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RECENT DEVELOPMENT

BOYS BEING BOYS AND GIRLS BEING GIRLS — STUDENT-TO-STUDENT SEXUAL HARASSMENT FROM THE COURTROOM TO THE CLASSROOM

Edward S. Cheng*

ABSTRACT

As sexual harassment is increasingly recognized in the classroom, traditional legal responses may not be sufficient to address this growing problem. In this Article, Cheng argues that the voices of the school community provide a unique, relevant perspective to the resolution of student-to-student sexual harassment. Cheng adopts James Boyd White's theory of translation, which states that the law maintains relevancy to society only if it truly reflects, or translates, the thoughts, needs, and wants of society. Applying this theory, Cheng presents his interviews of administrators, faculty, parents, and students who shared their views on sexual harassment, how existing laws and procedures affect them, and how schools can best treat the issue. Next, Cheng gives an overview of the relevant federal statutes and the debate in the federal courts over the application of Title VII and Title IX in student-to-student sexual harassment claims. This overview focuses on the evolution of Title VII and IX and the judicial reactions to the landmark *Doe v. Petaluma City School District* decision. Finally, Cheng reconciles the perspectives of the school community with sexual harassment jurisprudence, reaching a proposed solution

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that takes into account both the traditional legal analysis and the voices of those the law affects.

I. INTRODUCTION

The leers and lurid comments started as soon as [she] left home in the morning — teasing, foul language, lewd remarks aimed at her and her friends. It continued throughout the day: jokes about body parts, taunts and demands for sexual acts. It sounds like a textbook case of sexual harassment. But consider this: [the student] was 6 years old, her oldest tormentors were in the fourth grade and the harassment took place not on the street or even the playground, but on the school bus [she] rode every day and in the halls outside her first-grade classroom in the Eden Prairie school district in suburban Minneapolis.¹

A study of elementary and secondary school students, conducted by the Wellesley College Center for Research on Women and the NOW Legal Defense and Education Fund in 1992, revealed that this student is not alone in being subjected to sexual harassment by her peers.² Approximately eighty-nine percent of the girls interviewed reported being subject to sexually suggestive comments, looks, or gestures, and eighty-three percent reported being touched, pinched, or grabbed while in school.³ A researcher at the Center for Women's Studies at Wellesley College went so far as to analogize the experience of today's students in their schools to that of the female aviators in the recent Navy sex scandal "Tailhook," stating "[t]here's a Tailhook happening in every school . . . egregious behavior is going on."⁴

1. Margaret Lillard, *Sexual Harassment Spreads to First Grade*, L.A. TIMES, Oct. 3, 1993, at B4.

2. See NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 2 (1993) (cosponsored by NOW Legal Defense and Education Fund and Wellesley College Center for Research on Women). The study included the results of 2000 surveys of girls aged 9-19 on their experiences of sexual harassment. *Id.*

3. *Id.* Another survey, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, conducted by the American Association of University Women Educational Foundation in 1993, also reported similar results. AMERICAN ASS'N. OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993) (commissioned by the American Association of Women Educational Foundation and researched by Louis Harris and Associates). A survey of some 1,600 male and female students between the eighth and eleventh grades revealed that 80% had been sexually harassed by their fellow students. *Id.* at 6. Sexual harassment was defined for the purposes of the survey as "unwanted and unwelcome sexual behavior which interferes with your life." *Id.* Incidents of harassment reported ranged from sexual comments, jokes, gestures, or looks to forced kissing and other sexual acts. *Id.* at 8-10.

4. Lillard, *supra* note 1.

In response to these incidents, parents are increasingly turning to Title IX of the Education Amendments of 1972.⁵ Title IX prohibits sexual discrimination by federally funded programs and institutions and potentially provides a cause of action for student-to-student sexual harassment.⁶ However, most cases under Title IX have involved *teacher*-to-student harassment. In these situations, a straightforward application of the statute defines sex discrimination as the teacher's conditioning educational benefits on sexual demands.⁷ In August 1993, however, the United States District Court for the Northern District of California, in *Doe v. Petaluma City School District*, became the first federal court to recognize a cause of action under Title IX for sexual harassment between students.⁸ The court reasoned that other courts previously imported parts of Title VII sexual harassment analysis to Title IX cases involving teacher-to-student harassment.⁹ Thus, the *Petaluma* court concluded that student-to-student harassment could be analogized to hostile environment harassment between employees and held that Title IX prohibits hostile environment sexual harassment between students.¹⁰ To obtain damages, however, a plaintiff must allege and prove that the school or its employees intentionally discriminated on the basis of sex.¹¹ Subsequently, in November 1994, the United States District Court for the Northern District of New York followed *Petaluma* and recognized a cause of action under Title IX for sexual harassment between students.¹²

5. See Tamar Lewin, *Students Seeking Damages for Sex Bias*, N.Y. TIMES, July 15, 1994, at B7. In 1992, the United States Supreme Court, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), provided for monetary damages under Title IX in 1992. As a result, litigation has increased corresponding to the financial potential under Title IX. See Lewin, *supra*.

6. See 20 U.S.C. § 1681(a) (1994) [hereinafter Title IX]. Section 1681(a) of Title IX provides in relevant part: "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 education program or activity receiving Federal financial assistance . . ." *Id.*

7. See Lewin, *supra* note 5.

8. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993), *rev'd*, 54 F.3d 1447 (9th Cir. 1995), *different results reached on recons.*, 949 F. Supp. 1415 (N.D. Cal. 1996).

9. See *id.* at 1575.

10. See *id.* at 1571-72, 1575.

11. See *id.* at 1575-76.

12. See *Bruneau v. South Kortright Cent. Sch. Dist.*, No. 94-CV-0864, at 25 (N.D.N.Y. Nov. 15, 1994).

Conversely, a number of courts have steadfastly rejected the recognition of student-to-student harassment under Title IX. Among other things, these courts share an underlying assumption that school administrators cannot and do not want the additional responsibility of monitoring and controlling student-to-student interactions to prevent harassment. This Article challenges this underlying assumption by conducting surveys at two schools to discover whether this assumed hostility to Title IX prohibitions does indeed exist within the school community. The question is whether the scholastic community believes that Title IX should prohibit student-to-student sexual harassment, and whether school faculty and administrators believe they can and should effectively shoulder the additional burdens Title IX prohibitions would impose upon the way they conduct classes at school.

Why should we care what the scholastic community thinks about the relationship between Title IX and student-to-student sexual harassment? An answer can be found in James Boyd White's theory as expressed in *Justice as Translation*.¹³ White argues that the law maintains its relevancy and role in society only so long as it remains reflective, or translative of the thoughts, needs, and wants of that society.¹⁴ He offers his theory of "translations" as an ethical and political model for law and ultimately as a standard by which to measure justice.¹⁵ In modern academic discourse, academics often seek to translate all experiences into the specific language of their particular discipline.¹⁶ For example, an economist reduces all interactions between people into economic "exchanges" and in doing so, seeks to create a *de facto* dominant "universal language" into which all of life's texts can be translated.¹⁷ "It is in fact the radical intellectual vice of our day to insist that everything can be translated into one's own terms."¹⁸ However, these translations lose much of the original texts through the process.

13. JAMES BOYD WHITE, *Justice as Translation*, in JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 257-69 (1990).

14. *See id.* at 257.

15. *See id.* at 258. In his article, White defines "translation" as the "art of . . . confronting unbridgeable discontinuities between texts, between languages, and between people" through the creation of texts in response to others, even while "recognizing the impossibility of full comprehension or reproduction." *Id.* at 257-58.

16. *See id.* at 259.

17. *See id.*

18. *Id.*

In contrast, good translation preserves as much of the original text as possible.¹⁹ Thus, the lawyer must translate the everyday experiences of human actors into the inherently abstract language of the law, and translate the language of the law to reflect the real-life experiences of the actors.²⁰ Similarly, the law itself must also be capable of translating real experiences into the legal language, and legal language, such as a judicial opinion, must accurately reflect the underlying reality giving rise to a case.²¹ It is imperative that the legal discourse which mediates among virtually all of the other discourses of society does not destroy the language or texts of society in the process.

This Article seeks to reflect White's theory of translations by giving voice to the actors in the student-to-student harassment context. This voice, while not dispositive, adds a valuable, if unconventional, perspective to the legal issue. This approach, however, is tempered by the call for restraint by Judge Patricia M. Wald in her article, *Disembodied Voices — An Appellate Judge's Response*.²² In this article, Judge Wald agrees with the proposition that the law needs the re-insertion of the human voice and experience into the dry, abstract discourse of the legal process.²³ She cautions, however, that an undisciplined use of the "human voice" does not always serve the ends of justice well.²⁴ For example, she asks how closely should the law listen to the voices of the Nazi refugees in Skokie, Illinois, in protest to the presence of a uniformed neo-Nazi march down main street?²⁵ Thus, Wald concludes that the emotional element raised by the insertion of the "human element" into the legal process must be channeled into some pattern of "reasoned and predictable decision making."²⁶

This Article seeks to find the middle ground between introducing the human experience into the analysis and maintaining some measure of reason and order. Instead of interviewing and discussing the stories of the actual actors of the *Petaluma* case, this Article examines the perspective of students, parents, faculty, and administrators at several schools in order to maintain

19. WHITE, *supra* note 13, at 257.

20. *See id.* at 259-60.

21. *See id.* at 261-62.

22. Patricia M. Wald, *Disembodied Voices — An Appellate Judge's Response*, 66 TEX. L. REV. 623 (1988).

23. *See id.* at 623-24.

24. *See id.* at 624.

25. *See id.*

26. *See id.* at 625.

an element of objectivity and balance by providing voice to a broader group of people. This Article is divided into three parts. Part I establishes the real world context within which the student-to-student sexual harassment issue can be considered.²⁷ It examines the issue from the perspective of the potential actors whom the laws would affect, including the school principals who would create the rules and regulations to comply with any Title IX requirements, the teachers who would enforce the rules, and the students who would live by them. Part II discusses the issue from a traditional legal perspective.²⁸ There is a brief overview of the relevant federal statutes, including Title IX, followed by a review of federal court treatment of the issue leading up to the groundbreaking decision in *Petaluma*. This section concludes with a discussion of the *Petaluma* holding and subsequent federal court reaction to the case. Finally, Part III seeks to reconcile the differing conclusions stemming from the two approaches to this legal issue.²⁹

PART I: THE THEORY OF TRANSLATIONS

Part I of this Article addresses the issue of student-to-student sexual harassment from the perspective of the potential actors whom the laws would affect. Through a series of interviews conducted during the fall of 1995,³⁰ the administrators, faculty, parents, and students at two high schools gave voice to their thoughts and reactions to the issues.³¹ This survey does not purport to be a comprehensive sociological study. Its sample size is limited and the range of views expressed in the survey do not encompass the entire range of perspectives in the schools. On

27. See *infra* notes 30-69 and accompanying text.

28. See *infra* notes 70-218 and accompanying text.

29. See *infra* notes 219-25 and accompanying text.

30. The survey includes the interviews of approximately 20 individuals, made using uniform questions and forms developed prior to the interviews. While a formal methodology was not employed in conducting the interviews, objectivity was the aspirational goal throughout the process. The questions were developed with the goal of removing personal bias or views on the subjects. The people interviewed were selected randomly.

The survey was conducted at two high schools in the same suburban school district. The first school had a relatively heterogeneous student body, with representation from a range of social and economic classes as well as racial backgrounds. The second school had a homogeneous student body, with students from a predominantly white, middle to upper-class socioeconomic background.

31. The identities of the schools and the people interviewed are not revealed in order to protect their privacy. Copies of the interview records and notes are on file with the author and the *UCLA Women's Law Journal*.

the contrary, the goal of this survey is limited — to give voice to the actors in the schools. Moreover, it provides a bottom-up view of a legal issue which legal scholars traditionally omit from their published work. The trend in legal analysis has been to summarize and digest cases until the law is left considering abstract legal principles in the cultural and social vacuum of a law review page. The voices and observations of the actors who create and live with the laws we study provide a context in which to understand the issues. The incorporation of their views into legal analysis can only provide a legal conclusion that better reflects and respects the human condition.

The interviews centered on three broad topics. First, each person discussed their observations and thoughts on the general subject of sexual harassment in schools. They specifically addressed questions of what constitutes sexual harassment, the degree of control a school has over such behavior, their attitudes towards harassment, and the magnitude of the problem, if any, at their school. Second, the interviewees were asked about their perceptions of the school's responsibility with respect to sexual harassment among students. They were asked specifically to discuss their observations about their school's approach to controlling peer harassment, their school's role in educating the students on the subject, and the effectiveness of their school's actions. Finally, the interviewees were asked whether the courts should impose liability on the schools for student-to-student sexual harassment. After a brief discussion of current federal law on the issue, they each discussed their thoughts on what the school's legal responsibilities should be and the justifications for their approach. This section of the Article first summarizes and highlights the body of the survey, beginning with the interviews conducted at High School A, then those conducted at High School B. Concluding Part I is a discussion analyzing the results of the interviews.

A. *The Interviews*

HIGH SCHOOL A:

1. The Principal.³²

The principal believed that the school could not prevent sexual harassment. While the administration could stop "blatant" or

32. Interview with Principal, High School A (Nov. 16, 1995).

physical harassment from recurring, subtle forms of harassment such as verbal harassment defied prevention. This was the key to the problem of harassment: the line between sexual harassment and normal conduct was often vague, because each victim subjectively determined forbidden conduct. The same behavior in two different situations could be forbidden in one context but permitted in another. In this way, sexual harassment was unlike fighting between students, because with the latter, the conduct was always wrong and punishable. To control all sexual harassment, the school would have to monitor all students at all times throughout the day — a solution both impossible and overintrusive. However, while the school could not prevent harassment, it could stop further sexual harassment from occurring once a student has complained. Nonetheless, he noted that it was not a substantial problem in his school because he had not seen widespread sexual harassment among the students and he handled only one or two complaints during his tenure.

The principal also discussed his school's efforts to create an environment that allowed and encouraged students to approach the administration when sexual harassment occurred. Then, the school must actively respond. The important first step was to educate the students on what constituted sexual harassment. To accomplish this, the school implemented a sexual harassment policy that defines the boundaries of acceptable behavior.³³ This policy was developed jointly by a body of students, faculty, administrators, and parents and subsequently published and given to each student. One of the goals of the policy was to empower the students to make a complaint to the school by defining the meaning of sexual harassment and the procedures for initiating such a complaint. Another goal of the policy was to make the students aware of what behavior was considered forbidden. The principal believed that the policy had been effective, and had on one occasion followed its complaint procedures, but cautioned that the students were the final arbiters of its success.

The principal concluded the interview by stating that he favored holding a school accountable once it was notified of a problem. Furthermore, because the impetus was on the student to come forward with a complaint, the school must provide students with an environment receptive to their complaints. After all, he reasoned, within the confines of the school, the adminis-

33. A copy is on file with the author and the *UCLA Women's Law Journal*.

tration was the highest authority, and must exercise this power to ensure that the school was safe so that its students were never afraid of attending. For him, legal responsibility would certainly result in the school's full attention to the issues of student-to-student sexual harassment. However, he emphasized that the primary prerequisite for liability should be notice — the student must come to the administration for action.

