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BEYOND THE CAMEL'S NOSE: INSTITUTIONAL LIABILITY FOR PEER SEXUAL HARASSMENT ON CAMPUS

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I. INTRODUCTION

In recent years, the number of reported cases involving allegations of peer sexual harassment[1] at primary and secondary schools has increased dramatically.[2] Indeed, newspapers are filled with stories of real and alleged peer sexual harassment, involving young children on the playground and in the classroom.[3] In perhaps the most reported recent case, a North Carolina school district punished a six year old boy, Johnathon Prevette, for kissing a female classmate on the playground.[4] Such cases create the misimpression that peer sexual harassment is not a legitimate problem in the nation's schools and that school districts tend to overreact to complaints of peer sexual harassment.[5] While school officials have overreacted in some cases, numerous legitimate instances of peer sexual harassment occur every year.[6] As a result, institutional liability for peer sexual harassment has become an important issue of public policy in the nation's courts and legislative bodies.

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1. In this Article, the term "peer sexual harassment" refers exclusively to student harassment of other students. It does not include faculty members, coaches, administrators, or other staff members harassing students.

2. Sylvia Hermann Bukoffsky, Note, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX*, 42 WAYNE L. REV. 171, 186 (1995); *see also* Dawn A. Ellison, Comment, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2060 (1997) (noting that *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) is the impetus for a recent increase in education-related sexual harassment claims); Wendy G. Winters, Book Review, *When Bias Hinders School Performance*, WASH. POST, Aug. 6, 1995, *Education Review* at 20 (noting that reports of in-school sexual harassment of girls by boys are increasing).

3. *See, e.g.*, Cathy Cummins, *Girl, 10, Accused of Sexual Harassing After Determining Boy Was Teased, School Backs Off Suspension Threat*, ROCKY MTN. NEWS, Nov. 1, 1997, at 4A ("A fifth grade girl . . . was accused of sexual harassment and threatened with suspension . . . for asking a classmate if he liked her."); Geoffrey Etnyre, *Getting Front Page Fever Every Day*, WASH. TIMES, May 19, 1997, at F10 (reporting that a six year old North Carolina boy was suspended from school for sexual harassment after kissing a girl on the playground).

4. Ellison, *supra* note 2, at 2049.

5. Kathleen Megan, *Sexual Harassment a Part of Most Students' Education*, HARTFORD COURANT, Dec. 22, 1996, at A1.

6. *Id.*

Unfortunately, the appropriate standard of liability for peer sexual harassment in higher education has not been finally adjudicated or determined in the United States. Courts and commentators disagree whether, and under what circumstances, an educational institution may be held liable for peer sexual harassment. The federal circuit courts are split on the issue of liability under Title IX[7] for ignoring or improperly investigating and handling peer sexual harassment. Several decisions suggest that courts can apply Title VII sexual harassment principles in Title IX peer sexual harassment cases by analogy,[8] but at least two circuit courts have rejected that conclusion.[9] One of those circuits rejects any kind of institutional liability under Title IX for peer sexual harassment.[10] The other circuit holds that a school can be held liable for peer sexual harassment under Title IX only if it somehow treats complaints by female students differently than it treats complaints by male students.[11] And most recently, the Supreme Court has rejected applying Title VII standards to a Title IX teacher-student sexually hostile environment case.[12]

To further complicate matters, in March 1997 the United States Department of Education's Office of Civil Rights ("OCR") issued a set of written guidelines entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties"[13] (the "Guidance"). The Guidance applies to students at every educational level, from kindergarten through higher education. While the Guidance is mandatory for educational institutions, the federal courts have evinced an unwillingness to follow it.[14]

This Article sets forth the argument that the constructive notice standard of liability contained in the Guidance should not apply to peer sexual harassment cases in the higher education setting. The Article also asserts that courts should not apply Title VII sexual harassment principles in Title IX cases

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7. 20 U.S.C. § 1681 (1994). Title IX of the Education Amendments of 1972 ("Title IX") mandates that individuals may not be discriminated against on the basis of their sex in any educational programs or activities that receive federal funding.

8. *See, e.g.*, Doe v. University of Ill., 138 F.3d 653, 665-67 (7th Cir. 1998) (applying Title VII standards); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 959-61 (4th Cir. 1997), *vacated & reh'g granted* (4th Cir. Feb. 5, 1998) (applying Title VII constructive notice standard); Seamons v. Snow, 84 F.3d 1226, 1132 (10th Cir. 1996) (citing Davis v. Monroe Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996)); *Davis*, 74 F.3d at 1194 (applying Title VII principles).

9. *See, e.g.*, Davis v. Monroe Bd. of Educ., 120 F.3d 1390, 1392 (11th Cir. 1997) (affirming district court's refusal to apply Title VII principles); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996) (holding that a cause of action for peer sexual harassment exists only when the school treats males' and females' complaints differently); Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998) (altering the Tenth Circuit's test for institutional liability without explicitly overruling *Seamons v. Snow*).

10. *Davis*, 120 F.3d at 1406.

11. *Rowinsky*, 80 F.3d at 1016.

12. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998).

13. 62 Fed. Reg. 12,034 (1997) [hereinafter Guidance].

14. *See infra* note 125 and accompanying text.

alleging institutional liability for peer sexual harassment. Finally, the Article demonstrates that the rationale of those cases finding institutional liability for peer sexual harassment at the primary and secondary school levels should not be extended to colleges and universities. As will be discussed, the nature of the relationship between primary and secondary educational institutions and their students is fundamentally different from the relationship between higher education institutions and their students. Moreover, the legal duty for negligence that is owed to college students by higher education institutions is substantially lower than the legal duty for negligence owed to students by primary and secondary schools. The OCR's attempt, through the Guidance, to place colleges and universities on the same plane as primary and secondary schools with respect to institutional liability for peer sexual harassment is fundamentally flawed and unsupported by recent developments in the case law. It should thus be rejected by the courts.

Part II of this Article summarizes and discusses the Guidance. Part III discusses the leading reported peer sexual harassment cases involving primary and secondary schools, highlighting the dearth of peer sexual harassment cases involving colleges and universities. Part III also discusses the split of authority in the federal courts concerning the applicability of Title VII principles in Title IX peer sexual harassment cases. Finally, Part IV advances the argument that the rationale of the peer harassment cases involving primary and secondary schools does not make sense in the higher education setting and should not be applied in cases arising at colleges and universities.

II. THE DEPARTMENT OF EDUCATION GUIDANCE

The OCR recently adopted the Guidance to outline the proper steps "schools"[15] must take in response to sexual harassment complaints. Following the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*[16] and its progeny, the Guidance indicates that sexual harassment is a form of sex discrimination prohibited by Title IX. The Guidance identifies two types of sexual harassment: quid pro quo and hostile environment. The Guidance defines quid pro quo sexual harassment as any case where "[a] school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature."[17] The Guidance defines hostile environment sexual harassment as sexually harassing conduct

15. The Guidance defines "school" to include primary and secondary institutions, colleges, and universities. Guidance, *supra* note 13, at 12,038.

16. 503 U.S. 60 (1992). In *Franklin*, a teacher to student harassment case, the Court applied legal principles that courts established in workplace sexual harassment cases under Title VII to school sexual harassment cases.

17. Guidance, *supra* note 13, at 12,038 (endnote omitted).

"by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive educational environment."[18]

The Guidance states that Title IX applies to all public and private schools receiving federal funding and defines "education program or activity" as "all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."[19] With regard to whom Title IX protects, the Guidance is clear that both male and female students are to be protected against sexual harassment, regardless of the sex of the victim or the harasser.[20]

Citing the Supreme Court's decision in *Meritor Savings Bank v. Vinson*,[21] the Guidance applies agency principles to determine a school's liability for sexual harassment.[22] The Guidance breaks the discussion of liability into two categories: (1) cases involving sexual harassment of students by employees of the school and (2) cases involving sexual harassment of students by peers or third parties.[23]

According to the Guidance, a school may be held liable under Title IX for the sexual harassment of a student by one or more other students if: "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action."[24] Under this standard, a school is not responsible on an agency theory for the actions of its students or third parties. It is only potentially liable for its institutional response to a complaint of peer sexual harassment, such as its investigation (or failure to properly investigate) or response to such a complaint.[25]

The Guidance directs the Department of Education ("DOE") to determine

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18. *Id.*

19. *Id.*

20. *Id.*

21. 477 U.S. 57 (1986). In *Vinson*, the Court ruled that Title VII covers hostile environment sexual harassment in the workplace. *Id.* at 65-67. The Court established that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'" *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

22. Guidance, *supra* note 13, at 12,039.

23. *Id.* at 12,039-40. The former category is beyond the scope of this Article and will not be addressed. Similarly, potential institutional liability for quid pro quo sexual harassment is not addressed in this Article because this form of sexual harassment, by definition, typically does not involve peers or peer sexual harassment but employees of the educational institution.

24. *Id.* at 12,039. The Department of Education followed the principles set forth in the Restatement (Second) of Agency. *See* RESTATEMENT (SECOND) OF AGENCY: LIABILITY OF PRINCIPAL TO THIRD PERSON; TORTS § 219.2(b) (1958) (stating "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (b) the master was negligent or reckless.").

