2000

Davis v. Monroe County Board of Education: The Unresolved Questions,

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ARTICLE

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INTRODUCTION

For several months, LaShonda Davis was sexually harassed by her fifth-grade classmate G.F.[1] Among the harassing conduct, G.F. attempted to touch LaShonda's breasts and genital area, made vulgar statements to LaShonda, and purportedly placed a door stop in his pants and acted in a sexually suggestive manner toward LaShonda.[2] Although LaShonda and her mother repeatedly reported these incidents to teachers and the principal of Hubbard Elementary School, little action was taken.[3] In fact, it took more than three months for LaShonda to obtain permission to change her seat from beside G.F.[4] G.F. ultimately pled guilty to sexual battery for this misconduct.[5] As a result of this misconduct, LaShonda was traumatized.[6] Her grades dropped and she contemplated suicide.[7]

Title IX provides "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving . . . federal financial assistance."[8] Does Title IX proscribe G.F.'s conduct and more specifically, can a school board that receives federal financial assistance be held liable in damages to LaShonda? A divided Supreme Court, in *Davis v. Monroe County Board of Education*, recently held yes under certain circumstances.[9] The Court stated that a school board may be held liable under Title IX for damages in cases of peer harassment where the school board "is deliberately indifferent to sexual harassment of which they have actual knowledge"[10] but only when the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims access to the educational opportunities or benefits provided by the school."[11] Four Justices,[12] in dissent, exclaimed that the Court, with this decision, has insinuated the federal government "not only into one of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs . . . contrary to our traditions and inconsistent with the sensible administration of our schools."[13] Moreover, this decision will

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1. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1667 (1999).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. 20 U.S.C. § 1681(a) (1994).
9. *Davis*, 119 S. Ct. at 1675-76.
10. *Id.* at 1665.
11. *Id.*
12. Justice Kennedy authored the dissent and was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. *See id.* at 1676.
13. *Id.* at 1678 (Kennedy, J., dissenting).

[Women's Rights Law Reporter, Volume 21, Number 2, Spring 2000]

0085-8269/80/0908

trigger an "avalanche of liability"[14] and "embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response."[15]

Just one year earlier the Court in *Gebser v. Lago Vista Independent School District*,[16] established institutional liability for teacher-on-student harassment. The *Davis* Court applied similar fault and notice standards as those established in *Gebser*. *Gebser* had held that "a school district may be held liable in damages in an implied right of action under Title IX . . . for the sexual harassment of a student by one of the district's teachers . . . [when] an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[17] The dissent in *Gebser* would have held a school district liable under agency principles for the teacher's misconduct because "he was aided in accomplishing the tort by the existence of the agency relation."[18] The dissent chastised the majority for establishing such an "exceedingly high standard . . . [which] will virtually render inutile" Title IX causes of action.[19]

Only since 1992, in *Franklin v. Gwinnett County Public Schools*, has the Court recognized that schools may be held liable for damages under Title IX for the sexual harassment of a student.[20] These two recent cases begin to explore the contours of such liability. The Court in both cases was divided and provided only general guidelines for lower courts to follow. What remains are several unanswered questions with which the courts and commentators must now struggle. This article briefly identifies these questions and begins the process of exploring a few answers.

This article will first analyze the *Davis* decision, focusing on the arguments martialed by both the majority and the dissent and the fundamental disagreements between them. The article then identifies three questions which were raised by the *Davis* and *Gebser* decisions and analyzes how lower courts have struggled with these issues most recently as they begin to explore the contours of sexual harassment jurisprudence in the school context.

I. THE *DAVIS* DECISION

A. The *Davis* Majority

Justice O'Connor, writing for the majority, set out to resolve a circuit split "over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action resulting from student-on-student sexual harassment."[21] Treating the statute as legislation enacted pursuant to Congress's Spending Clause powers, the majority stated that the legislation must provide adequate notice to the funding recipient of the conduct for which it may be held liable and may hold the recipient liable only for its own misconduct.[22] The Court proceeded to determine whether these requirements are met by Title IX when holding a school liable for student-on-student harassment.

First, a recipient may be held liable under Title IX only for its own misconduct.[23] This was made clear in the Court's decision in *Gebser v. Lago Vista Independent School District*, which held that a recipient may be held liable for teacher-on-student sexual harassment when a school employee, with authority to remedy the harassment, acts with deliberate indifference to known acts of harassment.[24] There the Court explained that rather than hold the recipient liable under agency principles for the actions of its teachers, the recipient is held liable for its own intentional failure to act which, in turn, effec-

14. *Id.* (Kennedy, J., dissenting). *But see* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1410-11 (11th Cir. 1997) (noting that the "thousands of lawsuits" expected is based upon one survey which counted towards sexual harassment "a single unwelcome instance of [sexual comments, jokes, gestures, or looks] during the student's entire school life . . . . Yet, such an incident is extremely unlikely to result in litigation against the school.") (Carnes, J., concurring).

15. *Davis*, 119 S. Ct at 1691 (Kennedy, J., dissenting).

16. 524 U.S. 274 (1998).

17. *Id.* at 277.

18. *Id.* at 299 (Stevens, J., dissenting) (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

19. *Id.* at 304 (Steven, J., dissenting) (quoting Franklin v. Gwinnett County Schools, 503 U.S. 60, 74 (1992)).

20. 503 U.S. 60, 65 (1992).

21. *Davis*, 119 S. Ct. at 1668.

22. *See id.* at 1669-70.

23. *Id.* at 1670.

24. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

tively caused the discrimination.[25] The question in *Davis* becomes whether deliberate indifference to known acts of peer harassment also amounts to an intentional violation of Title IX.