2. The Faculty.³⁴

Two teachers from High School A were interviewed for the survey. They first echoed their principal in concluding that the school could not control student-to-student sexual harassment. The first teacher characterized harassment as the result of "ignorance and spontaneity" and observed that at their age, "kids just say things," especially about sex. Only through the employment of "extreme and harsh repressive methods" could a school control this kind of behavior. He observed, however, that there had been some diminution of harassment in the school since the development of the sexual harassment policy, because increased awareness among students caused them to be more cautious. He noted, however, that he kept an "old-fashioned" orderly classroom, so he had not seen or dealt with any instances of sexual harassment. The second faculty member argued that although the school could reduce harassment through education and threats of punishment, ultimately there was no way to prevent student-to-student sexual harassment. Moreover, she could not even imagine what it would take to stop harassment from occurring in the hallways, analogizing the problem to charging the police with preventing all crime. Although she said that she would not have been surprised to learn of sexual harassment between students in the hallways, she had not seen any herself, nor had any cases been reported to her. Both teachers agreed that at their high school, such issues were generally the responsibility of the administration, not the faculty.

They agreed that the school should have a role in educating the students about sexual harassment. The first teacher, however, argued that this type of education really was the responsibility of the students' parents, but that the demise of the traditional nuclear family left schools with no choice but to "pick

34. Interview with Teacher 1, High School A (Nov. 16, 1995); Interview with Teacher 2, High School A (Nov. 16, 1995).

up the slack.” He was aware of the existence of the sexual harassment policy and characterized it as being very clearly defined, although he could not find his copy. He believed that the general student body and the faculty were also aware of the policy and that it was successful so far as it exerted an initial pressure on students to behave. The second teacher also argued that schools now must teach many subjects that were once exclusively within the scope of responsibility of the parents. She further reasoned, however, that sexual harassment was a societal issue, and that the school, as a societal institution, was therefore responsible for educating its students on the issues. She was also aware of the existence of the sexual harassment policy, but was unaware of its effectiveness and had no dealings with the policy.

The faculty agreed with the principal that the school's responsibility should start with notice of the sexual harassment. The first teacher believed the school should be legally liable only for failing to do anything in response to a complaint, arguing that there should be liability only with “an awful lot of negligence on the part of the staff.” He added that even this restricted liability would constitute another intrusive administrative pressure and duty on the teacher, calling it “[yet] another spear in the side of education.” The second teacher also asserted that because the school cannot prevent sexual harassment between the students, there should not be legal liability simply if harassment occurred. She argued, nonetheless, that a school had a duty to create an environment where the students are informed of the issues and that the school must be responsive to complaints. With notice of a complaint, she reasoned that the school must do everything it could to stop the harassment, and that legal liability should only follow in the absence of such an effort. She concluded that the school must have the responsibility to try to “maintain a safe environment — both physically and psychologically.”

3. The Parents.³⁵

The survey also included the interviews of two parents of students enrolled at High School A. They agreed that the school could and should control “blatant” sexual harassment, such as physical assault, but that subtle types of harassment, including verbal and “incidental” harassment, were beyond the power of

35. Interview with Parent 1, High School A (Nov. 9, 1995); Interview with Parent 2, High School A (Nov. 8, 1995).

the administration. The first parent³⁶ believed that students, especially in high school, were virtually uncontrollable and attributed most of the sexual harassment to the "culture of intimidation" that permeates adolescent interaction between students. He cited as an example the football players at the school who would "hang out" in the hallways and harass and intimidate other students. The second parent³⁷ had not heard that much about whether any sexual harassment occurred in his daughters' school, although he was sure that some existed. He believed that the problem may not have come to his attention in part because "it is sometimes hard to distinguish such harassment from adolescence."

The parents also discussed their thoughts on the role of the school in sexual harassment. The first parent, who had been active in the school's Parent Teacher Association, argued that an educational process starting well before high school was important to help define what was acceptable behavior, particularly because the concept of sexual harassment was inherently vague and therefore difficult to monitor. He believed that schools and parents bore a joint responsibility for imparting proper standards of behavior on the students, but that the school was ultimately responsible for how students behaved on school grounds during the day. The development of the sexual harassment code or policy was part of this educational process, and he mentioned that the school had already developed such a policy, currently included in the student handbook. He reasoned that the code provided students with an expectation of safety and privacy and served as a tool for educating students. However, he cautioned that the existence of a code was not in itself a goal, but that it was important that the school also used the policy as a tool for discussion and education. In contrast, the second parent surveyed did not know whether High School A had a sexual harassment policy. He believed that there was some sort of procedure or code in place, but that the school had never published its contents to the parents. Nonetheless, he agreed that the schools and parents shared the responsibility to educate the students on the issue.

36. This parent was also the former president of the Parent Teacher Association (PTA) and had a son in the twelfth grade. Interview with Parent 1, *supra* note 35.

37. This parent had a daughter in the ninth grade of the high school and another in the seventh grade enrolled in a middle school in the same school district. Interview with Parent 2, *supra* note 35.

On the question of imposing liability, the first parent was reluctant to hold school districts liable for student-to-student sexual harassment. Instead, he believed that the State Board of Education, or other body responsible for reviewing and accrediting schools, should be responsible for requiring schools to prevent student-to-student sexual harassment. For him, there was no question that an anti-harassment code should be mandated and enforced, but the financial penalty of paying a legal award to an injured plaintiff was not the answer. This was especially true in light of the "incredible financial problems" schools were already facing — a damages award would only result in the other students being hurt. The second parent, on the other hand, would readily accept conditioning federal funds on the requirement that a school develop an anti-harassment policy and make good faith efforts to enforce such a code. He clarified, however, that he rejected the development of a federal code to be used in all schools nationwide. He emphasized that the anti-harassment code should reflect the standards of the local community, because impermissible behavior in one community could be acceptable in another. Lastly, he would reject holding a school district liable simply for the occurrence of student-to-student sexual harassment, unless the school had not acted reasonably to stop the harassment.

4. The Students.³⁸

Finally, the survey included the interviews of several students at the high school. They described a student body divided into numerous social cliques. Although none of the students had either personally experienced or observed harassment in their own social groups, every day in the hallways they saw behavior among others that they considered harassment. They explained that because determining whether conduct was sexual harassment depended on the subjective reaction of the victim, it was impossible to determine whether the acts were unwelcome or unwanted. In their view, "some girls like the attention" from the guys, while in other situations, "girls go along" with the suggestions of the guys, such as sitting on their laps, and even though

38. These included three female and one male student in the tenth grade, and one male student in the eleventh grade. Interview with three Female Tenth Grade Students at High School A (Nov. 16, 1995); Interview with Male Tenth Grade Student at High School A (Nov. 16, 1995); Interview with Male Eleventh Grade Student at High School A (Nov. 16, 1995).

uncomfortable with the contact, "they don't complain or say anything." Furthermore, the students observed that among some of the other groups, such as the sports "jocks" and minority cliques, sexually harassing behavior was so commonplace that it was not a "big deal" among those students. One student contrasted the difficulty in enforcing the vague standards of sexual harassment with the ease of administering the school's ban on bringing weapons to school. In the latter situation, there is no vagueness in whether a student has transgressed the rule; the student either was or was not carrying a weapon. With sexual harassment, the school could not predict when it would occur, and generally would not be present to stop it: "It's not like you can tape the kids' mouths shut."

Next, the students discussed their observations of their school's efforts to control student-to-student sexual harassment. A group of three female tenth grade students agreed that the school could not do much to prevent sexual harassment.³⁹ They observed that most of the harassment took place in the hallways where the administration and the faculty could not monitor the students. The hallways were too crowded, especially between classes, and the incidents rarely occurred when an adult was nearby. Even with notice from a victim of harassment, the school could only make threats, and the administration often threatened consequences that were nearly impossible to implement. As a result, students viewed the threatened punishments as merely empty threats, and some of the culprits would continue their harassment. Furthermore, the three students revealed that it was "very hard to come forward" with a complaint of sexual harassment. Although they were convinced that their friends would be supportive, they recognized the stigmatizing effect that the publicity of making a complaint of sexual harassment would have: "it's not something you're proud of."

To them, the school did not create an environment that encouraged coming forward, complaining that the administration neither defined sexual harassment nor communicated the school policy or procedure for handling a complaint. They suspected that the school had a sexual harassment code or policy in place and that it could be found in their student handbook, but they noted that the handbook went universally unread.⁴⁰ Further-

39. Interview with three Female Tenth Grade Students, *supra* note 38.

40. A tenth grade male student reported that he was familiar with the sexual harassment policy only because he had read the entire student handbook from cover

more, one of the students observed that it was not enough just to have a policy, but that it was also important for classroom instruction to fully explain the policy. She recognized, however, that there were no suitable school periods to conduct such a class; the "serious" classes could not be displaced, the homeroom period was only ten minutes long, and the school excused many students, including those interviewed, from the sex education class. The three students also expressed a desire that their school would "teach us how to respond" to harassment because they did not believe that they were socially equipped to handle sexual harassment. They argued that such instruction must be realistic rather than "cheesy" pamphlets or slogans like "Just Say No." They remembered and ridiculed a page in one of their textbooks which instructed on "how to make friends." The students conceded that teaching them how to react would not be an easy task, partly because each situation was unique and also because they believed that girls often did not want to start a confrontation.

Last, the students discussed the situations in which a school should be held liable for student-to-student sexual harassment. They were uniform in focusing on the requirement of notice and on the school's response once it was notified of a complaint. For them, a school should be legally liable only if the school failed to respond once it was "forced to become involved" through complaints made to the administration or faculty.⁴¹ Although a school should not be held liable merely because student-to-student sexual harassment occurred, they emphasized that a school must make a good faith effort to do as much as it could to stop harassment. One student reasoned that the underlying principle was that "you can't learn if there is fear."⁴² It followed that if sexual harassment was "endangering a student's learning," then the school should respond. He admitted, however, that the absence of fear and intimidation in the schools was an aspirational goal and not necessarily a practical, achievable result. Nonetheless, he agreed with the other students by concluding that schools should be liable only if the student had first gone through the school's reporting process and the school did nothing in response.

to cover several times during detention. He did not believe that the school had ever implemented the policy to deal with an instance of sexual harassment. Interview with Male Tenth Grade Student, *supra* note 38.

41. Interview with three Female Tenth Grade Students, *supra* note 38.

42. Interview with Male Eleventh Grade Student, *supra* note 38.

HIGH SCHOOL B:

1. The Principal⁴³

When he was discussing student-to-student sexual harassment in general, the principal at High School B sounded themes similar to those of the principal at High School A. Although he believed that the school could control blatant sexual harassment, subtle types of harassment, including sexually suggestive comments and excessive flirtation, were beyond the school's power to control. He described how some students liked the attention and physical contact that would be characterized as sexual harassment if observed by an objective third party. This situation was made worse by the fact that sexual harassment standards tended to be vague and undefined. Not only was it difficult for an observer to determine whether certain behavior should be forbidden, but also the students themselves, including the victim, were sometimes uncertain. Part of the problem was that students often became sexually active too young and were suddenly "in over their heads." These students were often still experimenting and unsure of themselves in their interactions, and the line between appropriate and inappropriate contact was often fluid and ill-defined.⁴⁴

On the role of the school in controlling student-to-student sexual harassment, the principal at High School B reasoned that the goal of the school was not to control the students but to educate them. This education encompassed not only the traditional subjects, but also how students should behave towards each other. He argued that the modern high school served as a de facto social agency as well as an educational institution: feeding many of the students, providing social services, and even serving as a "minimum security prison" for some who would otherwise have been "on the streets." This education sought to equip the students, especially the girls, with coping skills and a "stronger sense of self" — the ability to control what happened to them. He said his school had adopted a sexual harassment code, which was distributed in the student handbook on Student Rights and Responsibilities.⁴⁵ There was very little sexual harassment in the

43. Interview with Principal, High School B (Nov. 13, 1995).

44. In a situation arising at his school, the principal also described how the school was undergoing extensive renovations and how some of the construction workers bothered the female students with catcalls during their lunch hour. *Id.*

45. A copy is on file with the author and the *UCLA Women's Law Journal*.

school, so he had not applied the code often if at all. In addition, the school had a very good counseling system where students could go for help. There were also a number of teachers who were very close to the students in whom the students could confide. In general, he was confident that the school was run correctly and that sexual harassment was not a problem.

He would support the imposition of liability on a school district if a school did nothing to stop harassment. Sometimes, he admitted, only the threat of a lawsuit would compel a school to affirmatively act to stop harassment. He gave an example of another Massachusetts school which refused to expel a star athlete from school, even after there were several complaints of egregious sexual harassment of fellow students. Only with the threat of litigation did that school act to punish the student-athlete.⁴⁶ In an analogy to the strict drunk driving laws and the accompanying stiff penalties, the principal argued that the laws educate the public to avoid driving while under the influence of alcohol, while the stiff penalties reinforce this knowledge with the threat of punishment. The same principle would similarly work in compelling schools to take the issue of student-to-student sexual harassment seriously. His support for legal liability was tempered by his belief that too many problems were resolved through litigation. Nonetheless, he supported imposing legal liability in the face of inaction because an administrator was the only authority who could act to stop harassment once it had started.

2. The Faculty⁴⁷

The two faculty members interviewed at High School B were also "house masters" who taught and were responsible for the administration and disciplinary procedures within their "house" at the high school. The first teacher believed unequivocally that a school could not control or prevent student-to-student sexual harassment.⁴⁸ She reasoned that schools could "influence, educate, and encourage students," but that sexual harassment, especially in the form of speech, was beyond the power of the school. She reasoned that if parents could not always control their own children, even with threats of punishment, it was unreasonable to expect the school to exercise a

46. This story is unconfirmed — but there is value in its recounting.

47. Interview with Teacher 1, High School B (Nov. 13, 1995); Interview with Teacher 2, High School B (Nov. 20, 1995).

48. Interview with Teacher 1, *supra* note 47.

higher degree of control. Nothing short of twenty-four hour, direct supervision of each student would stop harassment from happening. The second house master had a different opinion, asserting that the school could and did control sexual harassment among the students.⁴⁹ Although she was convinced that much harassment occurred beyond the knowledge of the administration, she was also convinced that the rules and procedures in place allowed the administration to effectively deal with incidents brought to their attention.

On the role and responsibility of the school regarding student-to-student sexual harassment, the two house masters largely echoed the responses of their principal. The first teacher firmly believed that the school had the responsibility to teach the students some measure of morality, ethics, and general societal values.⁵⁰ The education on student-to-student mutual respect and behavior must not only be part of the school's curriculum, she argued, but also part of the school's culture. An important tool in this effort was the school's sexual harassment code, which she believed was generally effective. At minimum, it served as a basis for disciplinary action where the administration could point to the code and say, "Here, you broke this rule." In addition, she asserted that communication between the students was important because the line between sexual harassment and ordinary harassment was not always clear to the students (and sometimes the faculty). That was why part of the school's policy allows a victim of harassment to write a letter to her tormentor, describing her feelings and the conduct which she found unwelcome and offensive.⁵¹ The second house master also reasoned that the school must educate the students about sexual harassment, but she argued that the entire community, including parents, police, and religious leaders, shared in the responsibility.⁵² She was familiar with the school's sexual harassment code and knew the exact page on which to find the code in the student handbook. Finally, she described the school's efforts to communicate the contents of the code to the students through the student handbook as well as through the class on human sexuality which each entering student was required to take.