25. Guidance, *supra* note 13, at 12,040.

in each case if the action in question constituted sexual harassment, and whether the school had notice of the harassment. If both criteria are met, the DOE must assess the appropriateness of the school's actions in dealing with the situation. In making the initial determination that sexual harassment occurred, the Guidance focuses on two primary elements: (1) the welcomeness of the conduct and (2) the persistence and pervasiveness of the conduct.[26]

Conduct is considered to be unwelcome if "the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'"[27] This is not a simple determination to make. A student's failure to resist or complain about sexually harassing conduct does not necessarily mean that the student welcomed the conduct.[28] Several factors must be considered to answer the question of welcomeness. The ages of the student and the alleged harasser are key factors: the younger the student, the stronger the presumption that the conduct was unwelcome.[29] From this standpoint, as the age of the student increases, the presumption of unwelcomeness decreases.[30] The relationship of the harasser and the victim is also an important consideration. In a case of peer sexual harassment, where the welcomeness of the conduct is in question, a determination must be made based on the "totality of the circumstances."[31] This standard is not clearly developed or defined in the reported cases or the Guidance.

The alleged misconduct must also be severe, persistent, or pervasive to constitute sexual harassment. To make this determination, the Guidance uses the two-pronged test established by the United States Supreme Court in *Harris v. Forklift Systems, Inc.*[32] In *Harris* the Court concluded that conduct rises to the level of sexual harassment when an abusive environment exists in the subjective view of the victim and in the objective view of a reasonable person.[33] All relevant circumstances must be considered in making this determination.[34] The Guidance lists a number of relevant factors including the age and sex of both the harasser and the victim, their relationship, and the number of people involved.[35] In addition, the severity and frequency of the conduct are important

26. *Id.* at 12,040-42.

27. *Id.* (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)).

28. *See id.* at 12,040; *cf.* Lipsett v. University of P.R., 864 F.2d 881, 898 (1st Cir. 1988) ("[A] woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome.").

29. Guidance, *supra* note 13, at 12,040 ("OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual.").

30. *Id.*

31. *Id.* at 12,041 (including statements of witness, credibility of evidence, history of harassment, post-confrontation behavior or action, and other contemporaneous evidence).

32. *Id.* at 12,041 & nn.43-44 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993)).

33. *Harris*, 510 U.S. at 21-22.

34. Guidance, *supra* note 13, at 12,041 & n.45 (citing *Harris*, 510 U.S. at 23).

35. *Id.* at 12,041-42.

considerations.[36] If conduct is of a sufficiently severe nature, one incident can constitute hostile environment sexual harassment; if conduct that is not severe in nature is repeated a number of times, the conduct can rise to the level of hostile environment sexual harassment.[37]

If alleged misconduct is unwelcome and sufficiently severe, persistent, or pervasive, the Guidance requires an examination of whether the school had notice of the conduct. The Guidance states that "[a] school will be in violation of Title IX if the school 'has notice' of a sexually hostile environment and fails to take immediate and appropriate corrective action."[38] A school has notice of a hostile environment "if it actually 'knew, or in the exercise of reasonable care, should have known' about the harassment."[39] This definition provides for both actual and constructive notice of the sexual harassment by "an agent or responsible employee of the school."[40] A determination of who constitutes an agent or responsible employee will depend on such factors as the "authority actually given to the employee and the age of the student."[41] Actual notice can exist if the harassment is directly reported to a school employee, if the employee actually witnessed the harassment, or if the employee received information about the harassment from an indirect source such as a member of the community or the media.[42]

The Guidance allows for constructive notice of the harassment to exist "if the school would have found out about the harassment through a 'reasonably diligent inquiry.'"[43] While this standard is highly dependent upon the facts of a particular case, the Guidance does provide examples of constructive notice or knowledge. If a school knows of some incidents of sexual harassment, it may be liable for additional cases if the DOE determines that an investigation of the known incidents would have led to the discovery of the other cases.[44] A school also has constructive notice "if the harassment is widespread, openly practiced, or well-known to students and staff."[45] This could be the case if the harassment occurs in the open, such as in the hallways of the school, or if it takes the form of such things as graffiti in public areas.[46]

Once the school has either actual or constructive notice of the possible sexually harassing conduct, "[the school] should take immediate and appropriate steps to investigate . . . and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and

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36. *Id.*
37. *Id.*
38. *Id.* at 12,042.
39. *Id.* (quoting Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991)).
40. *Id.*
41. *Id.* at n.65.
42. *Id.* at 12,042.
43. *Id.* (citing Yates v. Avco Corp., 819 F.2d 630, 634-36 (6th Cir. 1987)).
44. *Id.*
45. *Id.*
46. *Id.*

prevent harassment from occurring again."[47] The Guidance requires each school to have in place a prompt and equitable grievance procedure for sexual harassment.[48] Even if a case of sexual harassment has not occurred in a school, that school will still be in violation of Title IX if it does not have procedures in place for dealing with sexual harassment.[49] A nondiscrimination policy and grievance procedures are sufficient to meet this requirement as long as they deal effectively with the problem of sexual harassment.[50] The Guidance outlines a number of elements to consider when determining whether a school's policy is equipped to handle sexual harassment claims sufficiently, including the following: (1) whether students, parents, and employees have notice concerning how to file a complaint; (2) whether the policy provides for adequate, reliable, and impartial investigation of complaints; (3) whether the policy designates reasonably prompt timeframes for major parts of the complaint process; and (4) whether the policy provides notice to the parties of the outcome of the complaint.[51] A school must ensure that students are aware of the grievance procedure and how it works.[52] In addition, every school must designate at least one employee to coordinate complaints and carry out the school's Title IX responsibilities.[53] This employee must have adequate training in what constitutes sexual harassment,[54] and schools must make all students and employees aware of the designated person's identity, address, and telephone number.[55]

Once a school has notice of sexual harassment, it is required under Title IX to investigate the alleged incident, even if the victim does not request an investigation.[56] If the school receives notice from a third party of the alleged harassment, the school must weigh several factors to determine whether it can confirm the complaint and whether investigation of the allegations is reasonable.[57] If the school can confirm the allegations, it must then proceed with an investigation of the alleged harassment.[58] While this investigation is ongoing, the school may have to take interim measures to ensure that the alleged harassment does not continued.[59] Such measures could include moving the alleged target or harasser into another class or living facility.[60] However,

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47. *Id.*
48. *Id.* at 12,044 (citing 34 C.F.R. § 106.8(b) (1997)).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 12,045.
53. *Id.* (citing 34 C.F.R. § 106.8(a) (1997)).
54. *Id.*
55. *Id.* (citing 34 C.F.R. § 106.8(a) (1997)).
56. *Id.* at 12,042.
57. *Id.* at 12,044; *see supra* text accompanying note 51 (listing factors school must weigh).
58. Guidance, *supra* note 13, at 12,044.
59. *Id.* at 12,043.
60. *Id.*

during the investigation process, the school must take every available measure to protect the identities of the parties involved.[61] Once the school, through its investigation, determines that sexual harassment did occur, "it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation."[62] For example, a school could warn or take disciplinary action against the harasser, depending upon the severity of the conduct.[63] Furthermore, if the school determines that the harassment has created a hostile environment, the school is responsible for eliminating the hostility and for taking reasonable steps to correct its effects.[64] These steps could include moving the target or harasser and ensuring that student's academic record is not adversely affected by the move.[65] If the school determines that the hostile environment has affected an entire class or group of students, the school may have to provide the students with additional information on sexual harassment and take other similar measures to repair the educational environment.[66]

Before applying the Guidance to a higher education setting, this Article first examines the well-developed body of case law on Title IX peer sexual harassment at the kindergarten through twelfth grade level. The case law highlights a number of critically important distinctions between higher education institutions and primary and secondary schools. The cases emphasize the different levels of control these two types of educational institutions exercise over their students and the legal duties they owe to their respective students for issues such as negligence.

III. THE CASE LAW

A. Supreme Court Decisions Concerning Title IX Sexual Harassment

The history of sexual harassment litigation under Title IX begins in large part with the United States Supreme Court's decision in *Cannon v. University of Chicago*.[67] In *Cannon* a female student filed suits against two private medical schools after they denied her admission.[68] The student alleged that the institutions had discriminated against her on the basis of her sex in violation of Title IX.[69] The United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of her complaint, ruling that Title IX does not

61. *Id.* at 12,037.
62. *Id.* at 12,043.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. 441 U.S. 677 (1979).
68. *Id.* at 680 & n.1.
69. *Id.* at 680 & n.2.

create a private cause of action.[70] The Seventh Circuit noted that Title IX does not expressly authorize a private right of action and ruled that Congress intended termination of the institution's financial support to be the sole remedy for a Title IX violation.[71] The Supreme Court reversed, ruling that Congress patterned Title IX after Title VI.[72] Moreover, at the time Congress enacted Title IX "the critical language in Title VI had already been construed as creating a private remedy."[73] Therefore, the Court concluded that a school in violation of Title IX has the potential of losing federal funding and being liable to an individual plaintiff.[74]

Following *Cannon*, the Court's next major step in Title IX sexual harassment claims was its decision in *Franklin v. Gwinnett County Public Schools*.[75] *Franklin* involved a student's allegation of sexual harassment by a teacher. *Franklin* is the closest the Supreme Court has ever come to making a definitive statement on the liability of schools for failing to stop sexual harassment. Many lower courts that have attempted to deal with this problem have considered the case as a cornerstone on the issue.[76] In *Franklin* the Court considered a female student's Title IX claim for monetary damages against her school for its failure to stop a teacher from sexually harassing her.[77] The student alleged that the school had actual knowledge of the harassment, and that it failed to take necessary actions to stop the harassment.[78] The Court noted that remedies available under Spending Clause statutes were limited when the school's conduct was unintentional.[79] Spending Clause statutes are meant to put schools on notice that if they accept funding under the statute, they will be held accountable if they intentionally violate it.[80] Spending Clause statutes give schools the option, albeit a limited one, of accepting or rejecting governmental funding.[31] The Court ruled that notice was not a problem in *Franklin* because it considered sexual harassment of a student by a teacher to be intentional conduct on the part of the school.[82] The Court wrote:

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70. *Id.* at 683.

71. *Id.* at 683-84.