The majority in *Davis* found that under certain circumstances deliberate indifference to known acts of peer harassment does support a private damages action under Title IX. The majority focused on the language of Title IX which provides for no person to "be *subjected* to *discrimination under* any education program" on the basis of sex.[26] The majority reasoned that the two terms "subjected" and "under" cabin school liability "based upon the recipient's degree of control over [both] the harasser and the environment in which the harassment occurs."[27] To satisfy the first limitation, the recipient must subject the victim to discrimination. In other words, the recipient's conduct must "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[28] This is most easily satisfied when the harasser is an agent of the recipient, as in *Gebser*, because the recipient exercises direct and substantial control over its agents. However, there need not be an agency relationship to satisfy this requirement. If the harasser is not an agent of the recipient, as in *Davis*, the requirement is satisfied when the recipient acts with deliberate indifference to known acts of harassment by an individual over which "the recipient exercises substantial control."[29]

Further, in order for the harassment to occur under an education program of the recipient, the harassment "must take place in a context subject to the school district's control"[30] and must be so severe that it has a "systemic effect on the educational programs or activities."[31] Thus, the identity of the perpetrator is relevant to the inquiry since sexual harassment of students by teachers is more likely to have such a systemic effect than harassment of students by other students.[32] But peer harassment may also satisfy this requirement when the peer harassment is sufficiently severe and pervasive and "occurs during school hours and on school grounds."[33]

Finally, the victim must be subjected to discrimination. The majority noted that the Court has previously recognized, in both *Franklin* and *Gebser*, that sexual harassment is a form of sex discrimination in the context of teacher-on-student harassment. However, is peer sexual harassment also a form of sex discrimination? Again, turning to the language of the statute, the majority explained that the various prohibitions give meaning to the term "discrimination."[34] Title IX protects students from being "excluded from participation in" or "denied the benefits of" any education program.[35] Thus, if the peer sexual harassment is sufficiently "severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"[36] it can be deemed sex discrimination. The majority explained that whether the harassing conduct rises to a level of "actionable" harassment, i.e. discrimination, "'depends on a constellation of surrounding circumstances, expectations, and relationships', including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."[37]

Next, the majority found that the recipient had sufficient notice that it could be held liable under Title IX for failing to respond to known sexually harassing conduct of a student. First, the statutory language is broad, focusing on the benefited class rather than the perpetrator.[38] This provides notice to schools that they are responsible for protecting their students from sexual harassment independent of the identity of the perpetrator. Second, the regulations require recipients to monitor the conduct of third parties under certain circumstances.[39] Thus, schools are on notice that they may be held lia-

25. *Davis*, 119 S.Ct. at 1671 (citing *Gebser*, 524 U.S. at 290).
26. 20 U.S.C. § 1681(a) (1994) (emphasis added).
27. *Davis*, 119 S. Ct. at 1672.
28. *Id.* (quoting the RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).
29. *Id.*
30. *Id.*
31. *Id.* at 1676.
32. *See id.*
33. *Id.* at 1672.
34. *Id.* at 1675.
35. 20 U.S.C. § 1681 (1994).
36. *Davis*, 119 S. Ct. at 1675.
37. *Id.* (quoting Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 82 (1998) and citing OCR Title IX Guidelines 12041-42).
38. *See id.* at 1669.
39. *See id.* at 1671.

ble for the conduct of third-party students. Third, state common law has held schools liable for negligently failing to protect their students from the tortious conduct of their peers and has recognized the school's disciplinary authority over its students providing further notice of potential liability for peer harassment.[40] Finally, liability for peer sexual harassment is further supported by the National School Boards Association's publication which projected that schools may be held liable for failure to respond to peer harassment[41] and the Department of Education's Office for Civil Right's recent guidelines that define such harassment within the scope of Title IX's proscriptions.[42]

The majority concluded that based upon the facts alleged in the complaint, LaShonda could demonstrate that she was subjected to discrimination under an education program because G.F. was a student over which the recipient had sufficient control; his misconduct took place on school grounds and during school hours, a context over which the recipient had sufficient control; the misconduct was severe and pervasive enough to have a systemic effect on the educational program and effectively deprive LaShonda of access to the program; and the principal–an official of the school district who has authority to institute corrective measures on the district's behalf–had actual notice of the misconduct and acted with deliberate indifference.[43] Here, the principal's response was clearly inadequate, however, the majority warned lower courts against second-guessing school disciplinary decisions.[44] Recipients need not purge their schools of all peer harassment or engage in particular disciplinary action to avoid liability under Title IX.[45] Deliberate indifference is met "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[46] Such a standard is sufficiently flexible to allow for other legal constraints on schools' disciplinary authority over students[47] and thus would not likely place the school in a double-bind situation when reconciling the interests of the harassed and the harasser.

B. The *Davis* Dissent

The dissenters, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, criticized the majority on several grounds. The dissent argued that to support its holding the majority must: (1) establish that Congress gave recipients clear and unambiguous notice that they may be held liable in damages for harassment by its students; (2) demonstrate that the statute provides notice that student-on-student harassment qualifies as discrimination on the basis of sex; and (3) show that the standard for liability will enable recipients to distinguish childish behavior from actionable harassment.[48] According to the dissent, the majority failed on all three counts.

The dissent viewed this case as generally one about federalism.[49] The Spending Clause power is a mighty sword which allows Congress to pursue objectives beyond its Article I powers by attaching certain conditions to the grant of federal funds.[50] The Spending Clause power is policed by requiring that Congress give clear notice of such conditions so that States may guard against excessive federal intrusion into their affairs.[51] The dissent concluded that insufficient notice is provided under Title IX to hold schools liable for the conduct of their students.[52]

First, turning to the language of the statute, the dissent interpreted the language more narrowly than the majority. By limiting liability to discrimination "under any education program" the statute imports agency principles such that only discrimination "authorized by" or in "accordance with"[53] the policies of the recipient meet the statutory language. Thus, harassment by the school's teachers, as agents of the school qualifies, but harassment by students does not. Moreover, the dissent argued that the majority misinterpreted the *Gebser* decision which, far from abandoning agency principles, held that an agency relationship between the school and the

40. *See id.* at 1671-73.
41. *See id.* at 1673.
42. *See id.*
43. *See id.* at 1676.
44. *See id.* at 1674.
45. *See id.* at 1673-74.
46. *Id.* at 1674.
47. *See id.*
48. *See id.* at 1677, 1685, 1687 (Kennedy, J., dissenting).
49. *See id.* at 1691 (Kennedy, J., dissenting).
50. *See id.* at 1677 (Kennedy, J., dissenting).
51. *See id.* (Kennedy, J., dissenting).
52. *See id.* (Kennedy, J., dissenting).
53. *See id.* at 1679 (Kennedy, J., dissenting).

perpetrator was necessary but not sufficient.[54] The *Gebser* Court, by requiring that the recipient have actual notice of its teacher's sexual harassment of a student, imposed a further limitation on school liability by "superimposing additional Spending Clause notice requirements on traditional agency principles."[55] The dissent chastised the majority for rejecting agency principles and replacing the line of liability with a "vague control principle" which is far too expansive and difficult to define.[56]

Second, the dissent argued that the regulations provide no notice to schools that they are responsible for the acts of third parties over which they exercise some control.[57] Rather, the regulations merely forbid grant recipients from giving aid to third parties who discriminate.[58] Third, liability under state common law provides no notice to recipients of potential liability under a federal statute.[59] Furthermore, relying on the National School Board Association publication to support notice "transform[s] a litigation manual . . . into a self-fulfilling prophecy."[60] Fourth, although schools have some degree of control over students, such control is complicated and limited.[61] These constraints create severe practical obstacles for schools to overcome when attempting to reconcile the interests of the harassed and the harasser.[62] The majority does not adequately take account of these competing interests and the double-bind situation in which the school may be caught.