49. Interview with Teacher 2, *supra* note 47.

50. Interview with Teacher 1, *supra* note 47.

51. Later, the school generally suspended the offender. During the subsequent readmission conference, the topic of sexual harassment was generally raised. *Id.*

52. Interview with Teacher 2, *supra* note 47.

Last, each house master discussed her view on imposing liability on a school for student-to-student harassment. The first house master reacted strongly against the proposition. She first reasoned that a school could be held responsible for a teacher's behavior because a school affirmatively placed the teacher in a position of responsibility, power, and trust.⁵³ In contrast, individual students could not be controlled and the school, therefore, should not be held responsible for their behavior. She argued that students were still children and simply did stupid things from time to time, despite the school's and parents' best efforts to prevent such behavior. For example, a student at the high school had recently slashed the tires of another's car in response to insults made to his girlfriend. The house master noted that the student had done well at school and had no history of disciplinary problems, but nevertheless responded to provocation in a stupid and disproportionate way. For her, allowing a student victim of harassment to make a claim against a school would be analogous to allowing the victim of a mugging to sue a municipality for failing to prevent the mugger from committing the crime. Furthermore, she reasoned that every school was a representative microcosm of society, including the future doctors, lawyers, and leaders of society, but also the future drug dealers, addicts, and criminals. Sometimes, she concluded, there would be problems regardless of the prophylactic efforts taken by a school.

In contrast, the second faculty member argued that "students have a right to feel safe in schools."⁵⁴ She observed that harassment was a serious subject, with devastating results and impact on student victims. Legal responsibility would be an effective way to push for reform, especially when the school systems pooled their experiences to determine what the requirements and duties of a school are. Although most schools were already moving in the right direction on this issue, the imposition of legal liability would ensure they took these issues seriously.

3. The Students⁵⁵

The students at High School B largely agreed with the faculty and administration that student-to-student sexual harass-

53. Interview with Teacher 1, *supra* note 47.

54. Interview with Teacher 2, *supra* note 47.

55. Interview with Male Twelfth Grade Student at High School B (Nov. 20, 1995); Interview with two Female Twelfth Grade Students at High School B (Nov.

ment was not a problem at their school. The first student interviewed was the senior class president,⁵⁶ who said that he had seen some harassment in the school and that several friends had come to him with their problems. He observed that most of the harassment in the school fell into two types. In the first, although the female student was uncomfortable or hurt by the male student's words or actions, the male student was not trying to do anything wrong — "it's just how he acts." In the second type, which was more common, the male students "treat the girls like meat" and the girls either do not mind or appreciate the attention. He characterized the behavior more as the creation of uncomfortable situations than harassment, and believed that the central issue concerned the line between sexual harassment and "hitting on" someone. When asked whether the school could prevent or control sexual harassment between the students, he answered, "No way — absolutely not." He believed that a school could prevent or stop harassment in the classrooms, but noted that the students commonly spent one-third to one-half of the day in the hallways and the common rooms away from the teachers' direct supervision. He likened the challenge of enforcing anti-harassment rules to the current lack of success in enforcing the school ban on smoking on school grounds: "the rule is there, it's clear and everyone knows about it . . . but the students always do it . . . they just smoke when there aren't any teachers around." He concluded that schools simply could not stop students from doing what they wanted though punishment or threats of punishment.

The remaining students confirmed that there were subtle types of harassment occurring in the high school, but that there was an absence of the egregious forms. An interview with two female students in the twelfth grade revealed that they had not seen any "heavy duty" sexual harassment in their school.⁵⁷ Although there were incidents where some students felt uncomfortable with some things said to them, they believed that these incidents did not rise to the level of sexual harassment. Furthermore, they explained that the school could not prevent harassment from occurring, especially where there were over 1,200

20, 1995); Interview with Male Eleventh Grade Student at High School B (Nov. 20, 1995); Interview with Female Twelfth Grade Student at High School B (Nov. 20, 1995).

56. Interview with Male Twelfth Grade Student, *supra* note 55.

57. Interview with two Female Twelfth Grade Students, *supra* note 55.

students in the school. However, once the "right people" were informed of any incidents, they were confident that their school could and would respond effectively and stop any further incidents from occurring: "it's just the nature of the administration which is very sensitive to such issues."⁵⁸

The students were split on what they thought the role of the school should be in controlling student-to-student sexual harassment. Two female twelfth grade students first expressed their confidence in the school administration's anticipated response to sexual harassment.⁵⁹ Furthermore, they were aware of the school's sexual harassment policy and its provisions, and they cited the freshman human sexuality class that included a section on sexual harassment. Another female twelfth grade student also knew about the sexual harassment policy, but was unfamiliar with its details.⁶⁰ The remaining two students interviewed, including the senior class president, did not know about the policy.⁶¹ The senior class president offered that punishments or threats after the fact were ineffective in stopping students from doing what they wanted to do. He allowed, however, that the only possible way for a school to control harassment might be through education, starting before high school. The goal would be for the schools to teach the students about respect for one another, not merely about the rules of sexual harassment.

Last, the students discussed whether they would impose liability on a school for student harassment. They first reasoned that the school could not prevent free expression, but nonetheless concluded that a school had a moral responsibility to regulate actions and speech that could hurt others. For them, it was part of the implied contract between the students and the school: if a student attended school and agreed to follow the promulgated rules of behavior, then he or she also had a right to "feel safe" in the school. When a student reported sexual harassment

58. *Id.* However, the student body at High School B was not unanimous in its understanding of the issues of student-to-student sexual harassment. The last student interviewed was a male student in the eleventh grade who had just transferred into the school. He said that he had not seen or experienced sexual harassment in the school, but admitted that he did not really understand what sexual harassment meant, let alone the concept of student-to-student harassment. Interview with Male Eleventh Grade Student, *supra* note 55.

59. Interview with two Female Twelfth Grade Students, *supra* note 55.

60. Interview with Female Twelfth Grade Student, *supra* note 55.

61. Interview with Male Eleventh Grade Student, *supra* note 55; Interview with Male Twelfth Grade Student, *supra* note 55.

to the school, the school must act to stop it. Although the prevention of harassment was impossible, a response was necessary. However, once a good faith effort was made to correct the situation, the school should not be liable for the harassment.

Again, the senior class president provided a strikingly different perspective from his classmates.⁶² He argued that schools were not “baby-sitters” and that they were responsible only for the physical safety of the students: “[the] school is not responsible for shaping students’ attitudes and social skills . . . these are already formed by the time they [students] get to high school . . . it’s the parents’ responsibility, not the school’s.” Furthermore, he reasoned that it was simply impossible for public schools to stop student-to-student sexual harassment. The size of the student body was too large and the administration had insufficient authority to effectively control the students, let alone the fact that many teachers did not want the additional responsibility. In contrast, it might have been possible for a private school to exercise sufficient control where its administration had substantially more absolute authority. Lastly, he argued that the law was too vague and subjective. Sexual harassment standards were inherently unenforceable when each teacher and administrator had a different personal standard as to what behavior constituted sexual harassment. An act which one teacher would tolerate could result in a suspension by another teacher. In sum, he argued against the imposition of any liability on a school when it lacked the power and authority to prevent or control the situation.

B. Discussion

1. Student-to-Student Sexual Harassment in the Hallways

The interviews inevitably returned to the theme that sexual harassment was nearly impossible to define and identify, not only for third party observers of suspect behavior, but also for the victim and harasser themselves. “Blatant” harassment, including physical contact up to and including sexual assault or repeated, open verbal abuse, was easy to detect and could be controlled by a school to the same extent as other types of forbidden behavior. The subtle types of harassment were more problematic, with both principals conceding that detecting, let alone stopping, the “incidental” physical touchings in the hallways or the occasional sexually harassing remark was virtually impossible. First, there

62. Interview with Male Twelfth Grade Student, *supra* note 55.

was no objective standard for deciding whether certain interaction constituted sexual harassment, particularly in the often sexually charged atmosphere of the adolescent high school students. The students were often experimenting with and engaging in sexualized behavior, and whether a limit had been overstepped was subjectively determined by the victim as it occurred. Compounding the problem was the observation that there were some students who subscribed to stereotypes and gender roles making them more susceptible to harassment. This led one student interviewee to conclude that there were male students who "treat[ed] the girls like meat," and that the girls just "accept[ed] the treatment."⁶³ Second, the harassment generally occurred beyond the knowledge of the faculty and administration. As several of the students pointed out, most of the incidents took place in the hallways, which were simply too crowded to fully monitor. Furthermore, the inherently furtive nature of many adolescents, in conjunction with a desire not to be caught doing something wrong, ensured that harassment almost never took place when an adult was present. This accounted for the different levels of harassment observed by the administration, faculty, and students, particularly at High School A. The analogy to the ban on smoking was apt where the students ignored the ban by simply smoking when adults were not present. Last, even when the administration became aware of student-to-student sexual harassment, it was not clear that the school could effectively stop or control the harassment. Although some of the faculty believed that effective control was possible, the principals and the students mostly disagreed. As one student reasoned, the school could not predict when sexual harassment would occur, and generally would not be there to stop it: "It's not like you can tape the kids' mouths shut."⁶⁴

2. The Schools' Responsibility to the Students

The interviews at High School A provided the most significant insight into the problems and complexities of sexual harassment within the school campus. At the top of the principal's priorities was the education of the student body on the rules and boundaries of sexual harassment. He emphasized the importance of establishing a school environment that encouraged vic-

63. *Id.*

64. Interview with Male Tenth Grade Student, *supra* note 38.

tims of harassment to step forward and give notice to the school. In addition, the school community, including administrators, parents, faculty, and students, expended substantial energy and effort to develop a sexual harassment policy that the school subsequently published in the student handbook. Moreover, it appeared that the faculty and the student body concurred with their principal's goals. However, the survey revealed that very few of these principles and efforts ever reached the student body. Although the faculty agreed that the school had a responsibility to teach the students about sexual harassment, neither teacher knew the school's sexual harassment policy except in the most general terms. Furthermore, the teachers had neither encountered any sexual harassment nor enforced any of the policy's provisions, reasoning that enforcement was the responsibility of the administration, not the faculty. The students were even less integrated into the program of education and empowerment. The students told of the schoolwide confusion as to the rules and boundaries of acceptable behavior. Furthermore, they described a school environment that discouraged victims from approaching the administration with their problems. The students were also nearly uniform in their ignorance of the provisions of the carefully developed sexual harassment policy, buried in their unread student handbooks, unsupported by classroom instruction. Their parents also never received a copy of the sexual harassment policy, although they may have suspected its existence.⁶⁵ In sum, the survey revealed a school struggling to address the issue of student-to-student sexual harassment. The administration clearly understood in principle how it wanted to develop the school environment and educate its students, but it was also equally clear that the students had yet to benefit from these principles.

In contrast, the principal, faculty, and students at High School B agreed that the school was effective in its dealing with sexual harassment, and none interviewed thought that sexual harassment was a significant problem in the school. Several of the students were familiar with the school harassment policy, as were the faculty members.⁶⁶ Moreover, the school required all

65. The parent who was familiar with the policy was also the former president of the school PTA and had a significant role in the preparation of the policy. See *supra* note 36.

66. It should be noted that both teachers interviewed were also house masters, whose responsibilities were administrative as well as instructional. See *supra* notes 47-49 and accompanying text.

incoming freshman to take a course on human sexuality that included instruction on sexual harassment. Several interviewees asserted that this class was an effective means of educating the student body which ideally would prevent or at least reduce the number of incidents in the school. Lastly, there was uniform opinion that the school administrators would deal with any incidents of harassment brought to their attention, "fairly and correctly — it's just the nature of the administration which is very sensitive to such issues."⁶⁷

This contrast between the two schools reveals that the education of the entire school on the policy concerning sexual harassment, from administration to faculty to students, was the key to creating an environment relatively free of sexual harassment. The obvious difference between the approaches taken by the schools is that the administration of High School B followed through with its measures against peer harassment and ensured that once the harassment guidelines had been created, the students were engaged in the program against harassment through education. The school's educational conduit was its human sexuality class, for which the school enforced mandatory attendance. In contrast, none of the students interviewed at High School A knew whether its sexual education course included instruction on sexual harassment because none of them had ever enrolled in the class.

3. Legal Liability for Student-to-Student Sexual Harassment

A clear legal standard emerged from the survey: (1) a school could not be held strictly liable for occurrences of student-to-student sexual harassment; but (2) once a student made a complaint, a school must respond in good faith to stop the harassment from continuing or recurring. The reasoning behind the standard reflected two strong, valid, yet contradictory themes: First, that the schools could not control the student body sufficiently to stop or prevent student-to-student sexual harassment; and second, that despite this, the schools had a duty to try to stop such harassment, because as the interviewees bluntly said, "you can't learn if there is fear,"⁶⁸ and "students have a right to feel safe in schools."⁶⁹ There was a general reluctance to impose on a school the affirmative duty to proactively identify and stop sexual

67. Interview with two Female Twelfth Grade Students, *supra* note 55.

68. Interview with Male Tenth Grade Student, *supra* note 38.

69. Interview with Teacher 2, *supra* note 47.

harassment, reflecting the confusion and difficulty inherent in distinguishing sexual harassment from the ordinary behavior of adolescent students. Furthermore, once the school was notified of harassment, the survey revealed that the focus was on whether the school made a good faith effort to stop the harassment and not whether the school was ultimately effective. At stake was the school's official condemnation of harassing behavior and confirmation of a victim's right to personal bodily integrity.

D. Summary

In summary, the survey findings revealed that student-to-student sexual harassment exists within our schools' corridors, and that there is much confusion surrounding the problem of peer harassment, particularly regarding the question of what conduct constitutes harassment. Furthermore, even if peer harassment is recognized, the survey revealed that it could be very difficult to control, and that even well-meaning school administrators who took facially reasonable steps to prevent such harassment could nonetheless be frustrated in their efforts. Virtually all of the respondents agreed, though, that the schools must still work to stop peer sexual harassment, because there was no other authority within the schools to help the victims of harassment. As a result, there was a consensus that there should be an imposition of legal liability on a school failing to respond to reports of peer sexual harassment.

PART II: THE TRADITIONAL LEGAL METHOD

Victims of student-to-student sexual harassment have largely looked to Title IX of the Education Amendments of 1972 for relief. Historically, Title IX has been used as the basis for actions concerning inequities between the relative spending levels for men's and women's school sports programs.⁷⁰ Nonetheless, development of Title IX has referred increasingly to the body of law concerning sexual harassment established under Title VII of the Civil Rights Act of 1964. This Part first takes a brief look at the current state of sexual harassment law under Title VII and reviews the origins and purpose behind the enactment of Title IX. Subsequently, it addresses the history of cases interpreting peer harassment claims under Title IX, culminating with *Doe v.*

70. See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 (11th Cir. 1996), *reh'g en banc granted*, *opinion vacated* by 91 F.3d 1418 (11th Cir. 1996).

Petaluma City School District. Finally, Part II makes an objective analysis of *Petaluma* and the analytical foundations of the decision.