72. *Id.* at 694. Section 601 of Title VI of the Civil Rights Act of 1964 provides: "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. § 2000d (1994).

73. *Cannon*, 441 U.S. at 696.

74. *Id.* at 704-05.

75. 503 U.S. 60 (1992).

76. *See, e.g.*, Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998) (considering *Franklin*); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1416-18 (N.D. Cal. 1996) (noting the importance of *Franklin*).

77. *Franklin*, 503 U.S. at 63.

78. *Id.* at 64.

79. *Id.* at 74 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28-29 (1981)).

80. *Id.* (citing *Halderman*, 451 U.S. at 17).

81. *Halderman*, 451 U.S. at 29.

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

> The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.[83]

In reaching its conclusion, the Court combined the implied cause of action under Title IX from *Cannon* with the cause of action provided to employees under Title VII for sexual harassment by their superiors. The Court's reference to "intentional actions" and its citation to *Meritor*, a Title VII sexual harassment case, have led to vast amounts of uncertainty, confusion, and debate in peer sexual harassment case law.

The most recent Supreme Court decision concerning school liability for sexual harassment, *Gebser v. Lago Vista Independent School District*,[84] attempted to clear up some of this uncertainty. In *Gebser* an eighth grade girl had a consensual sexual relationship with one of her male teachers.[85] The teacher initiated the relationship, which continued for several months without the school board or the girl's parents' knowledge.[86] After a police officer discovered the teacher and the student during a sexual encounter, the school district immediately fired the teacher.[87] At the time, the Lago Vista School District did not have a grievance procedure or anti-harassment policy in place.[88] Gebser filed suit against the school district, alleging violations of Title IX.[89]

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83. *Id.* (citations omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

84. 118 S. Ct. 1989 (1998). In addition to *Gebser*, the Supreme Court decided three other important sexual harassment cases in 1998. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Oncale v. Sundower Offshore Servs., Inc., 118 S. Ct. 998 (1998). However, these cases were not peer sexual harassment cases, with the exception of *Oncale*, which was purely a Title VII case and did not address the standard of liability. In addition, all of these cases arose in the workplace under Title VII, not in an educational setting under Title IX. Therefore, they are beyond the scope of this Article.

85. *Gebser*, 118 S. Ct. at 1993.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

The district court dismissed the plaintiff's claim on the grounds that the school district had no notice of the harassment.[90] The Fifth Circuit Court of Appeals affirmed the dismissal.[91]

On appeal to the United States Supreme Court, Gebser alleged that in light of the Court's *Franklin* decision, the school district should be held liable even if it had only constructive notice of the harassment.[92] In making this argument, Gebser relied upon the Guidance.[93] But the Court rejected Gebser's constructive notice argument, indicating that its reference to *Meritor* in the *Franklin* decision was not intended to establish a constructive notice standard.[94] The majority wrote:

> Whether educational institutions can be said to violate Title IX based solely on principles of *respondeat superior* or constructive notice was not resolved by *Franklin*'s citation of *Meritor*. That reference to *Meritor* was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX.[95]

Having addressed the ambiguity in its *Franklin* decision, the Court went on to consider Congress' intent in enacting Title IX. After concluding that Congress did not intend to permit unlimited recovery under Title IX without notice, the Court concluded "that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice (i.e., without actual notice to a school district official)."[96] The Court held that a school has actual notice when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf"[97] is informed. Once such an official is informed, the school still will not be held liable unless the school's response to the alleged harassment amounts to "deliberate indifference to discrimination."[98] When a plaintiff meets all of these burdens, then a court will hold a school district responsible for the harassment, and the plaintiff may recover.[99]

While *Gebser* dealt with a teacher-student sexual harassment scenario, it should prove instructive in addressing the issue of institutional liability for peer sexual harassment. *Gebser* clarifies the Court's intent in *Franklin* with its

90. *Id.* at 1993-94.
91. *Id.* at 1994.
92. *Id.* at 1995.
93. *Id.*
94. *Id.*
95. *Id.* (citing Oncale v. Sundower Offshore Servs., Inc., 118 S. Ct. 998 (1998)).
96. *Id.* at 1997.
97. *Id.* at 1999.
98. *Id.*
99. *Id.*

citation to *Meritor*. This is an important development in that, as will be discussed below, the federal courts have interpreted the citation in fundamentally different ways, reaching opposite outcomes in factually similar cases. *Gebser* is also important in that it acknowledges the Guidance and its call for a constructive notice standard but rejects the Guidance's constructive notice standard in an entire classification of teacher-student harassment cases.

B. Circuit Court Decisions Concerning Title IX Peer Sexual Harassment

Among the United States Courts of Appeals, five circuits (the Eleventh, Fifth, Tenth, Fourth, and Seventh) appear to have considered the issue of peer sexual harassment in schools.[100]

1. Davis v. Monroe County Board of Education

Davis v. Monroe County Board of Education[101] presented the Eleventh Circuit with a Title IX peer sexual harassment case. In *Davis* a fifth grader filed suit under Title IX against her school for failure to keep a male classmate from sexually harassing her both physically and verbally.[102] The harassment occurred over a six-month period and involved sexually charged verbal assaults and physical touching.[103] The girl's mother, on several occasions, requested the school principal's intervention, but the school took no action to separate the children or to discipline the boy.[104] The mother eventually contacted the local police; they charged the boy, and he pled guilty to sexual battery.[105] The complaint in the district court alleged that the victim's grades and emotional well-being suffered to the point that she wrote a suicide note.[106] However, the district court dismissed her complaint, holding that the harassing behavior was not part of a school activity or program.[107]

A three-judge panel of the Eleventh Circuit initially interpreted the Supreme Court's decision in *Franklin* and reversed the district court's dismissal, ruling that Title IX does allow such a claim.[108] In assessing the school's liability, the court applied a Title VII test, citing the Supreme Court's

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100. *See* Doe v. University of Ill., 138 F.3d 653 (7th Cir. 1998); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997); Davis v. Monroe Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Seamons v. Snow, 84 F.3d 1126 (10th Cir. 1996).

101. 74 F.3d 1186 (11th Cir. 1996), *vacated & reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996). The court of appeals affirmed the district court on rehearing. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997).

102. *Davis*, 74 F.3d at 1188-89.

103. *Id.*

104. *Id.* at 1189.

105. *Id.*

106. *Id.*

107. *Id.* at 1188.

108. *Id.* at 1191.

reference to *Meritor* in *Franklin*.[109] Under this test, a plaintiff must prove:

> (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[110]

As for the institutional liability in the fifth part of the test, the court applied a Title VII constructive notice standard that would make the school liable if it "knew or should have known of the harassment in question and failed to take prompt remedial action."[111] Under this standard, a plaintiff does not have to prove that the school had actual knowledge of the harassment. Constructive knowledge is sufficient to prove intentional discrimination on the part of a school.[112]

The initial *Davis* decision had a major impact on peer sexual harassment law. Following *Davis* many of the lower courts that considered this issue adopted either the *Davis* court's five-part test or a variation of it.[113] However, the Eleventh Circuit vacated the initial *Davis* decision and granted an en banc rehearing.[114] In its en banc rehearing,[115] the Eleventh Circuit completely departed from the conclusions reached by the initial panel. The en banc court ruled that Title IX does not allow a student to bring a peer sexual harassment claim against a school.[116] The court based its decision in large measure on its analysis of statutes passed by Congress pursuant to the Spending Clause.[117] The court held that "[w]hen Congress enacts legislation pursuant to the Spending Clause, it in effect offers to form a contract with potential recipients of federal funding."[118] The court viewed this contractual relationship as completely voluntary. "To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding."[119] The Eleventh Circuit ruled that the only sexual harassment

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109. *Id.*
110. *Id.* at 1194.
111. *Id.* at 1195 (quoting Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982)).
112. *Id.*
113. *See infra* Part III.C.
114. Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996).
115. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997).
116. *Id.* at 1406.
117. *Id.* at 1399.
118. *Id.*
119. *Id.* (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

violation of which the schools had notice when they accepted federal funding was teacher-to-student sexual harassment.[120] The court found that allowing a cause of action for peer sexual harassment would place schools at risk of a large number of suits and enormous litigation expenses.[121] This increased risk, in the court's opinion, would force schools to reconsider their decision to accept federal funding.[122]

The en banc Eleventh Circuit also ruled that Title VII liability standards cannot be applied in Title IX cases because Congress enacted Title VII pursuant to the Commerce Clause and to the Fourteenth Amendment to the United States Constitution, not pursuant to the Spending Clause.[123] The court deemed Title IX liability to be much narrower than Title VII liability. The court noted that the agency principles which attach liability under Title VII are not applicable in the peer sexual harassment context because the relationship between employers and employees is not comparable to the relationship between a school and its students.[124]

In reaching this holding, the court considered and rejected the Guidance.[125] As indicated in Part II of this Article, the Guidance calls for the application of Title VII standards in Title IX peer sexual harassment cases, including the Title VII "knew or should have known" standard.[126] In considering and rejecting the Guidance's standard of constructive notice, the Eleventh Circuit wrote:

> According to the OCR, however, the official may be liable even if he did not know about the harassment: the official may cause the school to violate Title IX if he failed to exercise "due care" in discovering the misconduct . . . . According to appellant and the Department of Justice, the Board received clear notice of this form of liability when it accepted federal funding under Title IX. We think not.[127]

In reaching its decision, the Eleventh Circuit clearly took into account the standards that the Guidance established and rejected them in the context of peer sexual harassment cases.

2. Rowinsky v. Bryan Independent School District

The Fifth Circuit reached a similar conclusion in *Rowinsky v. Bryan*

120. *Id.* at 1401.
121. *Id.* at 1401, 1404.
122. *Id.* at 1401.
123. *Id.* at 1401 n.13.
124. *Id.*
125. *Id.* at 1401 n.23 (citing Guidance, *supra* note 13, at 12,034).
126. *See supra* text accompanying note 39.
127. *Davis*, 120 F.3d at 1405 n.23 (citation omitted).