Turning next to the definition of discrimination, the dissent, while acknowledging that schools are rife with a "dizzying array of immature or uncontrollable behaviors by students" which are inappropriate and objectively offensive at times, argued that such behavior is not gender discrimination.[63] The majority inappropriately relied on the definition of sexual harassment as sex discrimination in the employment context.[64] In the school peer harassment context, given the immaturity of students and the lack of a power relationship between the harasser and the victim, such conduct is best identified as misconduct addressed by student disciplinary codes.[65]

Finally, the dissent argued that the majority's attempts to fashion a workable standard and cabin school liability fail miserably.[66] First, the majority's standard for distinguishing simple teasing from sexual harassment offers no guidance at all.[67] The majority does not explain what constitutes a deprivation of access to educational opportunities and its reference to a "systemic effect" intends only to exclude a single act of harassment from actionable harassment.[68] Second, although the majority requires that the recipient have actual notice of the harassment, it does not specify who qualifies as the "recipient."[69] The majority appears to imply the same standard as that in *Gebser*–notice must be given to a school employee with authority to remedy the harassment.[70] In the context of teacher-on-student harassment, this standard does impose some limit since notice to a teacher is inadequate as one teacher would have no authority over another teacher.[71] In the context of peer harassment, however, it imposes no limit at all as notice to a teacher will likely suffice since a teacher has authority to take measures to remedy peer harassment.[72] Finally, the deliberate indifference threshold which the majority defines actually invites lower courts to second-guess school disciplinary decisions by incorporating a reasonableness standard into the test and thus, transforming every disciplinary action into a jury question.[73]

The dissent concluded by citing a parade of horribles. The dissent claimed that "[t]he pros-

54. *See id.* at 1680 (Kennedy, J., dissenting).
55. *Id.* (Kennedy, J., dissenting) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288 (1989)).
56. *Id.* at 1681 (Kennedy, J., dissenting).
57. *See id.* at 1684 (Kennedy, J., dissenting).
58. *See id.* (Kennedy, J., dissenting).
59. *See id.* at 1684-85 (Kennedy, J., dissenting)
60. *Id.* at 1685 (Kennedy, J., dissenting).
61. *See id.* at 1681 (Kennedy, J., dissenting).
62. *See id.* at 1681-83 (Kennedy, J., dissenting). The dissent noted the following constraints: (1) the duty to educate all students within defined boundaries, even when the student is suspended or expelled, (2) due process requirements of notice and hearing for alleged harasser, (3) the Individual with Disabilities Education Act which limits disciplinary actions which may be taken against students with behavior disorders, and (4) the First Amendment. *See id.*
63. *Id.* at 1685 (Kennedy, J., dissenting).
64. *See id.* at 1686-87 (Kennedy, J., dissenting).
65. *See id.* (Kennedy, J., dissenting).
66. *See id.* at 1687 (Kennedy, J., dissenting).
67. *See id.* at 1688 (Kennedy, J., dissenting).
68. *Id.* at 1687 (Kennedy, J., dissenting).
69. *Id.* at 1688-89 (Kennedy, J., dissenting).
70. *See id.* at 1688 (Kennedy, J., dissenting).
71. *See id.* at 1688-89 (Kennedy, J., dissenting).
72. *See id.* at 1689 (Kennedy, J., dissenting).
73. *See id.* (Kennedy, J., dissenting).

pect of unlimited Title IX liability, will . . . breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment."[74] Further, Title IX has been transformed into a Federal Student Civility Code which will "embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response."[75] Perhaps most distressing of all, the "Nation's schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator . . . [which is both] contrary to our traditions and inconsistent with the sensible administration of our schools."[76]

C. The Fundamental Disagreements

The majority and dissent disagree on two fundamental issues–whether peer sexual harassment constitutes sex discrimination, and if so, whether Title IX imposes liability on a school for the conduct of its students who are not agents of the school. With respect to the first issue, the dissent argued that the type of student conduct alleged should not be considered sex discrimination.[77] While the conduct is clearly inappropriate, immature, childish, and even objectively offensive, it merely represents "children in the throes of adolescence struggl[ing] to express their emerging sexual identities."[78] "[C]hildren–particularly young children–are not fully accountable for their actions because they lack the capacity to exercise mature judgment."[79] Thus, equating such conduct with either sexual harassment of a student by a teacher or sexual harassment in the employment context "erase[s], in one stroke, all differences between children and adults, peers and teachers, schools and workplaces."[80]

The majority, on the other hand, recognized that peer sexual harassment can constitute sex discrimination when it is "so severe, pervasive, and objectively offensive and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[81]

Commentators have described several theoretical models, which guide sexual harassment jurisprudence.[82] These theories have generally been derived in the context of employment discrimination. Recently, however, one writer applied this jurisprudence to student-on-student sexual harassment.[83] This analysis demonstrates that student peer sexual harassment can constitute sex discrimination.

Four models have been created to explain sexual harassment as a form of sex discrimination: (1) The formal equality model, (2) The sexual content model, (3) The subordination model, and (4) The gender regulation model.[84] The majority in Davis relied on the formal equality model to justify finding that student peer sexual harassment is sex discrimination by requiring that the harassment be such as to deny victims equal access to educational opportunities.[85] This analysis is supported by studies that have confirmed that peer "sexual harassment creates an unequal educational environment between males and females."[86] The dissent, on the other hand, recognized only the subordination model of sexual harassment and interpreted that model narrowly, suggesting that only structural power will satisfy such a model.[87] Thus, when students harass other students "there is no power relationship between

74. *Id.* at 1689 (Kennedy, J., dissenting).
75. *Id.* at 1691 (Kennedy, J., dissenting).
76. *Id.* at 1678 (Kennedy, J., dissenting).
77. *See id.* at 1679 (Kennedy, J., dissenting).
78. *Id.* at 1685 (Kennedy, J., dissenting).
79. *Id.* (Kennedy, J., dissenting).
80. *Id.* at 1686 (Kennedy, J., dissenting).
81. *Id.* at 1675.
82. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997); CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).
83. *See* Daniel G. McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523, 542-47 (1998).
84. *See id.* at 542-46.
85. *See Davis*, 119 S. Ct. at 1675.
86. McBride, *supra* note 83, at 542; *see also* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1417 (11th Cir. 1997) (Barkett, J., dissenting) ("[A] female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.").
87. *Davis*, 119 S. Ct. at 1686 (Kennedy, J., dissenting)

the harasser and the victim."[88] This analysis fails to recognize the equality model of sexual harassment as sex discrimination and fails to acknowledge in the subordination model a broader view of power which encompasses societal structures that reinforce the harasser's dominance over the victim.[89]

