working environment created by employees should be the standards applicable to her case.²¹ The use of Title VII jurisprudence would mandate a finding that constructive notice of peer to peer sexual harassment is sufficient to establish institutional liability.

The court decided that Title VII standards do apply to the analysis of Title IX claims.²² The court limited its holding by stating that Title VII standards are not to be blindly followed in every Title IX case, but instead a court "must determine the appropriate segments and the proper extent to which the law of Title VII applies to a given Title IX analysis."²³ The *Bruneau* case was unique from those Title IX cases previously decided in the Second Circuit because it involved peer to peer sexual harassment rather than teacher to student harassment.²⁴ The court refused to apply Title VII's constructive notice standard for institutional liability in a peer to peer sexual harassment case.²⁵

Title VII "requires employers to take steps to assure their employees a work environment free from sexual harassment, regardless of whether the harassment or hostile environment is caused by a supervisor or other co-workers."²⁶ The plaintiff

18. *Bruneau*, 935 F. Supp. at 166. Verbal harassment included the plaintiff and other girls often being referred to as "lesbian," 'prostitute,' 'retard,' 'scum,' 'bitch,' 'whore' and 'ugly dog faced bitch.'" *Id.* Physical harassment included the male students "snapping the girls' bras, running their fingers down the girls' backs, stuffing paper down the girls' blouses, cutting the girls' hair, grabbing the girls' breasts, spitting, shoving, hitting and kicking." *Id.*

19. *Bruneau*, 935 F. Supp. at 166-67. Mr. Parker, Bruneau's teacher, when informed of the above-mentioned conduct responded that "he believed that the boys [sic] conduct was normal flirting and teasing and that 'Eve was so beautiful that the guys would be all over her in a couple of years.'" *Id.* at 167.

20. *Id.* at 166.

21. *Id.*

22. *Id.* at 171. The court based its finding on precedent and examined *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), a Title IX case, and analogized the situation to that in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), a Title VII case. The Second Circuit had previously indicated that "in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (analyzing *Meritor* and *Franklin* together).

23. *Bruneau*, 935 F. Supp. at 170. The court additionally stated that "Title IX analysis is guided by Title VII . . . jurisprudence 'only to the extent that the language and history of Title IX do not suggest a contrary interpretation.'" *Id.* at 173, (citing *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987)).

24. *Franklin*, which the Second Circuit builds upon, involved allegations of teacher to student sexual harassment under Title IX. *Murray* involved sexual harassment between New York University officials and a student.

25. *Bruneau*, 935 F. Supp. at 174.

26. *Id.* at 172 (citing *Columbia Univ. v. Karibian*, 14 F.3d 773, 780 (2d Cir. 1994), *cert. denied*,

claimed that educational institutions should be liable, just as employers are liable under Title VII, for "knowingly failing to act to remedy a hostile learning environment created by peer-on-peer sexual harassment."²⁷ Title VII allows constructive notice as a substitute for actual notice that exists "where a defective condition has existed for such a length of time that knowledge thereof should have been acquired in the exercise of reasonable care."²⁸ This, the court states, is "in essence, a negligence standard."²⁹ The court decided no liability exists unless a plaintiff shows that a school received actual, not constructive, notice.³⁰

The court explained its holding by stating that Title VII's justification in applying constructive notice comes from agency principles. Simply put, "liability for a hostile work environment created by a co-worker may be imputed to an employer even though the employer possesses no direct knowledge of the hostile environment because the co-worker is an agent of the employer."³¹ Students, the court stated, "are not agents of the schools which they attend."³²

The court intimated that their holding was influenced by the differences between adults and children. The court stated that "importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic."³³ The court further asserted that "the problem with sexual harassment is 'the unwanted imposition of sexual requirements in the context of unequal power.'"³⁴ Such a power relationship does not exist "[i]n the context of unwanted [peer to peer] sexual harassment,"³⁵ nor do such advances carry "the same coercive effect or abuse of power as those made by a teacher, employer or co-worker."³⁶

In the Eighth Circuit, Jennifer Bosley complained of sexual harassment by male students directed at her and other girls. The court in *Bosley* decided that Title VII provides an appropriate standard for analyzing Title IX peer to peer sexual harassment cases.³⁷ However, the *Bosley* court modified the Title VII standard for entity liability from "knew or should have known of the hostile environment and took no or insufficient remedial action," to "knew of the harassment and intentionally failed to take

512 U.S. 1213 (1994)).

27. *Bruneau*, 935 F. Supp. at 171.