A. *The Relevant Statutes — A Brief Discussion*

Sexual harassment is generally defined as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."⁷¹ The key concept of sexual harassment lies in this relationship between the parties and is based on concepts of power imbalances and coercion, not sexual attraction.⁷² The resulting abuse of power over members of a discrete and historically vulnerable group thus constitutes a violation of their civil rights.⁷³ The classic context for this abuse has been the workplace, where most sexual harassment law developed under Title VII of the Civil Rights Act of 1964.⁷⁴

1. Title VII

Congress enacted Title VII under the Commerce Clause of Article I, Section 8 of the Constitution to provide a claim for relief from unlawful discriminatory employment practices based on race, color, religion, sex, or national origin.⁷⁵ The purpose of

71. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979). This is the generally accepted definition of sexual harassment. See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984).

72. See Note, *supra* note 71, at 1451; see also MACKINNON, *supra* note 71; Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 863-72 (1993) (proposing that sexual harassment is less an issue about sex than it is an issue of power).

73. See Note, *supra* note 71, at 1451.

74. 42 U.S.C. §§ 2000e - 2000n (1994) (Title VII of the Civil Rights Act of 1964) [hereinafter Title VII]; *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 317 n.17 (10th Cir. 1987); *Lipsett v. University of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988); see, e.g., Note, *supra* note 71, at 1449-51.

75. See *Bougher v. Univ. of Pitt.*, 713 F. Supp. 139, 144 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989). Title VII provides in relevant part:

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, conditions, 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 was to eliminate discrimination in employment by directly regulating general employment conditions and specifically prohibiting certain discriminatory practices.⁷⁶ Since the passage of Title VII, judicial interpretation and the adoption of non-binding Equal Employment Opportunity Commission (EEOC) Guidelines have expanded the scope of the statute to encompass sexual harassment as a discriminatory practice.⁷⁷

Under Title VII, courts recognize two types of sexual harassment, *quid pro quo* and hostile environment. *Quid pro quo* harassment occurs where an employee in a supervisory position demands or extorts sexual favors in return for such benefits as job-related benefits, continued employment, or promotion.⁷⁸ The second type of sexual harassment, hostile environment or abusive environment harassment, occurs when a pattern of behavior creates an abusive working environment and unreasona-

42 U.S.C. §§ 2000e - 2000n; see also *Harris v. Forklift Sys., Inc.* 114 S. Ct. 367, 370 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986). The prohibition against sex discrimination was a last minute addition to Title VII on the floor of the House of Representatives. 110 CONG. REC. 2577-84 (1964). Nonetheless, the bill was passed as amended, but as a result, little legislative history has been available to the courts to interpret this aspect of Title VII. See *Meritor*, 477 U.S. at 64. The phrase "terms, conditions and privileges" has been central to the development of sexual harassment law, particularly with respect to the recognition of hostile environment sexual harassment. See *id.* at 64-67.

76. Civil Rights Act of 1964, 1964 U.S.C.A.N. 2355, 2403. See *Meritor*, 477 U.S. at 63-67. See *supra* note 75 for relevant text of Title VII, which states that "it shall be an *unlawful employment practice . . .*" (emphasis added).

77. See *Harris*, 114 S. Ct. at 370; *Meritor*, 477 U.S. at 66-68. 29 C.F.R. § 1604.11(a) (1996) states in relevant part:

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

78. See, e.g., *Meritor*, 477 U.S. at 65-66; Note, *supra* note 71, at 1454. Courts adopted *quid pro quo* harassment into Title VII law because of the analogous nature of such a claim with a disparate treatment claim based on either sex or race. See Note, *supra* note 71, at 1454. Because such sexual harassment generally originated from male supervisors against female employees, the harassment constituted an employment barrier for workers of only one sex and thus resulted in disparate treatment. *Id.* Consequently, EEOC guidelines and federal courts recognize a claim of *quid pro quo* sexual harassment under Title VII. See, e.g., *Meritor*, 477 U.S. at 65-66; *Barnes v. Costle*, 561 F.2d 983, 984-86, 995 (D.C. Cir. 1977); Note, *supra* note 71, at 1453-54.

bly interferes with an employee's work.⁷⁹ The doctrine imposes an affirmative duty upon the employer to provide employees with a working environment free from sexual harassment.⁸⁰

Once a plaintiff has successfully demonstrated sexual harassment, the court must determine whether the employer is liable for the resulting harm to the plaintiff. Applying general principles of agency to Title VII, courts impose strict liability on an employer for sexual harassment by the employer itself, a supervisor, or the employer's agents.⁸¹ Liability is imposed whether or not the harassment was authorized by the employer or forbidden by the employer's policy and regardless of whether the employer knew or should have known of the harassment.⁸² Where the harasser is in a non-supervisory position, however, courts will impose liability on an employer only where: (1) the employer knew or should have known of acts of sexual harassment, and (2) upon such knowledge, the employer failed to take steps quickly and reasonably calculated to stop further harassment.⁸³ Courts have

79. See *Harris*, 114 S. Ct. at 370; *Meritor*, 477 U.S. at 67-68; 29 C.F.R. § 1604.11(a).

80. See *Harris*, 114 S. Ct. at 370; *Meritor*, 477 U.S. at 65; 29 C.F.R. § 1604.11(a); see also 42 U.S.C. § 2000e-2(a) (1994). In 1986, in *Meritor Savings Bank v. Vinson*, the United States Supreme Court resolved a split among the various circuit courts by recognizing a claim of hostile environment sexual harassment under Title VII. The plaintiff in *Meritor* was a bank teller who alleged repeated instances of sexual assault by her supervisor over a period of several years. See *Meritor*, 477 U.S. at 59-61. She specifically alleged that he had coerced her into sexual intercourse between 40-50 times during the period, that he had fondled her in front of other employees, that he had followed her into the women's restroom and sexually assaulted her there, and that he had raped her on several other occasions. See *id.* The court reasoned that the phrase "terms, conditions, or privileges" in Title VII evinced the intent of Congress to directly regulate any discriminatory employment practice and not only those which directly involved *quid pro quo* economic or "tangible" elements. *Id.* at 64. The court further reasoned that both EEOC guidelines and several circuit court decisions supported a conclusion that Title VII protection extended beyond the economic aspects of employment. See *id.* Thus, the *Meritor* court held that Title VII recognized a hostile environment sexual harassment cause of action. See *id.* at 73.

81. See, e.g., *Meritor*, 477 U.S. at 69-71; *Anderson v. Methodist Evangelical Hosp.*, 464 F.2d 723, 725 (6th Cir. 1972); 29 C.F.R. § 1604.11(c). The EEOC guideline states in relevant part that

an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

29 C.F.R. § 1604.11(c).

82. See, e.g., *Meritor*, 477 U.S. at 70-71; *Anderson*, 464 F.2d at 725.

83. See, e.g., *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984); 29 C.F.R.

found constructive knowledge of harassment where a supervisor has actual knowledge of the harassment, either through previous notice or personal participation, or where the actions have been so pervasive and public that supervisors should have discovered it with ordinary care.⁸⁴ These standards reflect the reluctance of courts to infer knowledge, because it is difficult to hold an employer liable for failing to find harassment that is casual, isolated, or infrequent, particularly in the absence of actual knowledge of the harassment.⁸⁵

2. Title IX

Title IX of the Education Amendments of 1972 was passed under the Spending Clause of Article I, Section 8 of the Constitution⁸⁶ to prevent the use of federal funds for sexually discriminatory purposes and to provide individuals with effective protection against such instances of discrimination.⁸⁷ This was a congressional reaction to reports of discriminatory practices at educational institutions, where women faced more stringent requirements than men for admission to schools of higher educa-

§ 1604.11(d) (stating that “[w]ith 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”) (emphasis added).

84. See *Kopp v. Samaritan Health Sys.*, 13 F.3d 264, 270 (8th Cir. 1993); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1346 (10th Cir. 1990); *Hansel v. Public Serv. Co.*, 778 F. Supp. 1126, 1133-34 (D. Colo. 1991).

85. See *Baker*, 903 F.2d at 1346; see also *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988); *Caleshu v. Merrill Lynch*, 737 F. Supp. 1070, 1083 (E.D. Mo. 1990), *aff'd*, 985 F.2d 564 (8th Cir. 1991). Furthermore, the courts require that once an employer has gained knowledge — real or constructive — of sexual harassment, the employer must swiftly take positive remedial action reasonably calculated to stop the harassment. See, e.g., *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535 (7th Cir. 1993); *Guess*, 913 F.2d at 465; *Hansel*, 778 F. Supp. at 1132. When deciding whether an employer’s response has been reasonable, the court takes into account the circumstances of the harassment, requiring a response proportional to the severity and pervasiveness of the harassment. See, e.g., *Saxton*, 10 F.3d at 536; *Barrett*, 726 F.2d at 427; *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 270 (N.D. Ind. 1985), *overruled by Reeder-Baker v. Lincoln Nat’l Corp.*, 644 F. Supp. 983 (N.D. Ind. 1986).

86. See *Bougher v. Univ. of Pitt.*, 713 F. Supp. 139, 144 (W.D. Pa. 1989); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703-05 (1979).

87. See *Cannon*, 441 U.S. at 703-05; *Bougher*, 713 F. Supp. at 144. On the purpose of Title IX to prevent the use of federal funds for discriminatory purposes, Rep. Mink stated that “[m]illions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions [that discriminate].” 117 CONG. REC. 39,252 (1971).

tion, and where female faculty members were generally fewer in number, paid less, and promoted less frequently than their male counterparts.⁸⁸ To prove a *prima facie* cause of action under Title IX, a plaintiff must show: 1) an educational program subjected the plaintiff to discrimination or denied the plaintiff participation or benefits of the program; 2) the exclusion was based on sex or gender; and 3) the program is federally funded, in part or in whole.⁸⁹

Title IX was directly patterned after Title VI of the Civil Rights Act of 1964, adopting Title VI's language with the word "sex" substituted for "race, color, or national origin."⁹⁰ Congress enacted Title VI, also under the Spending Clause, to ensure that federal funds were not used to support racial discrimination and to protect individuals from the effects of such discrimination.⁹¹ Because of the nature of its Spending Clause powers, Congress did not seek to directly regulate the activities of federally funded programs.⁹² Thus, in contrast to Title VII's direct regulation of employment practices and working conditions, Title VI controls federally funded programs indirectly by terminating funding

88. See Educ. Amendments of 1972, 1972 U.S.C.C.A.N. 2462, 2511-12.

89. See *Bougher*, 713 F. Supp. at 143-44; see also *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996).

90. 42 U.S.C. § 2000d (1994) (Title VI of the Civil Rights Act of 1964) [hereinafter Title VI]; *Cannon*, 441 U.S. at 696; *Grove City College v. Bell*, 465 U.S. 555, 586 (1984) ("The interpretation of this [statutory language] as it already existed under Title VI is therefore crucial to an understanding of congressional intent in 1972 when Title IX was enacted using the same language."). Footnote 16 in *Cannon* also analyzes the genesis of Title IX and concludes that Title IX was directly derived and developed from Title VI. See *Cannon*, 441 U.S. at 694 n.16. In enacting Title IX, Senator Bayh, its sponsor, stated: "We [Congress] are only adding the 3-letter word 'sex' to existing law." 117 CONG. REC. 30,408 (1971).

Title VI provides in relevant part: "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." 42 U.S.C. § 2000(d). Compare Title IX, *supra* note 6.

91. See *Cannon*, 441 U.S. at 704 n.36; 110 CONG. REC. 7062 (1964) (Statement of Sen. Pastore) (stating in relevant part, "[T]he purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination."); 110 CONG. REC. 6543 (1964) (Statement of Sen. Humphrey) (noting President Kennedy's message of June 19, 1963, "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."); 110 CONG. REC. 1540 (1964) (Statement of Rep. Lindsay).

92. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983); *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970).

upon a finding of discrimination.⁹³ Federal courts also recognized a private cause of action under Title VI to protect individuals from the effects of any institutional discrimination.⁹⁴ In either situation, the gravamen of a Title VI cause of action is racial discrimination by the program or institution receiving federal funding.⁹⁵

Since Title IX developed along parallel lines as Title VI,⁹⁶ its primary enforcement mechanism is the threat of withholding federal funding.⁹⁷ Programs which discriminate on the basis of sex must change their practices to become non-discriminatory or risk losing federal funding.⁹⁸ This remedy only serves the first purpose of Title IX, which is to prevent the use of federal funds for discriminatory practices.⁹⁹ The second purpose of Title IX is to protect individuals against such discriminatory practices.¹⁰⁰ Because the withholding of funds is considered a drastic measure and consequently occurs only infrequently, federal courts have also recognized a private cause of action to protect individual rights.¹⁰¹

93. See *Guardians*, 463 U.S. at 596; *Rosado*, 397 U.S. at 420-21.

94. See, e.g., *Cannon*, 441 U.S. at 695-96; *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967); *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972).

95. See *Cannon*, 441 U.S. at 696, 703-05.

96. See *id.* at 694-95; *Grove City College*, 465 U.S. at 586 ("The interpretation of this [statutory language] as it already existed under Title VI is therefore crucial to an understanding of congressional intent in 1972 when Title IX was enacted using the same language.").

97. See *Cannon*, 441 U.S. at 695-96, 704.

98. *Id.*

99. *Id.* at 704-05.

100. *Id.* at 705.

101. *Id.* at 704-05. In *Cannon v. University of Chicago*, the United States Supreme Court held that Title IX implied a private cause of action. *Id.* at 717. The case arose over the issue of whether Title IX recognized a private cause of action in the absence of explicit statutory language authorizing private relief, when two private medical schools denied admission to a female applicant. *Id.* The court reasoned that 1) because Title VI recognized a private cause of action, Title IX would do the same; 2) Title IX explicitly conferred a benefit to persons discriminated against on the basis of sex and that the legislative history of Title IX indicated that Congress intended to create a private cause of action; 3) the implication of a private remedy would not contravene the underlying purpose of the legislation; and 4) the recognition of a federal remedy would not be an inappropriate usurpation of states' concerns. *Id.* at 694-96, 703-05, 709-11. These compensatory damages, however are available only for intentional violations of Title IX. See *infra* notes 168-72 and accompanying text.

B. *Federal Case Law History Before Doe v. Petaluma City School District*

The case history prior to *Petaluma* on student-to-student sexual harassment under Title IX did not present a clear approach to the issue. There were no United States Supreme Court or United States Courts of Appeals holdings that directly ruled on whether Title IX prohibited peer sexual harassment. Nonetheless, *Petaluma* did not emerge spontaneously from a void, and it was the culmination of a line of cases developing towards the gradual adoption of Title VII sexual harassment standards into a Title IX context. These cases primarily address *teacher-to-student* sexual harassment and recognized liability for hostile environment harassment under Title IX for such harassment. The courts reasoned that where the teacher affirmatively acted to create the hostile environment, the conditions constituted the denial of participation in and benefits of an educational program. The United States Supreme Court, in *Franklin v. Gwinnett County Public Schools*, also strongly indicated its acceptance of this theory by analogizing the teacher-student relationship under Title IX to the supervisor-employee relationship under Title VII. Another line of cases, however, completely rejected Title IX liability for hostile environment sexual harassment — even for harassment between teachers and students. The courts in these cases flatly refused to import Title VII standards, originally developed for the employment context, into the Title IX educational context. When considered as a whole, however, the prior case law establishes at most that federal courts were simultaneously embracing and resisting the expansion of liability under Title IX for sexual harassment in schools.