> Subordination by student sexual harassment relies, in part, upon the conveyance of structural power from the school to the harassers . . . . By refusing to act, the school cedes power to the student to control the victim's educational environment. The harassing student then derives a measure of subordinating power over the victim by creating a hostile environment and controlling the level of hostility.[90]

Both theoretical models thus support the claim that sufficiently severe and pervasive peer sexual harassment in schools constitutes sex discrimination because it violates formal equality and is sexually subordinating.[91]

The majority and dissent also debate the second issue–whether a school should be held liable for the conduct of its students. The dissent would draw the line based on agency principles limiting school liability to a school's deliberate indifference to notice of tortious conduct by one of its agents.[92] The majority drew the line based upon a control principle allowing school liability for a school official's deliberate indifference to notice of tortious conduct by an individual over which the school has control.[93] The majority noted that in *Gebser*, the Court employed the "deliberate indifference" standard used to establish municipal liability under Section 1983 to support holding the school liable for its deliberate indifference to the tortious conduct of its teachers.[94] The rationale imported from the Section 1983 cases is that the municipality, i.e. employer, is held liable for its own conduct and not the conduct of its employees; therefore, the conscious failure of an employer to address abusive conditions created by employees amounts to intentional discrimination by the employer.[95] However, in the Section 1983 context the perpetrators are agents of the employer, thus, under agency principles, their conduct can be attributed to the employer when the employer has notice of the conduct and fails to act.[96] These cases do not resolve the question of whether an agency relationship between the actor and the entity is necessary. However, one could argue that the "deliberate indifference" standard, rather than resting on an agency theory, rests on a control theory–an employer has control over its employees and thus could have prevented the tortious conduct by appropriately controlling or training the individuals over which it had control. Moreover, given the broad language of Title IX which focuses on the benefited class and not the perpetrator, and the use of the term "under" rather than "by" an educational program, the majority's reasoning appears more persuasive.

II. THE UNANSWERED QUESTIONS

The Court in *Davis* left several unanswered questions with which the lower courts are now struggling. First, what student conduct will rise to the level of "actionable" sexual harassment? Second, who must have actual notice of the harassment to hold a school liable? Third, what conduct by the recipient constitutes "deliberate indifference?"

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88. *Id.* (Kennedy, J., dissenting).

89. McBride, *supra* note 83, at 545.

90. *Id.*; *see also Davis*, 120 F.3d at 1417 ("[S]exual harassment–regardless of its source–subordinates girls in the classroom just as much as in the workforce . . . . [A] hostile environment can also be created by . . . fellow students who have no direct power relationship whatsoever with the victim.") (Barkett, J., dissenting).

91. The *Davis* decision appears to only address two of the four models of sexual harassment as sex discrimination. Daniel McBride discussed student peer sexual harassment under the sexual content and gender regulation models. *See* McBride, *supra* note 83, at 543-47. He concluded that the sexual content model would allow "schools to factor in the age and intent of the victim and harasser" by requiring actionable sexual harassment to include sexual intent. *Id.* at 544. The gender regulation model, however, proved too excessive since "virtually all student harassment could be construed to influence gender roles." *Id.* at 546.

92. *See Davis*, 119 S. Ct. at 1690-91.

93. *See id.* at 1673.

94. *See id.* at 1671.

95. *See, e.g.*, Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1187 (7th Cir. 1986); Gierlinger v. New York State Police, 15 F. 3d 32, 34 (2d Cir. 1994).

96. *Gierlinger*, 15 F.3d at 34 ("[T]hrough this failure, the [harassing] conduct [becomes] an accepted custom or practice of the employer.").

A. What Constitutes "Actionable" Sexual Harassment?

The majority in Davis held that to be actionable the peer sexual harassment must have "a systemic effect on educational programs or activities"[97] and be "so severe, pervasive, and objectively offensive that it can be said to deprive victims of access to the educational opportunities or benefits provided by the school."[98] The Court further explained that

> [w]hether gender-oriented conduct rises to the level of actionable "harassment" thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved .... [U]nlike the adult workplace, ... students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.[99]

The victim must demonstrate "a concrete, negative effect on her ... ability to receive an education."[100] The courts cannot satisfactorily rely on Title VII cases involving the adult workplace to determine what constitutes "actionable" harassment in the school context. As I have indicated previously,

> [t]hus far, most Title IX cases have involved sexually offensive acts persisting for lengthy periods and clearly rising to the level of actionable harassment.[101] As a result, few Title IX cases to date have focused on defining the contours of a hostile environment within the educational arena. One circuit, however, has established a standard against which to test the severity of the harassment. The Eleventh Circuit held that the harassment is actionable when "the educational setting is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the student's environment."[102] Factors the court should consider are "(1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the student's performance"[103] viewed both objectively and subjectively and acknowledging the ages of the students involved.[104][105]

While these factors effectively mirror those developed in the employment context,[106] further work will be necessary to fully develop the

97. *Davis*, 119 S. Ct. at 1676.

98. *Id.* at 1675.

99. *Id.*

100. *Id.* at 1676.

101. *See, e.g.*, Oona R.-S.- v. Santa Rosa City Schs., 890 F. Supp. 1452, 55-56 (N.D. Cal. 1995) (boys repeatedly referred to 11-year-old girl's private parts as "melons" and "beavers", and student teacher fondled girl's buttocks), *aff'd sub nom.* Oona R.-S.-v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (while on bus, boys repeatedly harassed eighth-grade girls, swatting their bottoms, groping their genital areas, and commenting "[w]hen are you going to let me fuck you?"), *cert. denied*, 117 S. Ct. 165 (1996). *But see* Emmalena Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1015-16 (1998) (discussing the publicity two young school boys received after being reprimanded for kissing a school mate). The school principals claimed that such behavior violated the school's policy against sexual harassment, although such a trivial, isolated incident does not rise to the level of actionable sexual harassment. *See id.* Nevertheless, such publicity detracts from the seriousness of the real problem of sexual harassment on our campuses. *See id.* at 1017.

102. Megan Healy, *Responding to Students' Pleas for Relief: The Need for a Consistent Approach to Peer Sexual Harassment Claims*, 17 N. ILL. U. L. REV. 479, 505 (1997) (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996)).