28. *Id.* at 173 (citing *Fiorella v. Calomiris*, No. CV-94-5487 (CPS), 1996 WL 288471, at * 3 (E.D.N.Y. May 24, 1996) (action in tort to recover for personal injuries)).

29. *Bruneau*, 935 F. Supp. at 173.

30. *Id.*

31. *Id.* The court also examined *Meritor* where the Supreme Court stated that they "agree with the EEOC [Equal Employment Opportunity Commission] that Congress wanted courts to look to agency principles for guidance in [the Title VII] area." *Meritor*, 477 U.S. at 72. The EEOC amicus brief stated that "courts formulating employer liability rules should draw from traditional agency principles." *Id.* at 70.

32. *Bruneau*, 935 F. Supp. at 173. Relying on the RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (1957), the court states that "[i]n order for agency principles to attach between a student and their school there must be some manifestation of consent by the student to the school that the student shall act on the school's behalf and subject to the school's control, as well as, consent from the school to the student's actions." *Id.*

33. *Id.* at 172 (quoting *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1011 n.11 (5th Cir. 1996)).

34. *Bruneau*, 935 F. Supp. at 172 (quoting *Rowinsky*, 80 F.3d at 1011 n.11 (quoting Catherine MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979))).

35. *Bruneau*, 935 F. Supp. at 172.

36. *Id.* at 172 (quoting *Rowinsky*, 80 F.3d at 1011 n.11).

37. *Bosley*, 904 F. Supp. 1006, 1022 (W.D. Mo. 1995).

proper remedial action."³⁸ By failing to include that part of the Title VII standard that allows liability for a school district that "should have known" of the harassment, the *Bosley* court decided on an actual notice standard.³⁹ The *Bosley* standard for liability was followed in the Eighth Circuit by *Burrow v. Postville Community School District*⁴⁰ and *Wright v. Mason City Community School District*.⁴¹

C. The Ninth Circuit Finds Hostile Learning Environment Liability When an Educational Institution Has Constructive Notice

In *Petaluma II*, the court held that a constructive notice standard is applicable in peer to peer sexual harassment cases.⁴² Plaintiff Jane Doe alleged that her school district "failed to stop sexual harassment inflicted on her by her peers while she was a student at Kenilworth Junior High School."⁴³ *Petaluma I* held that "it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it," rather it is necessary to demonstrate "actual intent to discriminate against the student on the basis of sex."⁴⁴ The court, like in *Bruneau*, declined to follow a "knew or should have known" standard of employer liability in a case of peer to peer sexual harassment because agency principles do not apply in a student to student context.⁴⁵ The court reexamined the case upon the filing of a motion for reconsideration.⁴⁶

Petaluma I and *Petaluma II* carefully considered the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*.⁴⁷ In *Franklin*, a hostile learning environment arose from the sexual harassment of a student by her teacher.⁴⁸ The plaintiff sued under Title IX, stating that the school district intentionally discriminated against her when other teachers and administrators, although aware of the harassment, took no action to stop it. The Court held that the school district was liable for intentional discrimination, but did not define the "intentional discrimination" standard as it relates to the actual and constructive notice options of Title VII.⁴⁹ Thus, after *Franklin*, a court

38. *Id.* at 1023.

39. *Bosley* additionally states that required intent could be established by inference. "[U]pon a showing that the plaintiff was subjected to harassment based on sex while participating in an educational program, and that the school district knew of the harassment and failed to take appropriate remedial action, the trier of fact could infer that the failure to take remedial action constituted intentional discrimination." *Bosley*, 904 F. Supp. at 1021, 1025.

40. *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193 (N.D. Iowa 1996).

41. *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412 (N.D. Iowa 1996).

42. *Petaluma II*, 949 F. Supp. at 1427.

43. *Id.* at 1416. Verbal harassment of the plaintiff by both male and female students included sexual innuendoes and the spreading of sexual rumors about her. Upon informing her counselor, plaintiff was told that "boys will be boys" and that "girls could not sexually harass other girls." Limited warnings were given to her harassers. *Petaluma I*, 830 F. Supp. at 1564-65.

44. *Petaluma I*, 830 F. Supp. at 1576.

45. *Id.* at 1572, 1575.