Independent School District.[128] In *Rowinsky* the mother of two eighth-grade girls brought a Title IX action against the school district for peer sexual harassment. Boys riding on the same public school bus allegedly verbally and physically harassed the girls on many occasions.[129] One boy regularly swatted one of the girl's bottoms in the aisle of the bus, asked for her bra and panty sizes, and called her degrading names.[130] He also grabbed one girl's genital area.[131] The girls complained to the school bus driver about the harassing conduct at least eight times.[132] In addition, the girls' mother complained to school officials on several occasions.[133]

Nevertheless, the district court held that the plaintiffs failed to state a claim under Title IX because no evidence existed to prove the school district discriminated against the plaintiffs on the basis of sex.[134] In assessing the plaintiffs' claim, the Fifth Circuit gave great weight to the fact that Congress enacted Title IX under the Spending Clause.[135] The court found that "[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of [T]itle IX."[136]

On appeal, the Fifth Circuit narrowly construed intentional sex discrimination. The court noted that Congress discussed only grant recipients' potential practices in the congressional debates leading to the passage of Title IX.[137] Congress did not consider actions of third parties and students on the record in the passage of the statute. As a result, the Fifth Circuit concluded:

> In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate [T]itle IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.[138]

The Fifth Circuit, therefore, did recognize a limited cause of action against

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128. 80 F.3d 1006 (5th Cir. 1996).
129. *Id.* at 1008.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1010.
135. *Id.* at 1012-13.
136. *Id.* at 1013.
137. *Id.* at 1013-14 (citing Cannon v. University of Chicago, 441 U.S. 677, 704 (1979); 118 CONG. REC. 5803-12 (1972)).
138. *Rowinsky*, 80 F.3d at 1016.

schools for intentional discrimination in peer sexual harassment cases. However, requiring a plaintiff to show disparate treatment by a school in order to prevail severely limits the universe of circumstances under which a student will be successful when bringing a peer sexual harassment claim against a school in the Fifth Circuit.

3. Seamons v. Snow

One month after the *Rowinsky* decision, the Tenth Circuit, in *Seamons v. Snow*,[139] considered a unique peer sexual harassment case involving the hazing of a male high school student, Brian Seamons. Seamons's football teammates tied him, without clothes, to a towel bar in the school's locker room.[140] The teammates then brought one of Seamons's former girlfriends into the locker room to witness the incident.[141] Seamons reported the incident to the administration, including the school's football coach and principal.[142] The football coach ordered Seamons to apologize to the team for betraying them by reporting the incident, and when he refused to apologize, the coach removed him from the team.[143] The school district responded to the incident by canceling the final football game of the season.[144] Seamons claimed that after the cancellation of the game his fellow students "threatened and harassed" him.[145]

In his subsequent Title IX hostile environment claim, Seamons alleged that the school's response to the incident was sexually discriminatory because the school expected him to "conform to a macho male stereotype."[146] Seamons argued that his football coach's suggestion that he "should have taken it like a man" evidenced the sexual discrimination.[147] In considering Seamons's claim, the Tenth Circuit adopted the five-part test used by the Eleventh Circuit panel in its original, now vacated, *Davis* decision.[148] However, in applying the test, the Tenth Circuit did not rule on the proper standard of liability for the school. The court concluded that Seamons failed to make even a threshold showing that he had been discriminated against or harassed on the basis of his gender.[149] Even though the school's response to the incident may have led to the hostility that Seamons faced from his classmates, the court concluded that the school's decision to cancel the final football game was not an attempt "to exacerbate or

139. 84 F.3d 1226 (10th Cir. 1996).
140. *Id.* at 1230.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1232 (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996)).
149. *Id.* at 1233.

create a hostile sexual environment for Brian."[150] Because Seamons's case did not rise to the level of sexual harassment, the court did not reach the question of institutional liability or the appropriate legal standard for such liability, noting that the legal standard remains unclear.[151] The Tenth Circuit dealt with this uncertainty again in *Morse v. Regents of the University of Colorado*.[152]

4. Brzonkala v. Virginia Polytechnic Institute & State University

A three-judge panel of the Fourth Circuit addressed institutional liability for peer sexual harassment in the case *Brzonkala v. Virginia Polytechnic Institute & State University*.[153] Within several months, the Fourth Circuit vacated the three-judge panel's decision and granted en banc review before the full Fourth Circuit. As of this writing, the Fourth Circuit has not rendered a decision. However, the recently vacated panel decision remains instructive because it is the first judicial decision to find institutional liability in a college or university peer sexual harassment case. The case involved a Virginia Tech freshman who was allegedly raped by two members of the university's football team.[154] A panel that conducted a university disciplinary hearing under the University's Sexual Assault Policy found one player, who admitted to having sex with Brzonkala after she objected, violated the policy and suspended that player from the university for two semesters.[155] Citing the university's failure to follow properly its own internal policies and procedures for dealing with sexual assault allegations, the player appealed the suspension and threatened to sue the school on due process grounds.[156] The university gave the player a second hearing, this time under the University's Abusive Conduct Policy; the panel in the second hearing found the player violated a university policy prohibiting the use of abusive language.[157] Again, the school gave him a two-semester suspension.[158] However, the university's Senior Vice President and Provost–citing as precedent the punishments meted out in prior cases involving violations of the Abusive Conduct Policy—ruled that the suspension was too harsh a penalty.[159] Based on this ruling, Virginia Tech permitted the player to return.[160]

No one informed Brzonkala of the Provost's ruling. She discovered it by

150. *Id.*
151. *Id.* at 1232 n.7.
152. *See infra* Part III.B.6.
153. 132 F.3d 949 (4th Cir. 1997), *vacated & reh'g granted* (4th Cir. Feb. 5, 1998).
154. *Id.* at 953.
155. *Id.* at 954. With respect to the second student-athlete, the panel found insufficient evidence of a violation. *Id.*
156. *Id.*
157. *Id.* at 955.
158. *Id.*
159. *Id.*
160. *Id.*

reading a newspaper article.[161] Upon learning that the player was again on campus, Brzonkala feared for her safety and declined to return for the fall semester.[162] Brzonkala felt that the university's actions displayed a disbelief in her allegations and filed suit against the university, alleging several claims, including a Title IX violation based on the university's failure to handle her rape claim adequately and to punish the admitted offender.[163] However, the district court dismissed her Title IX claim.[164]

On appeal, a three-judge panel of the Fourth Circuit ruled that it must apply Title VII principles in assessing the university's liability under Title IX.[165] In doing so, the court adopted the same five-part test that the Eleventh Circuit adopted in its original, now vacated, *Davis* decision. On the notice prong of the test, the court wrote, "We must determine whether Brzonkala has alleged facts sufficient to support an inference that Virginia Tech 'knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action.'"[166] With this statement, the Fourth Circuit became the only circuit court in the country to adopt a Title VII standard of constructive notice for peer sexual harassment. However, because the university had actual notice, the court did not further develop its constructive notice standard.[167] The court simply ruled that the rape itself created a hostile environment for Brzonkala, and the university had a duty to take remedial action.[168] The university's reversal of its suspension decision and what the panel obviously perceived as an apparent lack of any real punishment for the player created a question as to whether the university acted reasonably in responding to the plaintiff's harassment claim.[169]

5. *Doe v. University of Illinois*

Shortly following the *Brzonkala* decision, the Seventh Circuit considered the issue of institutional liability for peer sexual harassment in *Doe v. University of Illinois*.[170] The case involved a female student at University High School who was subjected to a campaign of verbal and physical sexual harassment by a group of male classmates.[171] On numerous occasions, Doe and

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161. *Id.*
162. *Id.*
163. *Id.* at 956.
164. *Id.* Ms. Brzonkala also made claims under the Violence Against Women Act of 1994, which the district court declared unconstitutional. *Id.* Those claims and that ruling are beyond the scope of this Article.
165. *Id.* at 957.
166. *Id.* at 960 (quoting Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996) (applying Title VII in the context of employment discrimination)).
167. *Id.*
168. *Id.* at 959-60.
169. *Id.* at 961.
170. 138 F.3d 653 (7th Cir. 1998).
171. *Id.* at 655.

her parents reported the harassment to different school officials.[172] However, the reports did not succeed in putting an end to the harassment.[173] Doe filed suit against the University of Illinois, which was affiliated with the defendant public high school, claiming that the school violated Title IX by failing to deal with the hostile environment to which Doe was subjected.[174] The district court dismissed Doe's claim, adopting the rationale of the Fifth Circuit in *Rowinsky* for establishing a school's liability for peer sexual harassment under Title IX (i.e., that schools can only be found liable in this context if they treat claims involving boys differently than claims involving girls).[175]

On appeal, the Seventh Circuit examined the analysis used by the Fifth and Eleventh Circuits. The panel explicitly rejected the Fifth Circuit's agency rationale for not holding schools liable for the actions of its students.[176] The Seventh Circuit wrote that schools in peer sexual harassment cases are being held responsible for their own actions in dealing with the harassment, not the actions of their students engaging in the harassment.[177] The Seventh Circuit views this distinction as a flaw in the Fifth Circuit's reasoning in *Rowinsky*.[178]