103. *Davis*, 74 F.3d at 1194.

104. Healy, *supra* note 102, at 505 (citing Alexandra Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 583 (1996)).

105. Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN'S L. J. 159, 172-73 (1999).

106. *See, e.g.*, Doe v. Univ. of Ill., 138 F.3d 653, 665 (7th Cir. 1998) (noting that the definition of sexual harassment in the educational context is derived from Title VII precedent); Murray v. N.Y. Univ. College of Dentistry, 57 F.3d 243, 248-49 (2d Cir. 1995) (applying Title VII analysis to student's Title IX claims against school involving sexual harassment by teacher); *see also* Preston v. Virginia, 31 F.3d 203, 206-07 (4th Cir. 1994); Lipsett v. Univ. of P.R., 864 F.2d 881, 896-97 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). *But see* McBride, *supra* note 83.

"what" and "how" of peer sexual harassment in schools.[107] The *Davis* Court recognized that it is a multi-factored inquiry which focuses on two primary considerations–the nature of the conduct and the effect on the victim. In *Davis*, the conduct continued over several months and culminated in a sexual battery finding against the student harasser. Moreover, the victim alleged that she had suffered severe trauma, her grades dropped, and she had contemplated suicide. Such allegations apparently meet the majority's standard for "actionable" harassment. As more cases of peer sexual harassment are addressed, the line between childish behavior and "actionable" harassment will become more clear.

B. Notice to Whom?

The Court in *Gebser* defined the individual who must have notice of the discrimination as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."[108] It is important to properly identify the individual because the recipient is to be held liable "for its own official decision" not for "its employees' independent actions."[109] Thus, the individual must have the authority to act on behalf of the recipient.

The circuits had been struggling with this question even before *Gebser*. The Fifth Circuit in *Rosa H. v. San Elizario Independent School District*,[110] identified the range of individuals through which the recipient acts–"members of the school board, administrators at particular schools, or classroom teachers."[111] In deciding whose acts constitute those of the recipient, the court rejected either end of the spectrum.[112] The court reasoned that if notice to a school board member were necessary, "victims of abuse would virtually never be able to recover . . . [since] school board members have little contact with the day-to-day interactions between teachers and students."[113] On the other hand, if a court holds a school liable whenever any employee has actual knowledge and fails to act, the court would be utilizing a respondeat superior standard. Charting between these extremes, the court held that a school would be liable when a "school official who had actual knowledge of the abuse was invested by the school board with a duty to supervise the employee and the power to take action that would end the abuse and failed to do so."[114] The court supported drawing the line here by stating that

> [t]his inquiry circumscribes those school employees in the chain of command whom the school board has appointed to monitor the conduct of other employees and, as distinguished from reporting to others, remedy the wrongdoing themselves. At the same time it locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination.[115]

The lower courts which have addressed this issue since *Gebser* have basically followed this rationale. In teacher-on-student harassment cases, courts have found that notice to another teacher is inadequate but notice to the principal, or another supervisory official, would satisfy *Gebser*.[116] However, in the context of stu-

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at 523 (discussing the theoretical difficulties in applying Title VII case law to Title IX).

A court will hold an employer liable for sexual harassment under Title VII if the conduct in question created a hostile work environment, as perceived objectively by a reasonable person and subjectively by the alleged victim. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993)). Courts evaluate the circumstances, including "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance . . .' to ensure that Title VII does not become a 'general civility code.'" *Id.* at 788 (quoting *Harris*, 510 U.S. at 23; Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)). While proof of physical or psychological injury is not necessary, *see Harris*, 510 U.S. at 22, the conduct must have been sufficiently extreme to create a change in the terms and conditions of employment, *see Faragher*, 524 U.S. at 788.

107. *See* Abrams, *supra* note 82, at 1170 (noting that the sexual harassment scholarship in the employment context focused on the "what" and the "how" following the initial scholarship describing the "why" and the Court's recognition of a claim for sexual harassment under Title VII).

108. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

109. *Id.*

110. 106 F.3d 648 (5th Cir. 1997).

111. *Id.*

112. *See id.* at 660.

113. *Id.* at 659.

114. *Id.* at 660.

115. *Id.*

116. *See* Miller v. Kentosh, No. Civ. A. 97-6541, 1998 WL 355520 at *6 (E.D. Pa. June 29, 1998); Morlock v. West Cent.

dent-on-student harassment courts have found notice to a teacher satisfactory, arguing that a teacher has supervisory authority over the student and the power to take action to end the abuse.[117] In fact, at least one court has distinguished liability under Title IX and Section 1983 on the basis of who must be given notice.[118] In a teacher-on-student sexual harassment claim, a district court held that notice to the principal is sufficient to establish school liability under Title IX but insufficient to establish school liability under Section 1983 because the principal is not a final policy maker.[119]

The Eleventh Circuit disagrees with this approach. The Supreme Court instructed the circuit to reconsider *Floyd v. Waiters*[120] in light of *Gebser*. In so doing, the circuit affirmed its decision which held that a member of the school board must have notice of the misconduct and fail to act.[121] The court stated that the official must be "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct."[122] The court reasoned that Title IX prohibits discrimination in any "program or activity"[123] defined as a "local education agency"[124] which in turn is defined as a "public authority legally constituted within a State for either administrative control or direction of . . . public elementary or secondary schools."[125] Thus, the court continued, it must look "to state law to determine who is responsible for the 'administrative control or direction' of the school district under Title IX."[126] The court concluded that under state law the local school superintendent is designated as the party responsible for ensuring the school's compliance with its statutory obligations and thus is the official who must have actual notice of the harassment.[127] The court did recognize that under Title IX each "recipient" is required to designate an individual responsible for ensuring compliance with Title IX–the Title IX coordinator. The court noted that no such individual had been brought to its attention and thus the court assumed the superintendent served in that capacity.[128] If, however, another individual served that role, the court would probably have found that the notice to that individual satisfied the standard as well.

The Eleventh Circuit rejected the Fifth Circuit's *Rosa H.* standard claiming that it imposed "a kind of vicarious liability based on respondeat superior."[129] To hold a school liable for the actions of lower employees "would be both cumbersome and costly . . . . In many school districts . . . some supervising positions may be five or six steps removed from the board of education and the superintendent of schools. We do not think that school districts, in reality, have actual knowledge–the knowledge to support potentially million-dollar liability for the school district"[130]–whenever a lower supervisor has knowledge. Further, in response to the claim that such a standard would render rights created under Title IX virtually meaningless, the Eleventh Circuit explained that "[s]chool superintendents and board members are local public officials to whom letters are easily sent and who appear at public meetings and receive constituent phone calls . . . . They can–for example, by reasonable efforts of parents and students–be put on notice of misconduct."[131]

Is either approach consistent with *Gebser*? The Court in *Gebser* sent mixed signals to the lower courts. While the *Gebser* Court stated

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Educ. Dist., 46 F. Supp.2d 892, 908-09 (D. Minn. 1999) (notice to individual designated in written policy manual as Title IX coordinator and building principal sufficient).