46. On March 11, 1996 the court issued an order granting leave to move for reconsideration of *Petaluma I*. The court stated that "[r]econsideration should be granted only when there has been an intervening change of law or fact, new evidence or authority not previously available in the exercise of reasonable diligence has been discovered, or reconsideration is necessary to correct a clear error of law or a manifest injustice." *Petaluma II*, 949 F. Supp. at 1417 (citing *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)). The court noted that "several new cases on school district liability under Title IX for student-on-student harassment have been decided since this Court's order of August 30, 1993." *Petaluma II*, 949 F. Supp. at 1417.

47. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

48. *Id.* at 63-64.

49. *Petaluma II* emphasized the lack of clarity of the meaning of "intentional discrimination" in

was free to interpret "intentional discrimination" to mean only actual notice or actual or constructive notice; the term's application was unclear. *Petaluma I* read this to mean that "under Title IX damages are available only for intentional discrimination but respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so."⁵⁰ Therefore, a student is not an agent, and thus a school district is not liable.⁵¹

After consideration of *Franklin*, *Petaluma II* decided that Title VII "is the most useful and appropriate analogue in Title IX cases" as it comports with sound public policy and "discerns in Title IX no intent to provide a lesser degree of protection to students than to employees."⁵² *Petaluma II* decided that *Franklin*'s ambiguous use of "intentional discrimination" was clarified by the Supreme Court's use of that phrase in the context of Title VII.⁵³ This occurred in *Landgraf v. USI Film Products*,⁵⁴ in which the Court recognized that "intentional discrimination" included hostile work environment discrimination.⁵⁵ The Supreme Court's discussion, according to *Petaluma II*, demonstrates that the Court "assumes that the term 'intentional discrimination' . . . includes hostile environment sexual harassment. . . . a persuasive indication that the Court's reference to 'intentional discrimination' in *Franklin* was similarly intended to include [hostile environment] sexual harassment."⁵⁶ Therefore, the term "intentional discrimination" was not to be interpreted solely as an actual notice standard, but encompassed constructive notice, as well. From this the *Petaluma II* court concluded that the intentional discrimination spoken of in *Franklin* should be analogized to Title VII jurisprudence, including hostile work environment liability criteria, which, in Title VII, allows for a constructive notice standard.

Among the prongs needed to establish hostile learning environment discrimination, the court mentioned that in the basis for institutional liability, "[t]he element of intent is less obvious."⁵⁷ From its analysis of *Franklin*, the court decided that the Title VII standard "which imposes liability where the entity knows or should have known of the hostile environment and fails to take remedial action, is the appropriate standard" in Title IX cases involving peer to peer sexual harassment.⁵⁸ The court stressed that this is not a strict liability standard forcing entities to be responsible for every incident of harassment in the environment over which the entity exercises control. There are

Franklin. Though *Franklin* relied on *Meritor*, which "instructed the lower courts to look to agency principles for guidance in formulating a rule on employer liability," *Franklin* "made no mention of agency principles and gave no explanation of the connection between the act of the teacher in sexually harassing a student, which it characterized as intentional discrimination, and the liability of the school district for intentional discrimination." *Petaluma II*, 949 F. Supp. at 1418.

50. *Petaluma I*, 830 F. Supp. at 1575.

51. *Petaluma II*, 949 F. Supp. at 1415, 1419. The court stated the *Meritor* test as "an employer is liable for the existence of a hostile environment in its workplace only if the employer failed to take prompt remedial action after the employer actually knew or should have known of the existence of the hostile environment." *Id.* at 1419.

52. *Petaluma II*, 949 F. Supp. at 1421.

53. *Id.*

54. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 249-50 (1994). *Landgraf* is a Title VII case concerning the sexual harassment of an employee by her co-workers and her supervisor's failure to remedy the harassment.

55. *Id.*

56. *Petaluma II*, 949 F. Supp. at 1421.

57. *Id.* at 1423.