The court then analyzed the Eleventh Circuit's Spending Clause reasoning in its en banc *Davis* decision. The Seventh Circuit noted that the Eleventh Circuit was correct in finding that legislation enacted pursuant to the Spending Clause creates a contract with the recipients of the federal funding.[179] However, the Seventh Circuit found that the *Davis* court was too narrow in its interpretation of Title IX.[180] The court wrote that in making its Spending Clause inquiry, the Eleventh Circuit looked primarily at the legislative history of Title IX and "[f]inding no mention in the legislative history of student-on-student sexual harassment . . . the court concluded that schools were not 'on notice' that they might be held liable for failing properly to address sexual harassment by students."[181] The Seventh Circuit noted that even though Title IX and its legislative history do not explicitly address teacher-on-student sexual harassment, the Supreme Court explicitly recognized such a cause of action in *Franklin*.[182] The court held that the Eleventh Circuit's overly-narrow reading of Title IX was inconsistent with the goals of the statute[183] and, thus, rejected the Eleventh Circuit's Spending Clause analysis. Instead, the court applied the

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 661-62.
176. *Id.* at 662.
177. *Id.*
178. *See id.*
179. *Id.*
180. *Id.* at 665.
181. *Id.* at 664 (quoting Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1401 (11th Cir. 1997)).
182. *Id.* at 665 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. at 60 (1992)).
183. *Id.*

Title VII standards it adopted in *Hunter v. Allis-Chalmers Corp.*[184] in which the court held that as long as the harassment was of the type that "'the employer could have prevented [it] by reasonable care in hiring, supervising, or if necessary firing the [harasser],' the employer is 'directly liable.'"[185] However, in adopting its Title VII standards in peer sexual harassment cases brought under Title IX, the Seventh Circuit declined to apply the Title VII constructive notice standard. Instead, the court followed its decision in *Smith v. Metropolitan School District Perry Township*,[186] a teacher-on-student sexual harassment case in which the court required a showing of actual notice on the part of the school before it could be found liable.[187] In *Smith*, the Seventh Circuit expressly acknowledged that the Guidance adopts a constructive notice standard for determining liability.[188] However, the court wrote that the "OCR's interpretation of Title IX is not entitled to strict deference from this Court."[189] Thus, while the Seventh Circuit concluded in *Doe* that some Title VII principles do apply in Title IX peer sexual harassment cases, that court—like the U.S. Supreme Court in *Gebser*—also determined that schools must be held to an actual notice standard, not a constructive notice standard, in determining their liability for improperly handling sexual harassment complaints.[190] The court drew no distinction between institutional liability for peer sexual harassment at the K-12 level and at the higher education level.

6. *Morse v. Regents of the University of Colorado*

The most recent circuit court decision involving institutional liability for peer sexual harassment as of this writing comes from the Tenth Circuit in *Morse v. Regents of the University of Colorado*.[191] In *Morse* two female Reserve Officer Training Corps ("ROTC") students alleged that their male ROTC superior officer, who was also a University of Colorado student, sexually harassed them.[192] The female cadets asserted that they reported the harassment to both their ROTC superior officer and the university, but both of these parties failed to respond adequately to the allegations.[193] The female cadets then filed suit against the university, alleging that it had violated Title IX by permitting a sexually hostile environment to exist on campus.[194] The

184. *Id.* at 666-67 (citing Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986)).
185. *Id.* (quoting *Hunter*, 797 F.2d at 1422).
186. 128 F.3d 1014 (7th Cir. 1997).
187. *Doe*, 138 F.3d at 668 (citing *Smith*, 128 F.3d at 1034).
188. *Smith*, 128 F.3d at 1033.
189. *Doe*, 138 F.3d at 667.
190. *Id.* at 668.
191. 154 F.3d 1124 (10th Cir. 1998).
192. *Id.* at 1126.
193. *Id.*
194. *Id.*

district court dismissed the plaintiffs' Title IX claim, citing the Tenth Circuit's decision in *Seamons v. Snow*,[195] on the grounds that the alleged harasser was not an agent of the university; therefore, no liability could attach to the university for his actions.[196]

On appeal, the Tenth Circuit considered the case in light of the Supreme Court's recent decision in *Gebser*.[197] Although the court acknowledged that *Gebser* was not a peer sexual harassment case, it nevertheless found the Supreme Court's rejection of institutional liability through agency principles in Title IX teacher-student cases instructive.[198] The Tenth Circuit used the Supreme Court's analysis to develop a new test for institutional liability in Title IX peer sexual harassment cases. The Tenth Circuit held:

> Under the holding in *Gebser*, plaintiffs may proceed on a claim under Title IX if they have sufficiently alleged that: (1) they were subjected to quid pro quo sexual harassment or subjected to a sexually hostile environment; (2) they brought the situation to the attention of an official at the educational institution receiving Title IX funds who had the "authority to take corrective action" to remedy the harassment; and (3) that the institution's response to the harassment amounted to "deliberate indifference."[199]

Using this test, the Tenth Circuit determined that the plaintiffs in *Morse* sufficiently stated a Title IX claim; therefore, the court remanded the case for further proceedings on the Title IX claim.[200]

In *Morse*, the Tenth Circuit appears at first glance to be applying *Gebser's* Title IX teacher-student liability standard to a peer sexual harassment case. However, the Tenth Circuit never explicitly stated that it was treating *Morse* as a peer sexual harassment case. In permitting Morse to bring a Title IX claim against the university, the court stated that, "the ROTC program is a University-sanctioned program and . . . a fellow student acting with authority bestowed by that program and an ROTC officer responsible for administering that program committed acts forbidden by Title IX."[201] The alleged harasser in this case is both the plaintiffs' peer and superior. The court's language throughout the opinion never clearly states whether the Tenth Circuit is viewing the alleged harasser as a student or a "teacher" who created a sexually hostile environment. Whether the Tenth Circuit viewed *Morse* as a quid pro

195. 84 F.3d 1226 (10th Cir. 1996).
196. *Morse*, 154 F.3d at 1127.
197. *Id.*
198. *Id.*
199. *Id.* at 1127-28 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998)).
200. *Id.* at 1129.
201. *Id.* at 1128.

quo sexual harassment case or a hostile environment case is not clear. The unique factual situation in this case and the lack of clarity by the court limits *Morse*'s instructive value in considering Title IX peer sexual harassment law.

7. Circuit Court Synthesis

As these decisions make clear, the United States Courts of Appeals are split concerning whether and under what circumstances courts can find an educational institution liable in peer sexual harassment cases. The circuit courts have attempted to reconcile the Supreme Court's confusing reference to Title VII principles in *Franklin* (as clarified in *Gebser*) with the Court's requirement that intentional discrimination be proven on the part of the school. The Fifth and Eleventh Circuits represent one end of the spectrum.[202] The Fifth Circuit has established a standard that is nearly impossible for a plaintiff to meet,[203] while the Eleventh Circuit's Spending Clause analysis has led it to conclude that Title IX does not even create a cause of action for peer sexual harassment.[204] On the other end of the spectrum are the Seventh and Fourth Circuits, both of which recognize a cause of action against an educational institution under Title IX for peer sexual harassment.[205] The Fourth Circuit attempted to adopt a liberal constructive notice standard of liability,[206] which has since been vacated, while the Seventh Circuit clearly requires actual notice for liability to attach.[207] In the middle are the Second[208] and Tenth Circuits, which have not definitively answered all of the questions on this issue. Only the Tenth Circuit has decided without vacating a peer sexual harassment case at the higher education level; and, only the Tenth Circuit has decided such a case since the Supreme Court's 1998 *Gebser* decision. Whether other federal courts will adopt the Tenth Circuit's new three-part test for institutional liability for peer sexual harassment remains to be seen.

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202. *See supra* Part III.B.1-.2.
203. *See supra* text accompanying notes 137-38.
204. *See supra* text accompanying notes 116, 118.
205. *See supra* text accompanying notes Part III.B.4-.5.
206. *See supra* text accompanying note 166.
207. *See supra* text accompanying note 187.
208. Although the Second Circuit has not addressed the issue of institutional liability for peer sexual harassment, it considered the seemingly analogous issue of institutional liability for sexual harassment of a student by a third party in *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995). *Murray* involved a Title IX gender discrimination claim by a dental student against a university for failing to protect her from alleged sexual harassment by a patient. *Id.* at 247. In *Murray* the Second Circuit seemed to conclude that Title VII standards are applicable in a Title IX sexual harassment case involving a non-employee. *Id.* at 248-49. The court stated that "[t]he Court's citation of *Meritor Savings Bank, FSB v. Vinson*, a Title VII case . . . indicates that, in a Title IX suit . . . based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." *Id.* at 249 (citation omitted). However, the court stopped short of deciding whether constructive or actual notice is required, because it found that the plaintiff failed to meet the less stringent constructive notice standard. *Id.* at 250.

The uncertainty in the circuit courts surrounding the issue of institutional liability for peer sexual harassment in higher education has contributed to a series of seemingly inconsistent decisions at the district court level. The debate at the district court level has focused primarily on the type of notice a school must have to be held liable under Title IX,[209] while the circuit courts have, in addition to notice, focused on whether institutional liability of any kind is constitutionally permissible.[210] All of the reported peer sexual harassment cases at the district court level seem to arise at the K-12 level, not at the college and university level. Of the reported cases, the district court decisions fall into two categories: (1) those requiring only constructive notice; and (2) those requiring actual notice.[211]

C. District Court Decisions Concerning Title IX Peer Sexual Harassment

1. Know or Should Have Known Standard

One of the earliest and most often cited United States district court decisions on peer sexual harassment is *Doe v. Petaluma City School District* ("*Petaluma I*").[212] In *Petaluma I* the court dismissed a peer sexual harassment claim, holding that Title IX does not permit an award of monetary damages in a private action without proof of "intentional discrimination on the basis of sex by an employee of the educational institution."[213] The District Court for the Northern District of California later granted reconsideration of this holding in *Doe v. Petaluma City School District* ("*Petaluma III*").[214] Upon reconsideration, the court tried to reconcile the uncertainties left by the Supreme Court in the *Franklin* decision, writing "it is not clear how the Court meant the 'intentional discrimination' standard it set in *Franklin* to relate to the standard for liability for hostile work environment sexual harassment under Title VII. The Court gave conflicting signals on this point."[215] The *Petaluma*

209. *See infra* Part III.C.1-.2.