117. *See* Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp.2d 618, 621-22 (S.D. W. Va. 1998) (allegation that teacher vested with authority over school children witnessed the harassment sufficient to survive motion to dismiss); *Morlock*, 46 F. Supp.2d at 908 (complaints to teachers concerning peer harassment sufficient since the teachers "had immediate responsibility over student discipline in their classrooms").

118. *See Morlock*, 46 F. Supp.2d at 910-11, 920-21.

119. *See id.* at 910-11, 921.

120. 133 F.3d 786 (11th Cir. 1998).

121. *See* Floyd v. Waiters, 171 F.3d 1264, 1265 (11th Cir. 1999).

122. *Id.* at 1264.

123. 20 U.S.C. § 1681 (a) (1994).

124. 20 U.S.C. § 1687 (2)(B) (1994).

125. 20 U.S.C. § 8801 (18)(A) (1994).

126. *Floyd*, 133 F.3d at 791.

127. *See id.* Interestingly, the Seventh Circuit followed this same approach in determining whether a principal constitutes a grant recipient and thus liable in his official capacity under Title IX. *See* Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1020-21 (7th Cir. 1997). However, in determining the notice standard, the court followed *Rosa H. See id.* at 1034.

128. *See Floyd*, 133 F.3d at 792 n.10.

129. *Id.* at 790.

130. *Id.* at 792 n.11.

131. *Id.* at 792.

that "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf . . ."[132] satisfies the standard, the Court invoked the Section 1983 "deliberate indifference" standard and emphasized that the recipient is held liable for its own conduct not that of its employees.[133] The Eleventh Circuit on reconsideration apparently interpreted the Court's citation to Section 1983 cases as invoking the final authority doctrine which states that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered."[134] "Mere authority to exercise discretion that implements another's policy is not enough."[135] Moreover, under Section 1983 the identity of the decisionmaker with final authority is based upon state and local law.[136] Following the rationale of these cases, the Eleventh Circuit analysis would appear correct. However, the Court in *Gebser* did not cite precedent reflecting the final authority doctrine, e.g. *Pembaur v. Cincinnati*,[137] instead the Court cited *Board of County Commissioners v. Brown*,[138] and *City of Canton v. Harris*,[139] which address the degree of fault necessary to satisfy deliberate indifference, and the causal link between a municipal policy and the alleged violation.

In *Pembaur*, the county prosecutor directed the deputy sheriff to break into Dr. Pembaur's medical clinic.[140] The issue before the Court was to determine whether particular decisions made by municipal officials represent municipal policy.[141] The Court held that the county prosecutor was acting as the final decisionmaker for the county, pursuant to local law, and thus the county could be held liable for that one decision.[142] By contrast, in *Canton*, the theory of municipal liability was a failure to adequately train police officers in the medical treatment of detainees.[143] The Court noted the "substantial division among the lower courts as to what degree of fault must be evidenced by the municipality's inaction before liability will be permitted."[144] The Court resolved this division by holding that the degree of fault must rise to a deliberate indifference to the constitutional rights of persons–where "'a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers."[145]

More recently the Court had an opportunity to distinguish the *Pembaur* line of cases from the *Canton* line of cases. In *Brown*,[146] the plaintiff had sustained injuries when a sheriff's reserve deputy used excessive force in her arrest. The plaintiff attempted to hold the county "liable for her injuries based on its sheriff's hiring and training decisions."[147] The plaintiff relied on the Court's decision in *Pembaur* arguing that "a single act by a decisionmaker with final authority in the relevant area constitutes 'policy' attributable to the municipality itself."[148] While the *Brown* Court agreed with this rationale it explained that "it is not enough for a Section 1983 plaintiff merely to identify conduct properly attributable to the municipality . . . . In relying heavily on *Pembaur*, respondent blurs the distinction between Section 1983 cases that present no difficult questions of fault and causation and those that do."[149] There was no question in *Brown* that the sheriff had the final authority to act for the municipality in hiring matters.[150] Rather, the difficult issue was whether his inadequate review of the applicant's record upon hiring constituted "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."[151]

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132. Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1998, 1999 (1998).
133. *See id.*
134. Pembaur v. Cincinnati, 475 U.S. 469, 481 (1986).
135. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, 1B SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 58 (3d ed. 1997).
136. *See id.* at 59 (citing *Pembaur*, 475 U.S. at 483).
137. *See Pembaur*, 475 U.S. at 469.
138. *See* Board of the County Comm'rs. v. Brown, 520 U.S. 397 (1997).
139. *See* City of Canton v. Harris, 489 U.S. 378 (1989).
140. *See Pembaur*, 475 U.S. at 480.
141. *See id.* at 480.
142. *See id.* at 485.
143. *See Canton*, 489 U.S. at 381-82.
144. *Id.* at 388.
145. *Id.* at 389 (quoting *Pembaur*, 475 U.S. at 483-84).
146. *See* Board of the County Comm'rs. v. Brown, 520 U.S. 397, 400 (1997).
147. *See id.*
148. *Id.* at 404.
149. *Id.* at 404-05.
150. *See id.* at 408.
151. *Id.* at 411.

This analysis suggests that the *Gebser* Court cited *Brown* and *Canton* in order to define the fault and causation requirements necessary to hold a school liable for sexual harassment rather than to define the official final policy maker as the individual who must have notice of the harassment. The *Gebser* Court first looked to the administrative scheme as a guide to answering the question of notice. The Court explained that the administrative scheme is predicated upon notice to an "appropriate person" under 20 USC section 1682 and then defined that person as one who "is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination."[152] The Court then turned to the definition of fault, explaining that the premise of a deliberate indifference standard "is an official decision by the recipient not to remedy the violation"[153] similar to the fault standard for claims under Section 1983 citing *Brown* and *Canton*. This rationale is further supported by the *Davis* decision in which the Court again cited *Brown* and *Canton* for the proposition that "recipients could be liable in damages only where their own deliberate indifference effectively *'cause[d]'* the discrimination."[154] Thus, the *Gebser* and *Davis* Courts were not relying on Section 1983 precedent to identify the "appropriate person" as the final official policymaker but rather to support the fault and causation requirements necessary to hold the recipient liable.