58. *Id.* at 1426.

three ways that the Title VII, and thus, the Title IX standard, disallows strict liability. These include:

[F]irst, the plaintiff must prove that gender-based harassment was so severe or pervasive as to create a hostile environment that adversely affected the plaintiff's ability to function in the environment; thus, an entity cannot be liable for sporadic or minor incidents. Second, the plaintiff must prove that the entity actually knew, or should in the exercise of its legal duties have known, of the harassment. Third, even if a hostile environment exists, and the entity has actual or constructive notice of it, the entity is not liable if it takes prompt, appropriate remedial action.⁵⁹

III. RESOLVING THE CIRCUIT SPLIT

To resolve the divergence of views on the standard of institutional liability in peer to peer sexual harassment, Congress should specifically amend Title IX to clearly state that its standard is constructive notice. In the interim, the Supreme Court is left to resolve such a circuit split. The Supreme Court has emphasized that the Court "gives great deference to the interpretation given the statute by the officers or agency charged with its administration."⁶⁰ The Office of Civil Rights (OCR) of the Department of Education has issued draft regulations in which it has stated that "[a] school will have notice of a hostile environment when it knew or should have known of the harassment."⁶¹ In addition to clearly stating the liability standard, the OCR defines constructive notice as "when the school would have found out about the harassment through a 'reasonably diligent inquiry.'"⁶² The Courts of Appeals in the Second and Eighth Circuits should follow the OCR's interpretation on the notice standard matter.

IV. CONCLUSIONS

A big picture view of peer to peer sexual harassment leads to the conclusion that it is not practical to adhere to the rationale of agency principles in a hostile learning environment harassment situation. Through doing so, actual notice is required and a school district is relieved from liability unless and until it receives such notice and then does not take any action to remedy the situation. True, a student is not an agent of a school, but "the school district is in the best position to be on the lookout for discriminatory conduct. The children themselves should not be a line of defense shielding the school district from liability."⁶³ Courts need to look beyond the narrow confines of Title VII's use of agency principles in a workplace when a school environment is at issue.

According to one court, "[a] sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program."⁶⁴ A school may not employ students, but stu-

59. *Id.*

60. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

61. 61 Fed. Reg. 52,178-79 (1996) (to be codified at 34 C.F.R. § 106.8(b)).

62. 61 Fed. Reg. 52,177 (citations omitted). The OCR goes on to state that in some cases "the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—where the harassment is widespread, openly practiced, or well-known to students and staff (such as sexual harassment occurring in hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision.)" *Id.*

63. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 887 F. Supp. 140, 143 (W.D. Tex. 1995).

64. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292 (N.D. Cal. 1993).

dents merit the same, if not better, protection that employees under Title VII receive in order to obtain the education to which they are entitled. Title VII exists to protect workers from feeling discomfort in the workplace from sexual harassment. Students should receive this benefit as well. Both students and employees are in a situation where they are not at liberty to walk out of the classroom or office. The *Davis* court aptly stated that just as "a working woman should not be required to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living,' a female student should not be required to run a gauntlet of sexual abuse in return for the privilege to obtain an education."⁶⁵

The *Bruneau* court decided that a power relationship does not exist between students, therefore peer to peer harassment should not be accorded the same weight as those unwanted sexual advances made by a co-worker.⁶⁶ What changes the dynamics of power between men and women in the time they are students and in the few years later when they become co-workers? Allowing student to student sexual harassment without recognizing a more strict accountability of the school district through constructive notice contributes to the difference in power that the *Bruneau* court accepts as a fact exists in the workplace. This reflects the idea that "[p]atriarchy is an all-encompassing worldview, and as an institution of patriarchy, law reflects that worldview as well."⁶⁷

Courts that adhere to an actual notice standard are, in effect, stating that a pervasive culture of sexual harassment between students is okay and normal as long as no one is "actually" complaining. A school district can "turn[] a blind eye toward discriminatory conduct" and by doing so instill into generations that it is acceptable, proper, and natural to refer to females by derogatory names or to touch their bodies in an inappropriate manner.⁶⁸

Adoption of the constructive notice standard for liability is a step towards promoting the equal footing that Title IX was enacted to strive towards. Courts need to take this broad purpose into account when they analogize sexual harassment that takes place in the schools to that which exists in the workplace. Congress must quickly clarify Title IX's intention to protect students attending school to the same degree employees are protected from sexual harassment in the workplace under Title VII.

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65. *Davis*, 74 F.3d at 1194 (quoting *Meritor*, 477 U.S. at 67).

66. *Bruneau*, 935 F. Supp. at 172 (quoting *Rowinsky*, 80 F.3d at 1011).

67. Patricia Smith, *Feminist Jurisprudence and the Nature of Law* in FEMINIST JURISPRUDENCE 12 (Patricia Smith ed., 1993).

68. *Rosa H.*, 887 F. Supp. at 143.

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