210. *See supra* Part III.B.

211. One of the earliest district court decisions came in *Garza v. Galena Park Independent School District*, 914 F. Supp. 1437 (S.D. Tex. 1994). In this case, the court did not allow a peer sexual harassment claim to be brought under Title IX. *Id.* at 1438. However, this decision was essentially overruled by the Fifth Circuit's decision in *Rowinsky*. Since *Rowinsky*, the only district court decision that applied the disparate impact standard was *Piwonka v. Tidehaven Independent School District*, 961 F. Supp. 169, 171 (S.D. Tex. 1997). In a very brief opinion, the court quickly dismissed the peer sexual harassment claim under the *Rowinsky* standard. *Id.* The Eastern District of Pennsylvania also considered the issue of peer sexual harassment in *Collier v. William Penn School District*, 956 F. Supp. 1209 (E.D. Pa. 1997) and ruled that an intentional violation of Title IX is necessary in a peer sexual harassment claim. However, the court's opinion did not provide a specific definition of an intentional violation.

212. 830 F. Supp. 1560 (N.D. Cal. 1993).

213. *Id.* at 1571.

214. 949 F. Supp. 1415 (N.D. Cal. 1996).

215. *Id.* at 1418.

III court gave a great deal of weight to the Supreme Court's reference to *Meritor* in its *Franklin* decision:

> The *Franklin* Court must have been aware that the appellate courts had fashioned a test for Title VII employer liability pursuant to the Court's instructions in *Meritor*. Under that test, an employer is liable for the existence of a hostile environment in its workplace only if the employer failed to take prompt remedial action after the employer actually knew or should have known of the existence of the hostile environment.[216]

The court then stated that "in *Hacienda Hotel*, adopting the 'knew or should have known standard,' the Ninth Circuit apparently intended the standard to be an intentional discrimination standard rather than a negligence standard."[217] Therefore, the court found that a school could intentionally discriminate against a student on the basis of gender by having constructive notice of sexual harassment and failing to act reasonably to protect its students. The court concluded:

> Thus it appears that school districts are on notice that student-to-student sexual harassment is very likely in their schools . . . . In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended . . . a hostile environment. Thus the Title VII standard for intentional discrimination, which imposes liability where the entity knows or should have known of the hostile environment and fails to take remedial action, is the appropriate standard.[218]

The court reconciled the conflicting themes of the Supreme Court's *Franklin* decision by permitting intent to be inferred from a school's handling of a peer sexual harassment claim once it has actual or constructive notice of the claim.

The Eastern District of Kentucky considered the question of peer sexual harassment in *Franks v. Kentucky School for the Deaf*.[219] The major debate in the case centered around the notice required to impose institutional liability for peer sexual harassment. The *Franks* court outlined the history of peer sexual harassment and ruled that the know-or-should-have-known standard is the

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216. *Id.* (citing EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).
217. *Id.* at 1423.
218. *Id.* at 1426.
219. 956 F. Supp. 741 (E.D. Ky. 1996).

standard of notice that most closely coincides with the purpose of Title IX.[220] Quoting the Eleventh Circuit's original, now vacated, *Davis* decision, the *Franks* court held that a plaintiff "must prove that she 'complained to higher management about the harassment or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.'"[221] Therefore, the court deemed actual or constructive notice to be sufficient.

In *Nicole M. v. Martinez Unified School District*[222] the Northern District of California once again considered a peer sexual harassment claim. The court followed its decision in *Petaluma III,* ruling that a school will be liable if it "knew or should have known"[223] of the sexually hostile environment and failed to act reasonably to solve the problem.[224] The court gave a thorough history of peer sexual harassment and the various tests that have been applied by courts in assessing liability.[225] The court concluded "that the approach taken in *Davis*, its progeny and *Petaluma III* is the better reasoned one. It is more consistent with the purposes of Title IX and the well-developed body of law under Title VII which the *Franklin* court implicitly found to be applicable."[226]

2. *Actual Knowledge Standard*

In *Bosley v. Kearney R-1 School District*[227] the District Court for the Western District of Missouri began its analysis by acknowledging that intentional discrimination is a required element in any Title IX sexual harassment claim against a school.[228] While direct evidence obviously establishes this intent, the court noted that "[d]iscriminatory intent may also be established by inference."[229] Having established the intent requirement, the court then developed its test for peer sexual harassment claims. In so doing, the court quoted a five-part Title VII test similar to the one later adopted by the

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220. *Id.* at 747-48.

221. *Id.* at 747 (quoting Davis v. Monroe Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir. 1996)).

222. 964 F. Supp. 1369 (N.D. Cal. 1997).

223. *Id.* at 1377 (quoting *Petaluma III*, 949 F. Supp. 1415, 1426 (N.D. Cal. 1996)).

224. *Id.*

225. *Id.* at 1372-78. The court noted that the Northern District of California previously ruled on the question of notice in *Oona R.-S. v. Santa Rosa City Schools*, 890 F. Supp. 1452 (N.D. Cal. 1995). In *Oona* the court ruled that the reasoning of *Franklin* and *Petaluma I* "persuasively establishes that intentional discrimination is an element of a Title IX claim against an institutional defendant." *Id.* at 1466. The court did not explicitly address the question of the standard of notice because the facts of the case established actual notice. However, the court in *Martinez* did not give much weight to the decision in *Oona* as the court decided the latter case in part upon the holding in *Petaluma I*, which was reconsidered in *Petaluma III*.

226. *Martinez*, 964 F. Supp. at 1377.

227. 904 F. Supp. 1006 (W.D. Mo. 1995).

228. *Id.* at 1020.

229. *Id.* at 1021.

Eleventh Circuit in its original *Davis* decision.[230] However, the court ultimately rejected that test in favor of the following four-part test:

> (1) the plaintiff was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment occurred during the plaintiff's participation in an educational program or activity receiving federal financial assistance; and (4) the school district knew of the harassment and intentionally failed to take proper remedial action.[231]

By adopting this test, the court accepted Title VII standards but required a plaintiff to show the school district had actual knowledge of the sexual harassment.

Following the *Bosley* decision, the Northern District of New York considered a peer sexual harassment case in *Bruneau v. South Kortright Central School District.*[232] In *Bruneau* the court adopted, in large part, the five-part test established in the original *Davis* decision.[233] However, in considering the fifth part of the test, the standard of notice, the *Bruneau* court adopted an actual notice standard.[234] It did so on the basis of an analysis of agency law in the employment context as compared to the educational context:

> Students, *per se*, are not agents of the schools which they attend. In order for agency principles to attach between a student and their school there must be some manifestation of consent by the student to the school that the student shall act on the school's behalf and subject to the school's control, as well as, consent from the school to the student's actions. . . . Therefore, although constructive notice principles properly attach between employer and employee in the Title VII context, they do not attach between the alleged harassing student and the Defendants[] in this Title IX case.[235]

The court held that actual notice on the part of the school must be proven in peer sexual harassment cases before the school can be held liable for the sexually harassing conduct of its students.[236]

The Northern District of Iowa followed a similar line of reasoning in a pair of peer sexual harassment decisions. In *Wright v. Mason City Community*

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230. *Id.* at 1022-23 (citing Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264 (8th Cir. 1993)).
231. *Id.* at 1023.
232. 935 F. Supp. 162 (N.D.N.Y. 1996).
233. *Id.* at 170-72.
234. *Id.* at 173.
235. *Id.* at 173-74.
236. *Id.* at 177.

School District[237] and *Burrow v. Postville Community School District*[238] the court required a showing of intentional discrimination by the school.[239] In addition, the court applied a variation of the five-part test developed in the original, now vacated, *Davis* decision.[240] In the fifth part of the test, which deals with institutional liability, the court adopted an actual notice standard and required "that the educational institution knew of the harassment and *intentionally* failed to take proper remedial measures because of the plaintiff's sex."[241] The *Burrow* court continued its consideration of intentional discrimination and held that "the Plaintiff may establish such intent through either direct or indirect evidence, and that in the absence of direct evidence, an intent to discriminate on the part of the school district may be inferred by the finder of fact from the totality of relevant evidence."[242] Under this standard, the school is liable if it had actual knowledge of the harassment and negligently failed to prevent it.

One of the most recent decisions on the issue of peer sexual harassment comes from the District of New Hampshire in *Doe v. Londonderry School District*.[243] In that case, the court discussed the Guidance in the context of a peer sexual harassment case.[244] The court noted that the Guidance calls for the adoption of a constructive notice standard on the question of institutional liability.[245] However, the court adopted a four-part test[246] that it created from the

237. 940 F. Supp. 1412 (N.D. Iowa 1996).
238. 929 F. Supp. 1193 (N.D. Iowa 1996).
239. *Wright*, 940 F. Supp. at 1420; *Burrow*, 929 F. Supp. at 1205.
240. *See Wright*, 940 F. Supp. at 1420; *Burrow*, 929 F. Supp. at 1205-06.
241. *Wright*, 940 F. Supp. at 1420; *Burrow*, 929 F. Supp. at 1205-06. The other four elements that the court required are: (1) that the plaintiff is a member of a protected group; (2) that the plaintiff was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of the plaintiff's education and create an abusive educational environment. *Burrow*, 929 F. Supp. at 1205.
242. *Burrow*, 929 F. Supp. at 1205.
243. 970 F. Supp. 64 (D.N.H. 1997).
244. *Id.* at 72-73.
245. *Id.* at 72.
246. The test calls for a showing that:

> (1) the plaintiff was a student in an educational program or activity receiving federal financial assistance within the coverage of Title IX; (2) the plaintiff was subjected to unwelcome sexual harassment while a participant in the program; (3) the harassment was sufficiently severe or pervasive that it altered the conditions of the plaintiff's education and created a hostile or abusive educational environment; and (4) the school district knew of the harassment and intentionally failed to take proper remedial action.