1. Title IX Decisions Developing Towards Recognition of Peer Harassment

Moire v. Temple University School of Medicine was the first in a sequence of cases leading to the *Petaluma* decision. In 1985, the United States District Court for the Eastern District of Pennsylvania became the first federal court to hold that Title IX prohibits hostile environment sexual harassment, at least between a teacher and a student.¹⁰² The plaintiff in *Moire* was a third-year

102. *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366-67 n.2 (E.D. Pa. 1985). Plaintiff also made claims under the Fourteenth Amendment, 42 U.S.C. §§ 1983 and 1985. *Id.* at 1366. For the purposes of this Article, only the Title

medical student enrolled in a psychiatric clerkship program who alleged that her supervisor sexually harassed her during her clerkship.¹⁰³ Although the court held that the plaintiff failed to establish that her supervisor sexually harassed her, the court applied the legal standards for hostile environment sexual harassment developed under Title VII for employment practices.¹⁰⁴

The *Moire* court first recognized that prior federal court decisions recognized *quid pro quo* harassment under Title IX but rejected hostile environment harassment.¹⁰⁵ Nevertheless, the *Moire* court concluded that Title VII doctrine and guidelines "seemed equally applicable" to Title IX situations and applied hostile environment sexual harassment standards to the facts of the case.¹⁰⁶ Although the court concluded that the defendant's behavior was motivated by his duties as the plaintiff's supervisor and did not constitute sexual harassment, it held that Title IX prohibited hostile environment sexual harassment between a teacher and a student in an educational environment.¹⁰⁷

The next step in establishing the viability of hostile environment sexual harassment theory under Title IX was taken in *Lipsett v. University of Puerto Rico* in 1988.¹⁰⁸ In *Lipsett*, the United States Court of Appeals for the First Circuit held that Title IX

IX claim and the relevant factual background are discussed. Following *Moire*, other cases such as *Lipsett v. University of Puerto Rico* and *Patricia H. v. Berkeley Unified School District* address hostile environment harassment in the teacher-to-student context.

103. See *Moire*, 613 F. Supp. at 1362-63. Plaintiff Laura Klawitter was a student at the Temple University School of Medicine, enrolled in a program at the private Horsham Clinic (Horsham). *Id.* The defendant, Dr. Loren Crabtree, was Supervisor of the Clerkship Program at Horsham, where he supervised the plaintiff's work. *Id.* The allegations of harassment centered around a series of four private discussions between the plaintiff and defendant concerning the behavior of Ms. Klawitter during her clerkship and her subsequent desire to transfer from the program. *Id.* at 1363. Plaintiff based her claim of sexual harassment primarily on a remark made by Dr. Crabtree during their first meeting, which was called to discuss her behavior, where he told her that she was attractive and this could lead to staff jealousies. *Id.* at 1367. The subsequent meeting took place when Dr. Crabtree placed a "gag order" on the plaintiff during group sessions as a disciplinary measure. *Id.* at 1369. Plaintiff also took offense to a story about an incompetent physician related by Dr. Crabtree during a lunch with students, which plaintiff believed to have been directed towards her. *Id.* Other cases refusing to import Title VII standards into the educational context include *Alexander v. Yale University*, *Bougher v. University of Pittsburgh*, and the Eleventh Circuit case, *Franklin v. Gwinnett County Public Schools*.

104. See *Moire*, 613 F. Supp. at 1366-70.

105. *Id.* at 1366-67 n.2.

106. *Id.* at 1369-70.

107. See *id.* at 1366-67 n.2, 1369, 1370.

108. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 897 (1988).

prohibited hostile environment sexual harassment in the educational context.¹⁰⁹ The court curtailed the breadth of its holding, however, by limiting its adoption of Title VII standards to *employment-related* claims under Title IX.¹¹⁰ In *Lipsett*, the plaintiff was a resident physician who alleged that she was sexually harassed by her fellow residents and supervisors.¹¹¹ The *Lipsett* court reasoned that there was a limited body of Title IX case law for sexual harassment, and instead referred to the body of law developed under Title VII.¹¹² In applying the Title VII hostile environment harassment standards, the court noted that the plaintiff was in an employment relationship with the defendant and specifically limited its analysis to *employment-related* claims under Title IX.¹¹³ Thus, the First Circuit held that Title VII standards for sexual harassment, both *quid pro quo* and hostile environment, were applicable in a Title IX claim, but only in the context of discriminatory treatment of an employee by a supervisor.¹¹⁴

Subsequently, the United States Supreme Court's 1992 opinion in *Franklin v. Gwinnett County Public Schools* provided federal courts with a strong impetus to recognize hostile environment claims under Title IX.¹¹⁵ In the primary holding of the case, the Court reversed the Eleventh Circuit and ruled that compensatory damages were available under Title IX upon the

109. *Id.* at 897.

110. *Id.*

111. *See id.* at 886-94. The alleged incidents ranged from indecent propositions to bold declarations that women did not belong in surgery, culminating in a sustained effort by co-workers and supervising physicians to drive plaintiff from the program. *See id.*

112. *Lipsett*, 864 F.2d at 896. The *Lipsett* court followed the reasoning of the Tenth Circuit in *Mabry v. State Board of Community Colleges and Occupational Education*, where the Tenth Circuit adopted Title VII standards into a Title IX context. 813 F.2d 311, 316 & n.6 (10th Cir. 1987). The Tenth Circuit in *Mabry* considered the issue of "disparate impact" sexual discrimination in contrast to the sexual harassment issues in *Lipsett*. *Id.* The case concerned the termination of employment of the plaintiff because of her sex, marital, and parental status. *Id.* at 313. The court held that Title VII substantive standards for "disparate impact" sexual discrimination in the employment context were the same for a Title IX action, and that the two actions would be considered concurrently. *Id.* at 316 & n.6.

113. *Lipsett*, 864 F.2d at 897. The First Circuit noted that plaintiff was both an employee and a student in the program, as she received both a salary and training. *Id.* This allowed the court to characterize *Lipsett* as a mixed employment-training context and not solely as an educational, teacher-student context. *Id.*

114. *Id.* at 897.

115. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992).

finding of the defendant's *intentional* violation of the statute.¹¹⁶ The Court, however, also provided commentary on the applicability of Title VII standards to a Title IX claim.¹¹⁷ The Court wrote that because teacher-to-student sexual harassment was directly analogous to supervisor-employee harassment, a claim of sexual harassment was available under Title IX.¹¹⁸ Quoting *Meritor Savings Bank v. Vinson*, the Court wrote that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate(s)' on the basis of sex."¹¹⁹ The Court then stated, "[w]e believe the same rule should apply when a teacher sexually harasses and abuses a student."¹²⁰ The Court, however, declined to address directly the Eleventh Circuit holding that Title VII standards could not be imported as a whole to a Title IX claim, and held that monetary damages were available only upon the finding of *intentional* discrimination.¹²¹

Finally in 1993, eight years after the *Moire* decision, the United States District Court for the Northern District of California recognized a hostile environment cause of action under Title

116. *Id.* at 75.

117. *See id.* at 74-75; *Murray v. New York Univ.*, No. 93 Civ. 8771, 1994 WL 533411, at *2 (S.D.N.Y. 1994). The *Franklin* dicta on importing Title VII analysis into Title IX is the only comment the United States Supreme Court has made on this issue. *Franklin*, 503 U.S. at 75.

118. *Franklin*, 503 U.S. at 75. The Court, however, declined to directly address whether the remedies available under Title VII and Title IX were the same. *Id.* at 65 n.4.

119. *Id.* at 75 (quoting *Meritor*, 477 U.S. at 64).

120. *Id.* Federal courts which have subsequently considered the application of Title VII hostile environment jurisprudence to a Title IX claim have disagreed on the weight of these statements, with some courts holding that *Franklin* speaks only on the issue of the availability of compensatory damages under Title IX, and others finding that *Franklin* endorses the use of Title VII standards in Title IX analysis. *See, e.g.*, *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (holding that the Supreme Court in *Franklin* left the issue of school district liability unresolved when it found there was a right to compensatory damages in a Title IX claim); *Murray*, 1994 WL 533411, at *2 (holding that the Supreme Court in *Franklin* merely held that monetary damages are an available remedy in Title IX actions). *But see* *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) (finding that although the Supreme Court declined to explicitly address the relationship between Title VII analysis and Title IX analysis, the Court looked to *Meritor* in considering the Title IX sexual harassment claim); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1575 (N.D. Cal. 1993) (holding that *Franklin* appears to have been a hostile environment case), *rev'd*, 54 F.3d 1447 (9th Cir. 1995).

121. *Franklin*, 503 U.S. at 74-75.

IX in *Patricia H. v. Berkeley Unified School District*.¹²² In *Patricia H.*, the plaintiff was the mother of two girls who were students in the Berkeley Unified School District (BUSD).¹²³ The plaintiffs alleged their music teacher had sexually molested the sisters years ago during his relationship with their mother.¹²⁴ The claim of hostile environment sexual harassment arose from his presence at the various schools while the sisters were students in the district.¹²⁵ In considering the claim, the *Patricia H.* court inferred from *Franklin* that the Supreme Court approved of the use of a *Meritor* hostile environment Title VII analysis in a Title IX claim.¹²⁶ Consequently, the court directly appropriated the substantive standards for hostile environment sexual harassment developed under Title VII and held that Title IX prohibited hostile environment sexual harassment between a teacher and student in a non-employment, educational context.¹²⁷ Thus, the *Patricia H.* court held that Title IX permits a hostile environment sexual harassment cause of action between a teacher and a student in an educational context.¹²⁸ In analogizing teacher-student hostile environment Title IX claims to supervisor-employee Title VII claims, the *Patricia H.* court paved the way for similar analogies between student-to-student hostile environment Title IX claims and co-worker Title VII claims.

2. Title IX Decisions Resisting Recognition of Peer Harassment

Federal court treatment of the issue does not uniformly support hostile environment claims under Title IX. The first federal court to address a sexual harassment claim under Title IX refused to consider a hostile environment claim at all. In 1977, the United States District Court for the District of Connecticut in *Alexander v. Yale University*¹²⁹ recognized a claim of *quid pro quo* sexual harassment under Title IX, but dismissed the claims

122. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993).

123. *Id.* at 1293-94.

124. *Id.*

125. *See id.* at 1293-96.

126. *Patricia H.*, 830 F. Supp. at 1292; *see supra* notes 115-21 and accompanying text.

127. *See Patricia H.*, 830 F. Supp. 1293, 1296-97.

128. *Id.* at 1293.

129. 459 F. Supp. 1 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980).

of hostile environment harassment.¹³⁰ The plaintiff, a female student at Yale University, alleged *quid pro quo* sexual harassment by her professor.¹³¹ The professor had offered to give the plaintiff an "A" in his course in exchange for compliance with his sexual demands, but gave her a low grade upon her refusal.¹³² Three other female students and a male faculty member also raised claims against the university, but under hostile environment theories.¹³³

The *Alexander* court first addressed the plaintiffs' hostile environment sexual harassment claims and reasoned that the harassment did not constitute a personal denial of participation or benefits of a federally funded program or activity.¹³⁴ The court held that Title IX protection did not extend to such vaguely defined concepts as "atmosphere" or "vicariously experienced" injuries.¹³⁵ In contrast, in reviewing the *quid pro quo* claim, the court reasoned that the conditioning of academic advancement or achievement upon submission to sexual demands struck at the heart of Title IX.¹³⁶ Because Title IX prohibited the receipt of federally funded educational benefits on sexually discriminatory grounds, *quid pro quo* harassment constituted an impermissible restriction of the benefits of a federally funded program.¹³⁷ The court analogized the teacher-student relationship with the emerging *quid pro quo* sexual harassment standards developed in the employment context between supervisors and employees under Title VII.¹³⁸ Thus, the *Alexander* court held that a *quid pro quo* sexual harassment claim was available under Title IX, but that

130. *Id.* at 3-4, 7. The terms *quid pro quo* sexual harassment and "hostile environment" sexual harassment were developed under Title VII case law. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66, 73 (1986); Note, *supra* note 71, at 1454.

131. *See Alexander*, 459 F. Supp. at 3-4.

132. *Id.*

133. *Id.* at 3. The claims of hostile environment sexual harassment arose when plaintiff John Winkler, a faculty member in the classics department, alleged that the distrust of fellow male faculty members hampered his teaching efforts. *Id.* Plaintiffs Lisa Stone and Ann Olivarius alleged suffering from a sexually hostile environment upon learning of and discussing allegations raised by other female students of sexual harassment, and plaintiff Margery Reifler alleged sexual harassment from the coach of an athletic team while she was manager of the team. *Id.* at 3-4.

134. *See id.* at 3.

135. *Alexander v. Yale Univ.*, 459 F. Supp. 1, 3 (D. Conn. 1977).

136. *Id.* at 4.

137. *Id.*

138. *Id.*

Title IX did not recognize a hostile environment sexual harassment cause of action.¹³⁹

Federal courts have since largely followed the lead of the *Alexander* court in extending Title IX protection to *quid pro quo* sexual harassment. As a result, most current controversy regarding Title IX analysis of sexual harassment concerns the applicability of the hostile environment claim.¹⁴⁰ Although the *Alexander* holding established the presence of Title VII *quid pro quo* sexual harassment substantive standards in Title IX claims, it also established a precedent for rejecting hostile environment claims which several federal courts subsequently followed. One such court was the United States District Court for the Western District of Pennsylvania which in 1989, in *Bougher v. University of Pittsburgh*, held that Title IX did not permit a hostile environment sexual harassment claim even between a teacher and student.¹⁴¹

The plaintiff in *Bougher* was a University of Pittsburgh student who alleged that her professor subjected her to hostile environment sexual harassment.¹⁴² Although the two were engaged in a consensual sexual relationship from 1976 to 1983, the plaintiff alleged that in retrospect, the relationship was actually unwelcome and violative.¹⁴³ In considering the applicability of a Title VII hostile environment cause of action under Title IX, the *Bougher* court first noted what it described as "fundamental distinctions" between Title VII and Title IX.¹⁴⁴ The court noted that Congress enacted Title VII as part of the Civil Rights Act of 1964 under the Commerce Clause to regulate employment conditions. Congress enacted Title IX as part of the Education Amendments of 1972 under the Spending Clause to eliminate the

139. *Id.* at 3-4, 7.

140. *See, e.g.*, *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 914 (1988) (denying summary judgment, holding that plaintiff could make a prima facie *quid pro quo* sexual harassment claim under Title IX); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (holding that *quid pro quo* sexual harassment had been extended to Title IX in a pre-*Meritor* decision); *Bougher v. Univ. of Pitt.*, 713 F. Supp. 139, 145 (W.D. Pa. 1989) (holding that Title IX "clearly reaches" *quid pro quo* sexual harassment claims).

141. 713 F. Supp. at 145. The Third Circuit affirmed the holding of the District Court on other grounds and declined to rule directly on whether Title IX prohibits student-to-student sexual harassment. 882 F.2d 74, 77 (3d Cir. 1989).

142. *Bougher*, 713 F. Supp. at 144.