Nevertheless, it remains unclear whether notice of peer sexual harassment to an individual teacher satisfies the *Gebser* standard. Is an individual teacher "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf"?[155] I doubt that either Congress or the Court in *Davis* intended for a school district recipient to be liable for the decisions of an individual teacher in addressing peer sexual harassment. Although individual teachers have direct control over individual students and the authority to exercise discretion in implementing policy, it is the principal of the school who has the authority to establish the disciplinary policy for the school and institute corrective measures. By requiring that the "appropriate person" be an "official" and by requiring that that person have at a "minimum" authority to institute corrective measures, it is more likely that the *Davis* Court intended that the principal have actual notice of peer sexual harassment before liability under Title IX may be imposed upon the recipient. While the Court did not expressly address this, it did note that the principal of Hubbard Elementary School had notice of the harassment.[156] Requiring notice to the school principal sets some limit on the school board's liability even in the peer harassment context without making it virtually impossible for victims of abuse to meet the standard.[157]

C. Deliberate Indifference

A third issue which is left unresolved, is the application of the deliberate indifference standard to both teacher and peer harassment of students. As discussed, *Gebser* invoked the Section 1983 standard to define the fault and causation necessary to qualify as deliberate indifference under Title IX. However, the Court had no occasion to apply the standard in that case as the Court found that the principal did not have adequate notice of the harassment.[158] The *Davis* majority illuminated the standard

152. Gebser v. Lago Indep. Sch. Dist., 524 U.S. 234, 290 (1998).

153. *Id.*

154. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1671 (1999) (emphasis added).

155. *Gebser*, 524 U.S. at 290.

156. *See Davis*, 119 S. Ct. at 1667.

157. One judge has recently noted that an actual notice standard makes insufficient allowance for the age of the victim. In *X v. Fremont County School District No. 2*, No. 96-8065, 1998 WL 704692, at **1 (10th Cir. Oct 2, 1998) (unpublished disposition), a 10-year old elementary school pupil had been allegedly sexually assaulted by his teacher although he had not reported the incident to the school. Under *Gebser*, the court held that no basis for institutional liability had been established. *See id.* at **2. While this is the right result under *Gebser*, Judge Lucero added that "very young children, with little experiential basis to make a judgment as to what constitutes appropriate or inappropriate behavior, and taught from an early age to respect teachers as role models, are neither likely nor well-equipped to report acts of harassment by those same parties .... [A]n actual notice standard interprets Congressional silence to provide better protection against harassment to older students than to their younger counterparts." *Id.* at **3 (Lucero, J., concurring). I am sympathetic to this argument. Given the particularly vulnerable position young students are in, the Court should perhaps consider a "known or should have known" standard of notice when the harassment involves elementary school children.

158. *See Gebser*, 524 U.S. at 291.

slightly, stating that only where the response to the harassment "is clearly unreasonable in light of the known circumstances"[159] will a recipient be deemed deliberately indifferent. The majority emphasized that "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[160] The dissent chastised the majority for setting a "reasonableness standard" which "transforms every disciplinary action into a jury question"[161] and for failing to account for various constraints on schools' disciplinary controls.[162] The majority declined to analyze the standard under the facts in *Davis*–merely stating that "it remains to be seen whether petitioner can show that the Board's response . . . was clearly unreasonable in light of the known circumstances."[163]

A few lower courts have had occasion to evaluate the response of recipients to allegations of teacher and peer harassment since the *Gebser* and *Davis* decisions. The Fifth Circuit in *Doe v. Dallas Independent School District*[164] evaluated the conduct of the school's principal after she received notice that an elementary school student had been fondled by his teacher. There the principal met with the student, his mother, and the teacher to discuss the issue. The principal, however, did not formally reprimand the teacher nor transfer him to another school.[165] The court granted summary judgment to the school because "actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . ."[166]

The First Circuit analyzed the sexual harassment of a female student by Professor Andesogan at Brown University.[167] Two judges of the panel found that a "reasonably firm reprimand" of Andesogan did not amount to deliberate indifference even though they characterized the response as "remarkably inept."[168] These judges refused to take account of later complaints by other students against the same professor as irrelevant since the plaintiff's harassment occurred before these incidents. Judge Lipez, in dissent, however, evaluated not only the immediate response of Brown to the complaint but later events which suggested that the school should have done more but did not. He stated: "the adequacy of a school's response may change with an increase in the school's knowledge of the circumstances of discrimination. . . . [W]hat was an adequate response to a single complaint . . . may become 'clearly unreasonable' when the school is placed on notice by additional complaints or other pertinent information . . . ."[169] Judge Lipez then summarized the response by Brown.[170] In December 1992, the provost and dean, in response to plaintiff's complaint, met with the professor and sent a letter of reprimand placing him on probation.[171] Two months later, the faculty voted to retain Andesogan (he was visiting from another institution) and gave him a raise. In September 1993, another student filed a complaint alleging Andesogan sexually harassed her in Fall 1992, prior to plaintiff's complaint.[172] The school took no action since they had since reprimanded him.[173] In January 1994, a third student informally complained about inappropriate behavior by Andesogan in Fall 1993.[174] Again, no action was taken.[175] Brown finally dismissed Andesogan in March 1994 after six other female students complained that he had assaulted them.[176] Judge Lipez argued that a jury could reasonably determine that Brown acted with "deliberate indifference" based upon this evidence.[177]

In a third case of teacher-on-student harassment, Ms. Chontos brought suit against Indiana University for alleged sexual harassment by Professor Rhea.[178] The district court began by noting that "as long as the responsive strategy chosen is one plausibly directed toward putting

159. *Davis*, 119 S. Ct. at 1674.
160. *Id.*
161. *Id.* at 1688 (Kennedy, J., dissenting).
162. *See id.* at 1682-83.
163. *Id.* at 1674.
164. 153 F.3d 211, 214 (5th Cir. 1998).
165. *See id.* at 219.
166. *Id.* Note that this analysis was in the context of a Section 1983 claim against the principal herself.
167. Wills v. Brown University, 184 F.3d 20 (1st Cir. 1999).
168. *Id.* at 27-28.
169. *Id.* at 41 (Lipez, J., dissenting).
170. *See id.* at 41-42 (Lipez, J., dissenting).
171. *See id.* (Lipez, J., dissenting).
172. *See id.* at 42 (Lipez, J., dissenting).
173. *See id.* (Lipez, J., dissenting).
174. *See id.* (Lipez, J., dissenting).
175. *See id.* (Lipez, J., dissenting).
176. *See id.* (Lipez, J., dissenting).
177. *Id.* (Lipez, J., dissenting).
178. *See* Chontos v. Rhea, 29 F. Supp.2d 931, 933 (N.D. Ind. 1998).