Id. at 74 (citations omitted).

tests applied in *Bosley*,[247] *Seamons*,[248] and *Wright*.[249] In the fourth part of its test, the court required a showing that "the school district knew of the harassment and intentionally failed to take proper remedial action,"[250] thereby rejecting the Guidance concerning the appropriate standard for institutional liability for peer sexual harassment.

At present, only two district courts appear to consider constructive notice sufficient to support institutional liability for peer sexual harassment.[251] Conversely, the majority of district courts require plaintiffs to prove actual notice in order for liability to attach.[252] However, in determining what constitutes actual notice, the district courts apply a number of different tests. While the purpose of the Guidance may have been to serve as a guide for courts, courts have not, in practice, followed the Department of Education's recommendations. Only a handful of reported cases since the issuance of the Guidance have addressed it and have rejected its constructive notice standard.[253] At least one circuit court decision rejects the directives of the Guidance altogether as advisory, finding that it is not binding upon the courts.[254]

D. The Title IX Case Law on Peer Sexual Harassment

One can draw several important observations and conclusions from an analysis of the developing body of Title IX peer sexual harassment case law. First, while the majority of the courts that have considered this issue recognize some form of a cause of action for peer sexual harassment under Title IX, two recently reported circuit court decisions either refuse to recognize such a claim or limit institutional liability to those rare cases in which an institution handles peer harassment cases involving males differently than cases involving females on the basis of gender.[255] The Fourth Circuit's vacation and en banc rehearing of its decision in *Brzonkala* may signal a similar move in yet another circuit.[256] Second, while the Seventh Circuit recognizes a cause of action for peer sexual harassment under Title IX, it has rejected attempted imposition by the

247. Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022-23 (W.D. Mo. 1995).

248. Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996).

249. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1420 (N.D. Iowa 1996).

250. Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997).

251. The Northern District of California and the Eastern District of Kentucky. *See supra* Part III.C.1.

252. *See supra* Part III.C.2.

253. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997); *Londonderry*, 970 F. Supp. 64.

254. *See Davis*, 120 F.3d at 1404 n.23.

255. *See id.* at 1390; Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996).

256. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *vacated & reh'g granted* (4th Cir. Feb. 5, 1998).

Guidance and three United States district courts of a constructive notice standard of liability.[257] Third, and most notably for present purposes, only two reported peer sexual harassment cases appear to consider the question of institutional liability for peer sexual harassment at the higher education level.[258] However, even in those cases the courts do not discuss the appropriateness of a distinction between the standard of liability for higher education peer sexual harassment cases and similar cases arising at the kindergarten through high school level. The assumption that the DOE relied upon this body of case law in its adoption of the Guidance seems logical. Nevertheless, despite a dearth of reported cases at the college or university level, the Guidance purports to apply a constructive notice standard to peer sexual harassment in higher education as well as K-12 institutions.[259]

The constructive notice standard contained in the Guidance should not be applied in the higher education setting for at least three reasons. Colleges and universities (1) have fundamentally different relationships with their students, (2) owe a different legal duty to their students, and (3) exercise a different level of control over their students.

IV. K-12 RATIONALE NOT APPROPRIATE IN HIGHER EDUCATION CASES

The legal relationship between colleges and universities and their students differs fundamentally from the relationship between primary or secondary institutions ("K-12 institutions") and their students. First, courts across the nation have consistently abrogated the doctrine of *in loco parentis* with respect to colleges and universities but have refused to do so with respect to K-12 institutions.[260] Second, as a practical matter, colleges and universities lack the level of supervision and control over their students that K-12 institutions have.[261] In fact, K-12 students, as minors, spend virtually every moment of their daily educational experience under the direct supervision of institutional employees. College students, on the other hand, are adults. They spend far less of their educational experience under the supervision of university officials, and their relationships with their instructors and their institutions differ substantially.

In light of these important distinctions between K-12 and higher education institutions, institutional liability for peer sexual harassment should not be extended to colleges and universities, especially in the form mandated by the now vacated *Brzonkala* decision and by the DOE in the Guidance. Instead, any federal court to address this issue should follow the actual notice standard adopted by the court in *Morse* and limit the liability of higher education

257. *See* Doe v. University of Ill., 138 F.3d 653 (7th Cir. 1998).
258. *See supra* Part III.B.4, III.B.6.
259. *See supra* note 15.
260. *See infra* Part IV.A.
261. *See infra* Part IV.C.

institutions accordingly.

A. The Abrogation of In Loco Parentis *in Higher Education*

Unlike primary and secondary institutions, colleges and universities do not stand in the place of parents vis-a-vis their students. The seminal case in this area is *Bradshaw v. Rawlings*,[262] in which the Third Circuit discussed the trend away from the doctrine of *in loco parentis* and provided the following commentary on the relationship between a modern college and its students:

> Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. . . . College students today are no longer minors; they are now regarded as adults in almost every phase of community life. . . . There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. . . . Regulation by the college of student life on and off campus has become limited.[263]

The court in *Beach v. University of Utah*[264] echoed this sentiment by writing:

> [C]olleges and universities are educational institutions, not custodial. . . . It would be unrealistic to impose upon an

262. 612 F.2d 135 (3d Cir. 1979).
263. *Id.* at 138-40.
264. 726 P.2d 413 (Utah 1986).

> institution of higher education the additional role of custodian over its adult students . . . . Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.[265]

Numerous other courts considering this issue have followed suit, holding that "[t]he in loco parentis doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."[266]

However, in primary and secondary schools the doctrine of *in loco parentis* is alive and well[267] primarily because mandatory schooling has required parents to rely upon school districts to care for their children during the day. Because higher education is not mandatory and college students (as adults) do not require the care of others during the educational process, the courts no longer recognize an *in loco parentis* relationship with respect to these students. The same rationale which supported the abrogation of the *in loco parentis* doctrine in higher education supports the courts' longstanding imposition of divergent legal duties on higher education institutions and K-12 institutions vis-a-vis their students.

B. Divergent Legal Duties

Even outside the realm of institutional liability for peer sexual harassment, courts have long drawn a distinction between the duty owed by K-12 institutions to their students for injuries or damages they sustain at the hand of third parties and the duty owed by colleges and universities to their students for injuries caused by third parties.

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265. *Id.* at 419 (citations omitted).

266. Nero v. Kansas State Univ., 861 P.2d 768, 778 (Kan. 1993); *see also* Hartman v. Bethany College, 778 F. Supp. 286, 293 (N.D. W. Va. 1991) ("The recent trend in the case law is against finding an *in loco parentis* relationship between colleges or universities and their students."); Klobuchar v. Purdue Univ., 553 N.E.2d 169, 171 (Ind. Ct. App. 1990) ("College students are not children and colleges 'are not expected to assume a role anything akin to *in loco parentis* or a general insurer.'" (quoting Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227, 232 (Ind. Ct. App. 1986))).

267. *See, e.g.*, Rupp v. Bryant, 417 So. 2d 658, 666 (Fla. 1982) ("The genesis of this supervisory duty is based on the school employee standing partially in the place of the student's parents."); Kimberly S. M. v. Bradford Cent. Sch., 649 N.Y.S.2d 588, 589-90 (App. Div. 1996) ("The duty owed by a school to its students 'stems from the fact of its physical custody over them . . . .'" (quoting Pratt v. Robinson, 349 N.E.2d 849, 852 (N.Y. 1976))).

1. The Duty Owed Students by Colleges and Universities

In order for a court to impose a legal duty on a defendant at common law, "it must balance the following factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns."[268] Generally, modern courts refuse to recognize any sort of "special relationship" between a university and its students.[269] Therefore, many courts do not recognize a common law duty upon the institution to protect its students from the unforeseeable actions of a third party.[270] Thus, absent a foreseeable injury or assault by a third party, no duty exists on the part of a university to protect its students from an assault; and, absent a duty which could be breached, there can be no liability for negligence as a matter of law.[271] Whether a duty exists is a question of law for the court.[272] At least one court that has considered this issue has held that "[a] duty to anticipate and to take steps to protect against a criminal act arises only when *the facts of a particular case* make it reasonably foreseeable that a criminal act is likely to occur."[273]

Thus, at common law, if a college or university did not know and could not have reasonably foreseen that one student would harm another, and if the college or university had no opportunity to intervene to stop the alleged injury or assault, most courts would conclude that the assault was not reasonably foreseeable. In such situations, the university would not owe a legal duty to its students to protect them from the assault. The same is not true of K-12 institutions because the courts have almost uniformly recognized that they owe a higher duty to their students.[274]

2. The Duty Owed Students by K-12 Institutions

Individuals charged with the care of minors owe them a legal duty far

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268. Motz v. Johnson, 651 N.E.2d 1163, 1166 (Ind. Ct. App. 1995).

269. *See, e.g.*, Crow v. California, 271 Cal. Rptr. 349, 359 (Ct. App. 1990) (rejecting claim of special relationship between university and students). *But see* Furek v. University of Del., 594 A.2d 506, 520 (Del. 1991) ("[W]here there is direct university involvement in, and knowledge of, certain dangerous practices of its students the university cannot abandon its residual duty of control.").

270. *See, e.g.*, Klobuchar v. Purdue Univ., 553 N.E.2d 169, 174 (Ind. Ct. App. 1990) (refusing to impose duty on Purdue to protect students from third parties); *see also* Nero v. Kansas State Univ., 861 P.2d 768, 778 (Kan. 1993) ("[U]niversity-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties.").