143. *Id.*

144. *Id.*

use of federal funds in discriminatory educational programs.¹⁴⁵ The court concluded that the plaintiff's hostile environment claim under Title IX constituted an unwarranted blurring of fundamental distinctions between Title VII and Title IX.¹⁴⁶ The court further reasoned that because the EEOC guidelines on sexual harassment for Title VII were developed in the context of employment, they were inappropriate in the educational context, particularly without administrative review by the Office of Civil Rights (OCR) of the Department of Education.¹⁴⁷ Consequently, the court held Title VI, and not Title VII, was the correct model for the development of sexual harassment standards, and Title IX did not permit a hostile environment claim.¹⁴⁸

Similarly, in 1990, the United States Court of Appeals for the Eleventh Circuit held, in *Franklin v. Gwinnett County Public Schools*, Title VII sexual harassment standards were not applicable to a Title IX claim.¹⁴⁹ The plaintiff in *Franklin* alleged that she was sexually harassed by her economics teacher.¹⁵⁰ The Eleventh Circuit reasoned that although Titles VI, VII and IX had common anti-discrimination purposes, the mechanism of enforcing the statutes differed.¹⁵¹ The court noted that Titles VI and IX were statutes which terminated the federal funding of programs upon a finding of sexual discrimination, while Title VII directly governed employment practices, prohibiting discrimination.¹⁵² The court also reasoned that applying the entire body of Title VII sexual harassment law to Title IX would hamper the

145. *Id.*

146. *Id.*

147. *Bougher v. Univ. of Pitt.*, 713 F. Supp. 139, 145 (W.D. Pa. 1989).

148. *Id.* See also *supra* Part II A (2) for a discussion of Title VI.

149. 911 F.2d 617, 622 (11th Cir. 1990). The Eleventh Circuit in *Franklin* also held that compensatory damages were not available for a claim under Title IX. *Id.* This holding was reviewed and reversed by the Supreme Court. 503 U.S. 60 (1992). With respect to the 11th Circuit's holding that Title VII standards were not applicable to Title IX, the Supreme Court addressed the issue in its *dicta* but did not directly decide the issue. See *supra* notes 115-21 and accompanying text.

150. *Franklin*, 911 F.2d at 618.

151. *Id.* at 622.

152. *Id.* The Fifth Circuit, in *Chance v. Rice University*, 984 F.2d 151, 152 (5th Cir. 1993), also declined to apply Title VII standards to a Title IX claim of gender discrimination. In *Chance*, the plaintiff, a professor at Rice University, brought an action against Rice University on the basis that she did not receive equal compensation or consideration for promotion as her male colleagues. *Id.* at 152. The Fifth Circuit held that Title VI standards were the appropriate model for deciding the Title IX claim. *Id.* at 153.

orderly analysis required in what the court characterized as a "confusing area of the law."¹⁵³

The cumulative case history of sexual harassment under Title IX reveals a division between federal courts on the degree to which Title VII substantive standards apply to Title IX. A sequence of decisions have gradually led to the adoption of Title VII analysis into Title IX, while other courts have resisted any importation of Title VII sexual harassment law, particularly in the context of peer hostile environment harassment. However, the United States Supreme Court in *Franklin*, while declining to rule directly on the issue, implied that aspects of Title VII analysis concerning supervisor-employee harassment may be analogous to teacher-to-student harassment.¹⁵⁴ Subsequently, the *Patricia H.* decision built on the implications of the *Franklin* opinion and recognized a Title IX hostile environment sexual harassment cause of action between a teacher and a student,¹⁵⁵ constituting the final doctrinal step necessary to lay the groundwork for the *Petaluma* decision. The analogy of teacher-to-student hostile environment Title IX claims to supervisor-employee Title VII claims was the necessary theoretical basis to support the similar analogy of student-to-student hostile environment Title IX claims to co-worker Title VII claims.

C. *The Doe v. Petaluma City School District Decision*

In 1993, in *Doe v. Petaluma City School District*, the United States District Court for the Northern District of California broke new ground in adopting and expanding the use of Title VII standards in Title IX, by recognizing a cause of action for student-to-student hostile environment sexual harassment.¹⁵⁶ The court, however, also held that to obtain monetary damages as opposed to declaratory or injunctive relief, the plaintiff must allege and prove that an employee of the educational institution intentionally discriminated on the basis of sex.¹⁵⁷

153. *Franklin*, 911 F.2d at 622.

154. *See Franklin*, 503 U.S. at 74-75.

155. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993).

156. *See Doe v. Petaluma City Sch. Dist.*, 830 F. Supp 1560, 1571-73 (N.D. Cal. 1993), *rev'd*, 54 F.3d 1447 (9th Cir. 1995) *different results reached on recons.*, 949 F. Supp. 1415 (N.D. Cal. 1996).

157. *See id.* at 1571.

The plaintiff attended Kenilworth Junior High School in Northern California, where the alleged harassment took place.¹⁵⁸ The plaintiff claimed that her classmates harassed her on a regular basis throughout the seventh and eighth grades, and that the school did not adequately act to stop the situation.¹⁵⁹ The incidents centered around the theme of the plaintiff having sex with a hot dog, and ranged from taunting in the hallways and classroom to fights between the plaintiff and female classmates.¹⁶⁰

The district court considered whether a claim of hostile environment harassment between students was available under Title IX.¹⁶¹ The court reviewed prior applications of Title VII hostile environment theory to the educational context under Title IX and noted that these applications were either in the context of employment or teacher-to-student harassment.¹⁶² Guided by the Supreme Court's *Franklin* opinion, the *Petaluma* court reasoned that although the harassment in *Franklin* occurred between a teacher and a student, the cause of action was consistent with Title VII hostile environment theory and analogous to harassment between a supervisor and employee.¹⁶³ The court con-

158. *Id.* at 1564. The Petaluma City School District and Petaluma Joint Union High School District ("PJUHSD") control and manage the public schools in Petaluma, including Kenilworth Junior High School. PJUHSD receives federal financial assistance. *Id.*

159. *Id.* The incidents started in mid-fall 1990, when two students said to plaintiff, "I hear you have a hot dog in your pants." *Id.* Throughout the rest of the year, classmates continued the comments, calling plaintiff a "hot dog" and accusing her of having sex with a hot dog. *Id.* The harassment continued during the summer recess of 1991, including incidents off school grounds, and continued into the next school year. *Id.* at 1565. On January 21, 1992, plaintiff was slapped in the face by a fellow student, and on February 20, another student stood up during class and said, "This question is for Jane. Did you have sex with a hot dog?" *Id.* The final incident occurred on February 28, when plaintiff was approached by another girl who wanted to start a fight. *Id.* at 1565. Plaintiff's mother removed her from the school, and plaintiff subsequently transferred to another public school where she suffered the same harassment by her new classmates. *Id.* at 1565-66. Plaintiff eventually enrolled in a private girls' school. *Id.* at 1566.

160. *Id.* at 1564-65. During the period from mid-fall 1990 until plaintiff withdrew from Kenilworth, plaintiff and her parents were in regular contact with her school counselor about the harassment. *Id.* Her counselor took several steps to stop the harassment, including warning the other students to stop and discussing the problem with groups of plaintiff's classmates at a time. *Petaluma*, 830 F. Supp at 1564-65. In the winter of 1992, the principal and the vice-principal of Kenilworth also became aware of the harassment and suspended the offending students for two days. *Id.* at 1565. None of these measures ultimately stopped the harassment. *See id.* at 1564-66.

161. *Id.* at 1571, 1575.

162. *Id.* at 1571-72.

163. *See id.* at 1574-75.

cluded that the Supreme Court implied in *Franklin* that hostile environment harassment was generally applicable to Title IX.¹⁶⁴ Because Title VII hostile environment doctrine encompassed both employee-to-employee harassment as well as supervisor-to-employee harassment, the *Petaluma* court similarly concluded that Title IX should extend to student-to-student harassment.¹⁶⁵ Finally, the court looked to the language of Title IX and reasoned that an educational program denies benefits to a student when sexual harassment compels her to quit the program.¹⁶⁶ Thus, the *Petaluma* court held that hostile environment sexual harassment between students is actionable under Title IX.¹⁶⁷

The *Petaluma* court then considered the issue of liability, and held that Title IX required a finding of an intentional violation of the statute by the school before the court would impose liability.¹⁶⁸ The court noted that the *Franklin* Court had implied that Title IX requires a finding of intent.¹⁶⁹ The court further reasoned that because Title VI requires intent and was the model for Title IX, the Title VII "known or should have known" standard was not applicable to Title IX.¹⁷⁰ In applying this intent

164. *Id.* at 1575.

165. *See id.* at 1574-75.

166. *Id.* at 1571, 1575.

167. *Id.*

168. *Petaluma*, 830 F. Supp. at 1571, 1575. The *Petaluma* District Court, however, later granted the plaintiff's motion for reconsideration on the issue of liability. 949 F. Supp. at 1415. In its July 22, 1996 opinion, the *Petaluma* District Court held that Title VII standards for imposing liability were applicable to Title IX cases. *Id.* at 1421-22. The court reinterpreted its original understanding of the Supreme Court's decision in *Franklin*, where the Supreme Court had required a finding of "intentional discrimination" before imposing liability on a defendant. *Id.* at 1417-18. While the *Petaluma* court admitted that the Supreme Court's use of the words "intentional discrimination" in *Franklin* was ambiguous, the *Petaluma* court looked to the Supreme Court's use of the phrase in the context of subsequent Title VII hostile environment cases. *Id.* at 1418-19, 1422-24. Upon review of Title VII cases, the *Petaluma* court found that under Title VII, "intentional discrimination" encompassed worker-to-worker hostile environment discrimination. *Id.* at 1424. Thus, the court concluded that under Title IX, the requirement of "intentional discrimination" would similarly include hostile environment peer sexual harassment. *Id.* at 1424, 1427.

This new wrinkle in the debate on the treatment of student-to-student sexual harassment under Title IX is beyond the scope of this Article. The primary subject of this Article is whether federal courts should recognize a cause of action under Title IX for student-to-student sexual harassment in the first place. As the review of federal cases to follow reveals, this remains a threshold issue which must be resolved.

169. *Petaluma*, 830 F. Supp. at 1571, 1575.

170. *See id.* at 1574-76.

requirement to the case, the court reasoned that a school's inaction or inadequate action in the face of complaints of student-to-student sexual harassment could constitute circumstantial evidence of an intent to discriminate.¹⁷¹ The *Petaluma* court held that hostile environment sexual harassment between students is actionable under Title IX, but that liability is contingent upon a finding that the school intentionally discriminated against the plaintiff on the basis of sex.¹⁷²

At the district court level, the school counselor in *Petaluma* unsuccessfully invoked the qualified immunity defense.¹⁷³ This defense is available to public officials unless the plaintiff's complaint alleges a violation of "clearly established law."¹⁷⁴ On appeal, the court reasoned that the trial court's opinion was the only case to date that established the counselor's duty to prevent peer sexual harassment.¹⁷⁵ *Petaluma* held that no such duty had been clearly established at that time, but declined to comment on whether or not such a duty exists now.¹⁷⁶

171. *Id.*

172. *Id.* at 1571, 1575-76. The court, however, dismissed the plaintiff's Title IX claim on the basis that the complaint did not adequately rest on the theory that the school's inadequate response to the complaints of student-to-student harassment was a result, and revealed an actual intent to discriminate against the plaintiff on the basis of sex. *Id.* at 1576. The court allowed the plaintiff to amend the complaint within thirty days to conform with this theory. *Id.*

173. *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1448-52 (9th Cir. 1995).

174. *Id.* at 1450 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

175. *Id.* at 1451. The court further recognized that another federal district court, in *Aurelia D. v. Monroe County Board of Education*, declined to follow the *Petaluma* holding. *Id.* See *infra* text accompanying notes 179-81 for a discussion of the *Aurelia D.* case.

In addition, the court dismissed *Doe's* references to *Clyde K. v. Puyallup School District*, an Individuals with Disabilities Education Act case, as dictum and noted that it was filed two years after the counselor's acts. See *Petaluma*, 54 F.3d at 1451-52. In *Clyde K.*, the Ninth Circuit upheld a school's removal of a student with Tourette's Syndrome from the classroom and made reference to the plaintiff's sexually explicit remarks, saying, "[P]ublic officials have an especially compelling duty not to tolerate [such remarks] in the classrooms and hallways of our schools." *Id.* at 1452 (quoting *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1401 (9th Cir. 1994)) (alteration in original). The *Clyde K.* court, however, declined to make a firm statement whether Title IX does prohibit student-to-student sexual harassment, stating, "[S]chool officials *might* reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment." *Clyde K.*, 35 F.3d at 1402 (emphasis added).

176. *Petaluma*, 54 F.3d at 1452. The *Petaluma* court stated:

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. However, those arguments are not properly before us It might turn out that Title VII cases . . .

D. *Federal Court Reaction to Doe v. Petaluma City School District*

Since the *Petaluma* decision, nine federal district courts have considered in published opinions whether Title IX prohibits peer sexual harassment, and their holdings present a mixed reaction to *Petaluma*. Three of the courts considering the issue declined to recognize a Title IX claim, while the remaining followed the lead of the *Petaluma* court. The last court declined to decide the issue.¹⁷⁷ This confusion among federal courts is evidenced by one court's plea, "[g]iven the enormous social implications for students, schools, and parents, this court wishes that Congress would step in and simply tell us whether it intended to make school districts responsible for the payment of damages to students under these circumstances."¹⁷⁸ Nonetheless, the most recent decisions seem to establish a trend towards greater acceptance of the *Petaluma* reasoning.

The first of the three cases which declined to follow *Petaluma* was *Aurelia D. v. Monroe County Board of Education*, decided in 1994. In *Aurelia*, the United States District Court for the Middle District of Georgia held that Title IX did not require

provide the basis for creating a duty to act under Title IX. We express no opinion as to that question.

Id.

177. The United States District Court for the Southern District of New York declined to decide the issue at all. In 1994, in *Murray v. New York University College of Dentistry*, the court reviewed prior case law on the applicability of Title VII hostile environment analysis to a Title IX claim and reasoned that the law was "uncertain." 1994 WL 533411, at *2-3 (S.D.N.Y. 1994), *rev'd*, 57 F.3d 243 (2d Cir. 1995). The court applied standards from both Title VII and Title IX and concluded that in both cases, the plaintiff failed to allege facts sufficient to sustain a claim under either statute. *See id.* The *Murray* court considered the Supreme Court holding in *Franklin*, but reasoned that *Franklin* merely stood for the availability of monetary damages under Title IX and did not speak to the applicability of Title VII sexual harassment analysis to a Title IX claim. *Id.* at *2.

The United States Court of Appeals for the Second Circuit reviewed *Murray* and assumed *arguendo* that harassment by a third party was actionable under Title IX, but denied relief on other grounds. *See Murray*, 57 F.3d at 250 (finding there was no liability because the university did not have sufficient notice of the harassment); *see also Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 n.8 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996) (holding that a school district could not be held liable under Title IX for sexual harassment of female students by male students, absent an allegation that the school district responded to sexual harassment claims differently based on sex).