an end to the known harassment, courts should not second-guess the professional judgments of school officials."[179] Chontos was the last in a series of students who had complained about Rhea.[180] The university suspended Rhea following that complaint and Rhea ultimately resigned.[181] However, the court found that a reasonable jury could find that the University had been deliberately indifferent to prior complaints of harassing conduct by Rhea. Beginning in 1989, Rhea had been involved in two incidents with female students.[182] The dean confronted Rhea, issued him a written reprimand, told him that his behavior violated school policy, and removed the students from his class.[183] Later that year another incident occurred and the dean recommended that Rhea get psychological counseling.[184] This he did although the university did not obtain any information regarding the results of his counseling.[185] Additionally, the university wrote Rhea and informed him that another incident would expose him to suspension and firing.[186] Five years went by with no incident and then in spring 1994 another student informally complained about Rhea to the director of student activities but no action was taken.[187] Chontos was sexually harassed by Rhea in May 1996.[188] The court found that the university's failure to respond to the 1994 incident raised a jury question in which a jury could find that "this nonresponse was not plausibly directed toward putting an end to Rhea's harassment, but instead amounted to condoning Rhea's behavior or to consciously disregarding an obvious risk that Rhea would sooner or later harass another student."[189]

In a final case, *Morlock v. West Central Education District*,[190] a district court judge found that plaintiff survived a motion for summary judgment in a case of peer harassment at the Melrose Area Learning Center, a "cooperative alternative secondary school program designed for the purpose of meeting the educational needs of students who are unable to meet their educational needs in a mainstream setting."[191] In this case the school did not entirely fail to respond to plaintiff's complaints. Rather, the superintendent expelled or suspended several students and held meetings with the principal of the school to discuss the consistent enforcement of discipline policies.[192] Nevertheless, such actions were ineffective. The court found that plaintiff could survive defendant's summary judgment motion by showing that the "school district took only minor steps to address the harassment with the knowledge that such steps would be ineffective."[193]

These cases have been recounted to demonstrate the difficulty courts have with determining what amounts to "deliberate indifference." When a school completely ignores students' complaints the call is easy. Moreover, if the school immediately terminates a teacher or expels a student for sexual harassment the call is again easy. However, there are a myriad of actions the school might take which may or may not end the harassment and often the call will come down to a question left for a jury. In summarizing the few cases decided since *Gebser* and *Davis*, the courts appear to be carefully cabining the deliberate indifference standard. The two appellate decisions both granted summary judgment for defendant, finding that plaintiff failed to raise a genuine issue of material fact demonstrating deliberate indifference by the institution. One district court denied summary judgment based upon the school's complete failure to respond to an incident when it had had knowledge of misconduct previously. In only one case did the district court deny defendant's summary judgment based upon an ineffective response to plaintiff's claims of peer harassment. In summary, it appears so far that the courts are generally heeding the *Davis* majority's warning that the deliberate indifference standard "does not mean that the recipient can avoid liability only by purging their schools of actionable peer harassment . . . [and] courts should refrain from second-guessing the disci-

179. *Id.* at 934 (quoting Doe v. Univ. of Ill., 138 F.3d 653, 667-68 (7th Cir. 1998)).
180. *See id.* at 934-36.
181. *See id.* at 936.
182. *See id.* at 935.
183. *See id.*
184. *See id.*
185. *See id.*
186. *See id.*
187. *See id.* at 936.
188. *See id.*
189. *Id.* at 937 (citations omitted).
190. 46 F. Supp.2d 892, 897 (D. Minn. 1999).
191. *See id.*
192. *See id.* at 909.
193. *Id.* at 910.

plinary decisions made by school administrators."[194]

One last observation concerning the deliberate indifference standard–is the standard sufficiently flexible to allow for both practical and legal constraints on a school's disciplinary options? Two of these cases demonstrate the double-bind in which the school might find itself while having to carefully balance the interests of the harassed and the harasser. Basic notions of due process require that a school allow an alleged harasser to confront his or her accusers before terminating employment or expelling from school. In *Chontos*, the university stated that the complaining students did not want to pursue their complaints formally where they would have to confront Rhea at a public hearing, a requirement for firing a tenured professor.[195] This, the university argued, curtailed the disciplinary options left open to the school. Moreover, Rhea had had a solid academic record which the university took into consideration in deciding what response would be appropriate.[196] The court responded to these arguments stating: first, the university need not have fired Rhea since a number of other responses were available that could have been effective and, second, by 1994 "Rhea's record was considerably tarnished and did not outweigh the threat to students he presented."[197]

The second example is *Morlock* where the school was an "alternative" school designed to educate students who were either chemically dependent, had emotional behavioral disabilities, or had a history of expulsion or truancy.[198] In such an environment, the school is required to educate the students while maintaining order. However, in these environments it is not uncommon for the school's disciplinary actions to be ineffective. The school is limited in its ability to discipline the students, e.g. it cannot expel the students as there are no other alternative schools left, yet the school must protect its students from harassment or be liable for damages to the victims.

These two examples demonstrate some of the constraints on a school which create practical obstacles to reconciling the interests of the harassed and the harasser. Only time will tell whether the deliberate indifference standard is sufficiently flexible to provide the school with the discretion necessary to balance these interests.

CONCLUSION

Courts and commentators have just begun to explore the parameters of student sexual harassment. In 1986, the Supreme Court in *Meritor Savings* first recognized sexual harassment as sex discrimination in the employment context.[199] It was not until 1992, in *Franklin*, that the Court recognized teacher-on-student sexual harassment as sex discrimination and held that a student may hold a school liable for damages under Title IX.[200] In 1999, the Court, in *Davis*, recognized that a student may hold a school liable for student-on-student sexual harassment under Title IX as well.[201] The Court has provided some general guidelines but has left several unanswered questions. Just as the courts and commentators have struggled to develop the contours of sexual harassment jurisprudence in the employment context following *Meritor Savings*, courts and commentators will have to struggle to develop the contours of sexual harassment jurisprudence in the school context following *Davis*.

194. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1674 (1999).
195. Chontos v. Rhea, 29 F. Supp.2d 931, 937 (N.D. Ind. 1998).
196. *See id.*
197. *Id.*
198. *Morlock*, 46 F. Supp.2d at 897.
199. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
200. Franklin v. Gwinnett County Public Schs., 503 U.S. 60 (1992).
201. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1666 (1999).