271. *See* Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991) (listing elements of negligence).

272. *See* Douglass v. Irvin, 549 N.E.2d 368, 369 (Ind. 1990); *Motz*, 651 N.E.2d at 1166 (citing *Webb*, 575 N.E.2d at 995).

273. *Motz*, 651 N.E.2d at 1167.

274. *See infra* Part IV.B.2.

higher than the legal duty that colleges or universities owe to adult students.[275] In defining the legal duty that school districts owe K-12 students, at least one court has said:

> It is well settled that "[a] school district owes a duty to its students to exercise the same degree of care toward them as would a reasonably prudent parent under similar circumstances." Stated another way, a school district has "a *special relationship* to its students . . . analogous to that between carriers and their passengers or innkeepers and their guests." A school district, however, is not an insurer of the safety of its students. The duty of a school district to its students "is strictly limited by time and space" and exists "only so long as a student is in its care and custody during school hours, and terminates when the child has departed from the school's custody."[276]

Thus, school districts stand in the shoes of parents while students are in their care and custody.

School districts owe their students a much higher legal duty than do colleges and universities. The "special relationship" between K-12 institutions and their students "'requires a school to act when a child, while in its charge, is threatened by the negligence of a third party, and it must make reasonable efforts to anticipate such threats.'"[277] This is an affirmative duty. No similar duty is imposed upon colleges and universities.

C. Differing Levels of Control Over Students

Another critical distinction between K-12 institutions and higher education institutions arises out of the level of control each institution is able to exercise over its students. Colleges and universities have far less control over their students than K-12 institutions. Students in K-12 are in the presence and under the supervision of their teachers whenever they are at school. On the other hand, college students spend only a small percentage of their college

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275. *See* Gloria "X" v. Gibbs, 659 N.Y.S.2d 349, 351 (App. Div. 1997); Cole v. Fairchild, 482 S.E.2d 913, 922 n.9 (W. Va. 1996) ("'As a general rule, a person who undertakes the control and supervision of a child, even without compensation, has the duty to use reasonable care to protect the child from injury.'") (quoting Laite v. Baxter, 191 S.E.2d 531, 534 (Ga. Ct. App. 1972)); Doe v. Boys Clubs of Greater Dallas, Inc., 868 S.W.2d 942, 950-51 (Tex. App. 1994) *aff'd*, 907 S.W.2d 472 (Tex. 1995) ("Organizations whose primary function is the care and education of children owe a higher duty to their patrons . . . .").

276. Harker v. Rochester City Sch. Dist., 661 N.Y.S.2d 332, 334 (App. Div. 1997) (citations omitted) (emphasis added).

277. Kimberly S. M. v. Bradford Cent. Sch., 649 N.Y.S.2d 588, 590 (App. Div. 1996) (quoting Pratt v. Robinson, 349 N.E.2d 849, 852 (N.Y. 1976)).

experience in the classroom or in the presence of institutional employees. For the most part, college students are emancipated adults living on their own. College and university employees are rarely present when students interact with one another privately. College students generally are more mature than their K-12 counterparts. Moreover, most colleges and universities lack the resources, the desire, the ability, and the political will to exercise supervision or "control" over their students. As adults, most college students are understandably more resistant to close supervision than are K-12 students. These characteristics are among the many reasons why the courts have abrogated the *in loco parentis* doctrine at the college and university level.

Extending the rationale of the K-12 peer sexual harassment cases to higher education directly contradicts the divergent legal duties that higher education institutions and K-12 institutions owe students. The widespread abrogation of the *in loco parentis* doctrine at the college and university level, but not at the K-12 level, and the differing levels of control these two distinct types of educational institutions have and exercise over their students proves this hypothesis.

D. Courts Should Reject the Guidance's Constructive Notice Standard

The constructive notice standard proposed by the Guidance is against the great weight of applicable legal authority and is contrary to an apparent trend in the case law at the circuit court level, and, on the basis of *Gebser*, perhaps at the Supreme Court level. To suggest that colleges and universities owe students the same duties as K-12 institutions, even though the former lack the control necessary to discharge adequately those duties, defies logic and common sense. Simply stated, to expect colleges and universities to bear full responsibility for peer sexual harassment, when they lack the control necessary to prevent it, to become aware of it, or to effectively police it on their campuses, is untenable and ill advised.

For the OCR to extend the rationale of the K-12 peer sexual harassment cases (and the Title VII constructive notice standard) to higher education is contrary to the well-established case law on *in loco parentis* and legal duty for negligence, as well as the conditions at most American colleges and universities with respect to institutional control over students. Moreover, compliance with the mandatory Guidance imposes upon American colleges and universities a virtually impossible task: the duty to become the insurers of students' safety and to protect them from harm caused by other students, even though the institution and its representatives are rarely present when incidents of sexual harassment occur. To discharge this duty effectively would require these institutions to post guards in each dormitory room and every building where students live, work, or socialize on a 24-hour-per-day, 365-day-per-year basis. Such measures would be tantamount to making babysitters out of college and university officials.

This administrative attempt to reinstate the *in loco parentis* doctrine at the

college and university level, which courts across the country have abrogated, should be rejected by courts addressing the issue. The Guidance substantially increases the risk of liability for colleges and universities and threatens to open further the floodgates of litigation. The Guidance artificially creates a demand for a new bureaucracy on American campuses geared toward identifying, investigating, and handling peer sexual harassment complaints. The expense of this bureaucracy will be paid by institutions already burdened in many instances by declining enrollment, declining revenue, and increased budget shortfalls. Such an expense detracts from the academic missions of universities and constitutes a drain on institutional resources away from mission-driven activities. This expense might also create an adverse relationship between harassment victims and colleges and universities fearful of litigation.

Peer sexual harassment cases put universities in the middle of disputes involving two or more of its students, often in a highly charged atmosphere pitting one student's word against another's. Universities are ill-equipped to be the arbiter of truth in such situations, especially when the university itself is facing potential liability. Given the Hobson's choice of a lawsuit by the alleged victim for sexual harassment and a lawsuit by the alleged perpetrator for due process violations, breach of contract, or defamation, universities are not well-situated to render a decision on responsibility or culpability for the alleged harassment. The truth often is elusive in such cases anyway. The courts, not institutions of higher learning, are better equipped to find the truth and to resolve disputes involving allegations of peer sexual harassment.

The K-12 case law on peer sexual harassment has led some school districts to overreact to complaints and to adopt overreaching sexual harassment policies. As noted at the outset of this Article, at the K-12 level this reality sometimes leads to absurd results, ranging from allegations of sexual harassment levied against primary school students for playing tag, kissing a girl on the playground, or telling a boy she likes him. At the higher education level, the dangers of absurd results are just as likely. Sexual harassment policies at colleges and universities that are too strict could well lead to higher education institutions' treating adults like children, driving a wedge between academic institutions and their students.

To resolve this issue, the federal courts should adopt the rationale of the Tenth Circuit in *Morse*[278] and the analogous rationale of the Supreme Court in *Gebser*,[279] declining to follow the Guidance on peer sexual harassment with respect to constructive notice. Moreover, courts addressing this issue should find, as did the Fifth Circuit in *Rowinsky*[280] and the Eleventh Circuit in *Davis*,[281] that Title VII principles do not apply in Title IX peer sexual harassment cases. At the very least courts should find, as did the Seventh Circuit in *Doe* and the

278. *See* discussion *supra* Part III.B.6.
279. *See* discussion *supra* Part III.A.
280. *See supra* Part III.B.2.
281. *See supra* Part III.B.1.

Tenth Circuit in *Morse*, that colleges and universities are not liable for peer sexual harassment on a constructive notice standard.[282] The appropriate standard of liability, if any, is the actual notice standard adopted in *Doe*,[283] *Gebser*,[284] and *Morse*.[285]

V. CONCLUSION

In the final analysis, what is needed is a uniform, nationwide standard of liability to resolve the current split in the federal courts on the issue of college and university liability for peer sexual harassment. The United States Supreme Court needs to resolve the question of whether a cause of action under Title IX for peer sexual harassment is constitutionally permissible, even though Congress enacted Title IX under the Spending Clause, not under the Fourteenth Amendment or the Commerce Clause. The Supreme Court also should determine, unequivocally, whether Title VII principles apply in Title IX peer sexual harassment cases. If the Court answers either of these questions in the affirmative, it should finally determine the appropriate standard for institutional liability (e.g., actual notice or constructive notice) for peer sexual harassment on American college campuses. For the reasons set forth above, the Court should draw a sharp distinction between the standard of peer sexual harassment liability for K-12 institutions and higher education institutions. As indicated above, the relationship enjoyed by higher education institutions and their students is fundamentally different from the relationship between K-12 institutions and their students.

In the absence of clear guidance from the United States Supreme Court on these issues, the split of authority among the federal circuit courts is likely to continue. American colleges and universities will have little alternative but to follow the Guidance and its constructive notice standard, behaving in all respects as though a cause of action under Title IX for peer sexual harassment exists. Furthermore, higher education institutions will have to assume that the constructive notice standard of liability mandated by the Guidance applies in all peer sexual harassment cases. Such a result would be unfortunate, because the vast majority of courts to address the issue in recent years have adopted an actual notice standard. It also would be unfortunate for practical reasons, because a constructive notice standard forces university officials to avoid legal liability for peer sexual harassment by interjecting themselves into the private lives and relationships of their students, most of whom are emancipated adults. University officials are neither suited nor qualified for this role, and it would represent a return to the now abrogated *in loco parentis* doctrine on American college campuses.

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282. *See supra* Part III.B.5-.6.
283. *See* discussion *supra* Part III.B.5.
284. *See* discussion *supra* Part III.A.
285. *See* discussion *supra* Part III.B.6.