178. *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1414 (N.D. Iowa 1996).

a school to respond to complaints of peer sexual harassment.¹⁷⁹ The plaintiff, a fifth grade student of the Hubbard Elementary School, alleged that a classmate had sexually harassed her.¹⁸⁰ The court reasoned that the behavior of a fellow classmate was neither part of, nor an activity of, a school program, and that no federally funded program had proximately caused the plaintiff any harm, concluding that Title IX was inapplicable.¹⁸¹

Similarly, in 1994, the United States District Court for the District of Utah, in *Seamons v. Snow*, refused to recognize a Title VII hostile environment claim under Title IX.¹⁸² The case arose from a hazing incident among football players where four members of the team taped the plaintiff to a towel rack in the locker room.¹⁸³ The court noted that hostile environmental sexual harassment was a Title VII doctrine developed in the employment context.¹⁸⁴ The court then reasoned that Title IX was patterned after Title VI, not Title VII, and that Title IX did not expressly create a cause of action for hostile environment.¹⁸⁵ Consequently, the court concluded that it would be inappropriate for Title VII analysis to be applied in a Title IX claim.¹⁸⁶ The court held that there was no basis for a hostile environment sexual harassment claim under Title IX.¹⁸⁷

179. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994). This judgment, however, was overturned by the United States Court of Appeals for the Eleventh Circuit in *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1196 (11th Cir. 1996). See *infra* notes 213-17 and accompanying text.

180. 862 F. Supp. at 364-65. Specifically, the plaintiff alleged that the harassing student had repeatedly attempted to touch her breasts and vaginal area, used vulgar language towards her, and that the school did not adequately respond to her complaints. *Id.*

181. *Id.* at 367.

182. See *Seamons v. Snow*, 864 F. Supp. 1111, 1118 (D. Utah 1994), *aff'd*, 84 F.3d 1226 (10th Cir. 1996). The United States Court of Appeals for the Tenth Circuit affirmed *Seamons v. Snow* in 1996, but declined to expressly decide whether Title IX prohibited peer sexual harassment. 84 F.3d at 1232 n.7.

183. See *Seamons*, 864 F. Supp. at 1115. A fifth classmate subsequently left the locker room and returned with the girl that plaintiff had brought to the homecoming dance to see plaintiff's condition. *Id.*

184. *Id.* at 1118.

185. *Id.*

186. *Id.*

187. *Id.* The court was aware at the time of their holding of the *Petaluma* decision by the District Court for the Northern District of California and cited the *Petaluma* case in their opinion. *Id.* at 1117. The *Seamons* court completed its analysis of the case by applying Title VI standards and concluded that plaintiff failed to state factual allegations sufficient to support a claim of sexual harassment. *Id.* at 1118-19.

In 1995, a third court declined to follow the *Petaluma* holding. The United States District Court for the District of Connecticut in *Mennone v. Gordon* held that it was not clearly established in 1991 that a high school teacher had an affirmative duty to prevent student-to-student sexual harassment under Title IX.¹⁸⁸ The case arose when the plaintiff, a female high school student, was sexually harassed by a male classmate, and neither her teacher nor the school responded to prevent the harassment.¹⁸⁹ The relevant part of the case concerned the high school teacher's defense of qualified immunity, similar to that of the school counselor in the *Petaluma* case before the Court of Appeals for the Ninth Circuit discussed above.¹⁹⁰ The *Mennone* court reasoned that the key issue in determining whether a defendant could raise a qualified immunity defense lay in whether the defendant's conduct violated the plaintiff's clearly established Title IX rights.¹⁹¹ The court considered the cases cited by the plaintiff and reasoned that there was a clearly established duty to protect students from abuse or harassment by a teacher, but not from student-to-student harassment.¹⁹² Furthermore, the court reasoned that the extension of liability for student-to-student harassment did not "clearly flow" from prior "duty-to-protect" sexual harassment cases.¹⁹³ The court concluded that the defendant's failure to protect the plaintiff was "very troubling," but held that Title IX did not clearly establish an affirmative duty upon the teacher to protect a student from peer sexual harassment.¹⁹⁴

The majority of federal district courts followed *Petaluma* in recognizing peer sexual harassment claims under Title IX. In

188. *Mennone v. Gordon*, 889 F. Supp. 53, 58 (D. Conn. 1995).

189. *Id.* at 54-55. Because the court's findings at this point in the litigation were made in response to the defendants' motion to dismiss the claims, the following facts are based on the allegations in the complaint. *Id.* at 54. The plaintiff was enrolled during the 1990-91 school year in an environmental science class taught by the defendant, James Bouchard. *Id.* at 54-55. A male classmate harassed her almost daily in class, making derogatory comments about the plaintiff's breasts, and grabbing her hair, legs, breasts, and buttocks. *Id.* at 55. The classmate went so far as to threaten the plaintiff with rape. *Mennone*, 889 F. Supp. at 55. Despite the defendant's presence in class during these incidents, and the plaintiff's appeals for his help, the teacher did nothing to stop the harassment. *Id.* Ultimately, the plaintiff went to the police, who arrested and charged the classmate with sexual assault and breach of the peace. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 58.

193. *Id.*

194. *Id.*

1994, in *Bruneau v. South Kortright Central School District*, the United States District Court for the Northern District of New York followed *Petaluma* and held that Title IX recognizes a cause of action for student-to-student sexual harassment.¹⁹⁵ The plaintiff in *Bruneau* was a sixth grade student who alleged that her male classmates harassed her during school hours.¹⁹⁶ The court directly cited *Petaluma* and reasoned that the case established a cause of action for peer harassment under Title IX.¹⁹⁷

Also, in 1995, the same district court that decided *Petaluma* held in *Oona R. v. Santa Rosa City Schools* that Title IX requires a school to take affirmative steps to stop peer sexual harassment.¹⁹⁸ The plaintiff, a sixth grade student, alleged that her male classmates were verbally harassing girls and that the school encouraged the behavior by showing MTV videos and failing to prevent the harassment.¹⁹⁹ The *Oona R.* court reasoned that *Petaluma* had set a precedent in that district that Title IX prohibited student-to-student sexual harassment in the schools.²⁰⁰ The court further reasoned the Ninth Circuit dicta in *Clyde K. v. Puyallup School District*, strongly implied that schools have a Title IX duty to act to prevent peer sexual harassment.²⁰¹ Based on these two opinions, the *Oona R.* court held that a Title IX cause

195. *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162 (N.D.N.Y. 1996). This discussion concerns the court's judgment on a motion to dismiss for failure to state a claim. *Id.* The plaintiff also alleged discriminatory segregation of the students from classroom activities by their teacher and made claims under § 1983. *Id.* at 166-67. This Article does not address these additional causes of action. On July 25, 1996, the court also issued a judgment in favor of the plaintiff on the defendant's motion for summary judgment. *Id.* at 162.

196. See Lewin, *supra* note 5, at B2. Specifically, the plaintiff alleged that male classmates called the plaintiff and other female classmates names such as "dog-faced bitch" and "scum," snapped their bra straps, and grabbed their breasts. *Id.*

197. See *Bruneau*, 935 F. Supp. at 164-65. Moreover, the *Bruneau* court reasoned that the threshold issue was whether the defendant had intentionally discriminated against the plaintiff. *Id.* The court, referring again to *Petaluma*, held that intentional discrimination could be inferred on the basis of insufficient action by the defendant, in the face of complaints, to stop harassment between students. *Id.*

198. *Oona R. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1469 (N.D. Cal. 1995). The plaintiff's claims also included a claim of teacher-to-student sexual harassment. *Id.* at 1455. This claim is not discussed because, for the purposes of this Article, the issue is subsumed within the court's consideration of student-to-student harassment.

199. *Id.* at 1457. According to the plaintiff's complaint, the harassment included references to the girls' body parts as "melons" and "beavers" and questions asking whether she "had a beaver at home," and whether she had "left her melons at home." *Id.*

200. *Id.* at 1469.

201. *Id.* See *supra* note 175 for a discussion of the Ninth Circuit opinion in *Clyde K.* Note that the *Oona* court filed its opinion on May 2, 1995, while the Ninth Cir-

of action arises when a school fails to prevent student-to-student sexual harassment.²⁰²

During 1996, the federal district court decisions on the issue unanimously followed *Petaluma*.²⁰³ Despite this trend towards the recognition of peer harassment under Title IX at the federal district court level, the United States Courts of Appeals remain divided. The Court of Appeals for the Fifth Circuit held against Title IX recognition of peer sexual harassment, while the Court of Appeals for the Eleventh Circuit held that such a claim is viable.²⁰⁴ The battle for recognition of these claims remains active in the circuit courts of appeal.

Last year, the United States Court of Appeals for the Fifth Circuit, in *Rowinsky v. Bryan Independent School District*, held that Title IX did not prohibit sexual harassment between students.²⁰⁵ The plaintiffs, two female eighth grade students, complained of harassment by other students during their morning school bus rides and alleged that the school's responses to their complaints were inadequate.²⁰⁶ The court considered three fac-

cuit's *Doe v. Petaluma* discussion of the impact of *Clyde K.* on Title IX peer harassment was filed on May 12, 1995. See *infra* text and accompanying notes 212-17.

202. *Oona R.*, 890 F. Supp. at 1469.

203. See *Linson v. Trustees of the Univ. of Pa.*, 1996 WL 479532 (E.D. Pa. 1996) (concluding that although the plaintiff did not allege facts sufficient to indicate that the defendant's actions were gender-motivated, a Title VII peer sexual harassment claim could be incorporated under Title IX); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193 (N.D. Iowa 1996) (denying cross-motions for summary judgment, the court held that Title VII standards and theories were applicable to Title IX); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419 (N.D. Iowa 1996) (reviewing Title IX case law and following what it concluded to be the majority view, that Title IX prohibits peer sexual harassment); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995) (reasoning that prior Title IX case law had already borrowed extensively from Title VII, and therefore concluded that Title IX similarly prohibited peer sexual harassment).

204. See *Wright*, 940 F. Supp. at 1416-18 ("[T]he appellate court decisions do not present a uniform rule with regard to whether a student must prove an *intent* to discriminate on the part of the educational institution to state a valid claim for . . . peer-to-peer sexual harassment.") (emphasis in original). As discussed above, the United States Court of Appeals for the Second, Tenth, and Ninth Circuits have all declined to address this issue.

205. 80 F.3d 1006 (5th Cir. 1996). Without comment, the Supreme Court denied review of this case (No. 96-4) last year. 117 S. Ct. 165 (1996).

206. In addition to the incidents on the school bus, one plaintiff also alleged that another schoolmate had reached under her shirt and unfastened her bra. *Rowinsky*, 80 F.3d at 1009. The school's actions included suspending the offender's school bus privileges for short periods of time and suspending the offender for one day. *Id.*

tors in making its decision: the “scope and structure” of the title, the legislative history of Title IX, and agency interpretations.²⁰⁷

First, the Fifth Circuit concluded that since Title IX was enacted under the Spending Clause, the statute prohibited discrimination by federal grant recipients only because they have little control over the actions of third parties.²⁰⁸ The court then looked towards the legislative history of the statute and reasoned that its purpose, like that of Title VI, was primarily to prevent sexual discrimination by grant recipients.²⁰⁹ According to the court, the drafters of the statute “recognized that it was not a panacea for all types of sex discrimination, but rather a limited initial attempt to end discrimination by educational institutions.”²¹⁰ Finally, the court reviewed the interpretations of Title IX made by the United States Department of Education Office of Civil Rights (OCR), and concluded that they were consistent with refusing to impose liability for the acts of third parties.²¹¹ The court noted that both the implementing OCR regulations and Policy Memoranda for Title IX discussed only acts by recipients of federal funding themselves.²¹² The Fifth Circuit concluded that all three factors weighed against the recognition of student-to-student sexual harassment under Title IX.

In contrast, in 1996, the United States Court of Appeals for the Eleventh Circuit, in *Davis v. Monroe County Board of Education*, held that the plaintiff’s allegations that the Board of Education knowingly permitted the existence of a hostile environment in her school caused by a fellow student constituted a valid claim under Title IX.²¹³ As discussed above, the District

207. *Id.* at 1012.

208. *Id.* at 1012-13.

209. *Id.* at 1013.

210. *Id.* at 1014.

211. *Id.* at 1014-15.

212. *Id.* For example, the OCR’s Policy Memorandum defines sexual harassment as harassment “by an employee or an agent of the recipient.” *Id.* at 1015 (emphasis in original). The *Rowinsky* court noted that the only OCR documents which apply Title IX to peer sexual harassment are Letters of Finding. *Id.* The court, however, noted that these Letters should be accorded little deference because, as the court reasoned, “none of the traditional factors supporting deference are present.” *Rowinsky*, 80 F.3d at 1015. The letters are written with the purpose of compelling voluntary compliance by an institution where the pressure to settle is great, and ordinary rule-making proceedings are omitted. *Id.* Moreover, the court reasoned that the implementing regulations and Policy Memorandum promulgated by OCR outweighed any deference the courts should give to agency Letters of Finding. *Id.*

213. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996).

Court for the Middle District of Georgia had dismissed the plaintiff's claims on summary judgment.²¹⁴ The Eleventh Circuit first observed that the United States Supreme Court, in *Franklin*,²¹⁵ had relied on Title VII principles and case law in deciding a Title IX case.²¹⁶ Because other federal courts used a similar approach, the Eleventh Circuit concluded that Title VII principles were therefore generally applicable to Title IX, including the prohibition of hostile environment peer sexual harassment.²¹⁷

E. *Analysis of the Petaluma Decision*

There is no doubt the situation facing students like the plaintiff in *Petaluma* is deplorable. Judges and lawyers, like other people, are moved by a natural sympathy for the victims of sexual harassment to find a way for to compensate these students' harms — in all likelihood, it was this sympathy which motivated the *Petaluma* court. However, from a legal standpoint, the *Petaluma* court may have lacked a clear legal basis for its decision.

The case history prior to *Petaluma* was mixed; one sequence of cases, from *Moire* to *Lipsett* to *Patricia H.* tended to establish liability for hostile environment harassment under Title IX for teacher-to-student harassment, while another series reached an opposite conclusion, with some even rejecting liability for hostile environment harassment between teachers and students. Moreover, federal courts considering the issue after *Petaluma* are also divided on their acceptance of the student-to-student harassment theory. While the most recent trend of district court opinions reveals an increasing acceptance of the *Petaluma* reasoning, among the Courts of Appeal that have considered the issue, the Fifth and Eleventh Circuits are in direct opposition. Lastly, the Court of Appeals for the Ninth Circuit, reviewing an appeal of the district court's opinion in *Petaluma*, expressed tepid recognition of the potential impact of the *Petaluma* theory, recognizing

214. See *supra* notes 179-81 and accompanying text.

215. *Franklin v. Gwinnett County Pub. Sch.*, 50 U.S. 60 (1992).

216. *Davis*, 74 F.3d at 1191.

217. *Id.* at 1192-93. Note that in this opinion, the Eleventh Circuit endorses the complete importation of Title VII standards and theories into the Title IX context. *Id.* The *Davis* opinion marks a complete reversal of the Eleventh Circuit's earlier opinion in *Franklin v. Gwinnett County Public Schools*, where the court had rejected any reference to Title VII in a Title IX case. See *supra* notes 162-67 and accompanying text.

only that “[i]t might turn out that Title VII cases . . . provide the basis for creating a duty to act under Title IX.”²¹⁸

This absence of consensus on the proper treatment of peer harassment claims under Title IX has led to the repeated criticisms by courts opposed to *Petaluma* that federal Title IX case law prior to *Petaluma* simply did not support the *Petaluma* holding. These courts are absolutely correct in this argument, and in the strictest meaning of the concept, the *Petaluma* court did not have a direct precedent on which to base its holding. This argument, however, ignores the fact that none of the opinions addressing the issue of student-to-student sexual harassment were binding on the *Petaluma* court. Although there are a number of federal court cases which reject the *Petaluma* theory, these opinions are merely persuasive, not controlling. Moreover, although no court prior to *Petaluma* had interpreted Title IX to prohibit student-to-student sexual harassment, there was a clear sequence of holdings directly leading to this conclusion. The development of any statute depends on the independent decisions of courts extending the body of interpretation of the statute piece by piece. One cannot argue that the *Petaluma* court was wrong solely because it broke new ground in its interpretation of Title IX without similarly arguing against any development of statutory interpretation. The entire body of sexual harassment law under Title VII serves as an example of such progressive development.

From the perspective of statutory analysis, *Petaluma* rests upon arguably unstable grounds. First, *Petaluma* followed Title VII hostile environment theory and reasoned that the maintenance, whether through action or inaction, of a sexually hostile environment in school constituted the deprivation of education to certain students on the basis of sex. In this way, a school's failure to do anything to stop student-to-student harassment was an exclusion or denial of “the benefits of [a] . . . program or activity receiving Federal financial assistance.” On the flip side of the argument, the appellate court in *Rowinsky* and the district courts in *Bougher* and *Seamons* reasoned that the *Petaluma* court had appropriated Title VII theories for Title IX in contravention of the statutes' legislative histories. Congress had patterned Title IX after Title VI and both were enacted under the Spending Clause. In contrast, Title VII was a Commerce Clause statute,

218. *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995).

yet the *Petaluma* court nonetheless imported the hostile environment theory of this statute. Why do we care? Because the federal government is one of enumerated powers only, the source under which Congress exercises its powers is central to the principles of Constitutional government. Congress is empowered by the Commerce Clause to directly govern the conditions of employment and has chosen to do so through Title VII. On the other hand, because Title VI and Title IX were enacted under the Spending Clause, Congress can only govern conditions indirectly, through a program's purse strings. Under Title VII, the very existence of discriminatory conditions constitutes a violation of the statute. In contrast, Spending Clause statutes are powerless when the program is not the actor who directly causes the discriminatory condition to exist. These courts rejected the student-to-student harassment theory under Title IX based primarily on this objection.

Second, courts opposing *Petaluma* have distinguished the Constitutional origins of Titles VI, VII and IX, and taken a technical, formalistic approach to the issue. According to this argument, the *Petaluma* court would have Title IX require schools to *affirmatively* act to stop or control student-to-student sexual harassment, while the Spending Clause only authorizes *negative* restrictions on a school's actions. This is a very fine distinction — the difference between affirmative and negative controls in the law is often more the result of semantics than the result of substantive differences. Another perspective of the *Petaluma* theory would be that Title IX restricts schools from condoning or fostering an educational condition which is sexually discriminatory. This construction arguably restricts the range of options available to a school and constitutes a *negative* or *restrictive* burden on the schools, not an *affirmative* burden.

Finally, the courts have argued that Title IX is based upon Title VI and not Title VII. Under such circumstances, the importation of Title VII substantive standards is inappropriate. Again, this argument appears to be legalistic and formalistic, where the question is not whether a court best serves the purpose of Title IX by appropriating Title VII standards, but whether it is justified by the origins of the statutes. Although Title IX was based on Title VI, from a broad perspective the courts would not violate the purpose and spirit of Title IX to combat sexual discrimination by adopting the extensively developed sexual harassment law under Title VII. There is no reason for the courts to create

parallel theories of sexual harassment under Title IX if such theories and standards are already available under Title VII — the federal court system is already sufficiently overburdened without the additional tasks of developing parallel theories of sexual harassment. Furthermore, the United States Supreme Court has already endorsed the adoption of substantial aspects of Title VII law into Title IX for teacher-to-student hostile environment sexual harassment.

The *Petaluma* court's holding reflected a natural sympathy for the victims of student-to-student sexual harassment. However, it may have gone out on a "legal limb" in its recognition of this cause of action under Title IX. Although there was a clear sequence of cases that supported the development of Title IX law in this direction, there was also an equally clear series of cases which rejected this trend. Finally, there are substantial arguments both for and against the recognition of student-to-student sexual harassment based on the source and construction of Title IX itself. In conclusion, the *Petaluma* court stretched the limits of Title IX jurisprudence farther than it had ever been taken before, and although recent federal district courts appear to have embraced this expansion, the appellate courts have not unanimously endorsed *Petaluma* and the Supreme Court has yet to consider the issue.

PART III: CONCLUSIONS

A. *Tradition and Translation Reconciled*

Part III, the last section of this Article, seeks to reconcile the opinions and conclusions of Part I and the traditional legal analysis of Part II. The interviews discussed in Part I of this Article demonstrated the school community's nearly uniform desire that the law require schools to respond to student-to-student sexual harassment, even if the response is ultimately ineffective. On the other hand, in Part II, traditional legal analysis led to the conclusion that the *Petaluma* holding may have been based upon an insecure legal foundation. This Part addresses the relationship between these two conclusions and considers whether the desire for Title IX liability within the school community informs the courts' legal analysis of Title IX.

Although the courts rejecting *Petaluma* made valid legal arguments, all were based on legalistic and technical points. These courts neither address the issue from Congress' underlying moti-

vation to stamp out sexual discrimination, nor do they discuss the benefits of adopting fully developed standards and theories under Title VII. Instead, they rely on legalistic reasoning to justify their conclusions. This approach is especially puzzling in light of the Supreme Court's prior command to interpret Title IX with "a sweep as broad as its language."²¹⁹

The question is why these courts would resort to such arguments in an effort to forestall the imposition of Title IX liability on schools for student-to-student sexual harassment. Perhaps there is an underlying motivation not based on the traditional legal justifications of statutory interpretation or legislative intent. The nature of their arguments permits the inference that these courts are generally reluctant to impose any further potential liabilities on schools. Certainly, such a motivation is understandable, if not laudable. There is no question that many school districts within the United States currently face budgetary and education crises. These courts may be acting on the natural sympathy for the problems of the school system and find imposing additional legal burdens and potential liability on the schools unfair. Moreover, in light of the inherent difficulties in controlling the behavior of children, the possibility of imposing significant legal liability on a school system based on the behavior of an uncontrollable student can be difficult to justify. For example, the court in *Aurelia D.* justified its rejection of *Petaluma*, stating in part "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity."²²⁰ Similarly, the Court of Appeals for the Fifth Circuit, in *Rowinsky*, observed that schools have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX.²²¹ The court went on to discuss an example where the parents of a female student discouraged her from attending school because they did not believe in education for females.²²² The *Rowinsky* court reasoned that under a *Petaluma* interpretation of Title IX, the school would be required to affirmatively act to stop the discrimination.²²³

219. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

220. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994).

221. *Rowinsky*, 80 F.3d at 1013.

222. *Id.* at 1013 n.15.

223. *Id.*

The results of Part I of this Article, however, directly address the concerns of these courts. First, the survey results provide a different perspective. Courts have focused on the actor creating a sexually hostile environment and have been reluctant to impose liability when the actor is not an agent of the school system. In contrast, the respondents to the interviews in Part I focus their attention on the school's response to complaints of sexual harassment. When a school responds to complaints, the school has expressed its condemnation of the behavior. On the other hand, when a school ignores complaints and allows harassing behavior to continue unchecked within its hallways, it is in fact condoning such behavior. It is this *de facto* approval through inaction that the school community focuses on and would prohibit. Furthermore, the voices of the school community are clear in what they demand from the law; the school must be responsible for its actions. The respondents were virtually uniform in believing that the student has a right to an education free from fear; the student cannot learn in the presence of fear. Under this principle, the respondents of the survey reasoned that the school must affirmatively act to provide an environment without fear. Even if its efforts are ultimately fruitless, the school must respond in good faith.

The applicability of the results in Part I to the issues raised in Part II rest on the reasoning that legal conclusions are not complete when formed in a social vacuum. The courts that reject the student-to-student sexual harassment theory relied on traditional methods of legal analysis and referred to sources which have been through a process of abstraction. This process carefully removes layer upon social and contextual layer from the law.²²⁴ The product, the judicial opinion, then constitutes the primary source of material to form legal conclusions. What is missing is the original context of the problem — the stories of the actors facing student-to-student sexual harassment in their own schools every day. As James White would argue, although the attorney must translate the client's story into the language of the law, the traditional methodology of legal analysis loses much of the original text in the process. When this happens, the law loses

224. First, the attorneys for each litigant translate their client's story into an abstract for the purposes of the trial. Then, the trial process itself limits the type and range of information available to the court. Lastly, the published opinion offers yet another refinement of the facts of the case made by the judge.

relevance to those it purports to serve: principals, teachers, parents, and students of society's schools.

Thus, the school community, speaking through the interviews of Part I of this Article, directly addressed the underlying issue concerning the courts which would reject *Petaluma*.²²⁵ These courts relied on a common sense prediction of the school community's rejection of any further legal intrusions into the operations of the school system. Surprisingly, however, Part I demonstrates that this prediction is wrong and that the school community embraces the legal requirement that a school respond to student-to-student sexual harassment. The school administration bears most of the burden with the imposition of legal liability because administrators' reactions to a problem would be reviewed by a court. Nonetheless, the principals interviewed fully agreed that the law must hold schools accountable for their responses to student-to-student sexual harassment. This belief stems in part from the principle that the school administration holds the greatest authority within the school and, as such, must respond to the students' cries for help. This is especially true in cases of sexual harassment which can have potentially devastating long-term effects on the victim. Moreover, in the absence of a legal duty to respond, some schools simply will refuse to address a victim's problems, especially if there is a strong competing interest in brushing the problem under the rug. As one principal asked, if a student is subjected to daily sexual harassment and the school refuses to help, who will?

B. *Doe v. Petaluma Revisited*

Assuming that the federal courts have a responsibility to develop Title IX to reflect the needs and requirements of the community, the question is what form and standard should the courts adopt. In *Doe v. Petaluma*, the court held that hostile environment sexual harassment between students is actionable under Title IX, but that liability is contingent upon a finding that the school intentionally discriminated against the plaintiff on the basis of sex. Similarly, the survey in Part I called for the imposition

225. This is not to say that the survey conducted for Part I of this Article completely represents the spectrum of opinions and perspectives within the scholastic community. The point being raised is that this survey reveals the fact that while courts try to make common sense decisions, they do so within a vacuum, isolated from the realities of society. The hope is that this survey provides a glimpse into the social context within which these issues reside.

of legal liability only if a school fails to respond in good faith after it was notified of student-to-student sexual harassment. Moreover, the respondents were similarly clear in rejecting the imposition of liability simply on the basis that sexual harassment had occurred. The two important issues were those of notice and response. The interviewees believed that formal notice of a problem through school procedures predicates the imposition of liability. This is due to the fact that most of the harassment occurs when adults are not present and in situations where observation is simply impossible, such as a crowded hallway. Furthermore, the vague and subjective nature of the standards involved, where behavior may be socially acceptable in one context and constitute harassment in another, persuaded the interviewees that the school cannot be required to act without notice. The survey results also focused on the school's response to a problem, rather than its effectiveness or results. This reflected the widespread belief that the students are ultimately beyond the control of the school administration. As one student observed, in the analogous situation of the school ban on smoking, the rule exists and is well known, but students just find ways to circumvent the ban.

Perhaps to the credit of the *Petaluma* court, the *Petaluma* legal standard and the standard that the school community would create are largely the same. Both reject strict liability solely on the basis of incidents of student-to-student sexual harassment. Instead, the emphasis is on a school's response to a problem. The *Petaluma* court would impose liability only with a showing of intentional discrimination, failure to act, or grossly inadequate responses to a problem as evidence of bad intent. Similarly, the respondents to the survey described a school's legal duty as the responsibility to respond as best as it could under the circumstances. The legal standard before imposing liability, from both perspectives, appears to be substantially higher than that of negligence, or a reasonable effort. Instead, there must be a showing of true bad faith by a school administration, to the extent of virtual inaction in the face of complaints brought to its attention, before the law should impose legal sanction. To this point, litigation has centered on the threshold issue of whether Title IX recognizes a cause of action against a school district for student-to-student sexual harassment. Assuming that this legal theory gains acceptance among federal courts, the next wave of litigation will explore and define the boundaries of the law. At issue will be

questions such as the elements of notice and the adequacy of a school administration's response.

Another theme struck by the interviews was the central role of education. The respondents were virtually uniform in describing the absolute need for educating the entire school community on the subject of sexual harassment. One goal of such education is preventive: when students learn what constitutes acceptable behavior and what constitutes sexual harassment, they will try to avoid unacceptable behavior. Another goal of education is to empower potential victims of harassment, not only to stand up to the harassment, but to be able to make a complaint to school administrators when a problem arises. The survey was equally clear, however, that the law should not impose a duty upon the schools to install such educational programs. The school context is so complex, and the situations the school administration faces so varying and unique, that the respondents believed that the school should be liable only in the absence of a good faith response to a problem. Part II of this Article is equally silent on the issue. The concerns of the courts arise only after an incident has taken place, and the issues center around accountability after the fact and not as much on the preventive measures a school might take. The educational steps as described by the school community are clearly aspirational, not practical. They can potentially reduce the incidents of sexual harassment among students, but it is also impossible to define standards by which to define whether a program is adequate, or even needed, in a particular school.

C. Conclusion

There is a problem of student-to-student sexual harassment in our schools today. The surveys cited in the Introduction and the results of the survey conducted for this Article reveal that such harassment occurs routinely within our schools' hallways. The *Petaluma* court's holding that Title IX prohibits student-to-student sexual harassment clearly broke new ground in Title IX law. It represented an effort by that court to react to this problem that students face daily, especially when no other federal case before *Petaluma* had recognized a cause of action based on student-to-student sexual harassment.

In Part II of this Article, however, legal analysis revealed that *Petaluma* may have been based on potentially vulnerable grounds. On the one hand, *Petaluma* relied on a sequence of Ti-

tle IX cases that gradually adopted Title VII principles, and it does not strain reason to consider a student as being "denied the benefits of" an educational program when driven to quit because of severe sexual harassment. On the other hand, some courts have expressed valid legal reasons to reject the student-to-student sexual harassment theory. But these reasons are generally legalistic and technical objections, and perhaps there are underlying reasons or concerns motivating these courts to rely on formalistic grounds to reject *Petaluma*. The reasonable inference is that these courts are motivated by the desire to avoid imposing additional legal restrictions or duties upon already beleaguered school systems. The results of Part I, however, directly address this concern and challenge the courts' belief that additional legal protections are not welcome. On the contrary, the school community has expressed its desire that the law require a school to react to complaints of student-to-student sexual harassment. Taking Parts I and II of this Article together, the results neatly dovetail into the conclusion that Title IX properly prohibits student-to-student sexual harassment and that a school must respond to known student-to-student sexual harassment.

