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Articles

ASSESSING INSTITUTIONAL RESPONSIBILITY FOR SEXUAL HARASSMENT IN EDUCATION

Julie Davies [a1]

This Article examines the viability of private enforcement of Title IX, which prohibits discrimination on the basis of sex by educational entities receiving federal funding, in sexual harassment cases. Several years ago, the United States Supreme Court announced a standard heightening protection of entities in cases that seek to impose liability for violations of Title IX. There was speculation that private enforcement of the statute would be greatly reduced. The Article examines sexual harassment cases brought under Title IX after adoption of the new standard as a means of understanding whether the prospects of private actions are as dismal as they may seem.

The Article traces the development of entity liability doctrine, comparing treatment of employers under Title VII and educational entities under Title IX. Although the Article does not advocate use of the workplace standard in education, it demonstrates the commonality of the Supreme Court's concerns about liability for sexual harassment under both statutes and argues these fundamental policy concerns should be used to guide the lower courts as they grapple with the issues that emerge under the Title IX standard. Judicial opinions, mostly in the context of pretrial motions, give an indication of the depth and complexity of the pertinent questions. Some courts interpret the standard in a manner that virtually forecloses institutional responsibility, while others manifest a broader view. The numbers of dismissals, particularly in peer harassment cases, give an indication of how challenging litigation in this area has become.

The Article argues that the underlying policy warrants a broad interpretation of the new standard. The Article also suggests that despite other factors that influence funding recipients to prevent sexual harassment, private enforcement remains a powerful incentive for prevention. A cramped interpretation of the standard for entity liability may negatively impact not only those who seek to litigate individual grievances, but the general student population as well.

*388 I. Introduction

Private actions for damages are crucial to the enforcement of Title IX [1] in sexual harassment cases. These actions are brought against federal funding recipients [2] --school districts and universities, among others. In the last several years, the United States Supreme Court ***389** decided two cases that transformed the way institutional liability under Title IX is approached. [3] Lower courts had long viewed treatment of sexual harassment under Title VII as a model for Title IX interpretation, [4] but the Supreme Court adopted completely separate standards for each statute. [5] The Title IX standard bears a distinct resemblance to the Court's restrictive rules on municipal liability under 42 U.S.C. § 1983 [6] and could, if interpreted rigidly and formalistically, defeat institutional accountability. The direction that the law will take depends largely on how lower courts interpret the standard. [7] They are, in a real sense, at a crossroad as they adjudicate the cases that test the meaning of the new standard. This Article examines emerging interpretive conflicts in the lower courts and the characteristics and outcomes of cases applying the new standard to assess whether the standard chokes off institutional accountability for damages. The ***390** Article then recommends the direction the law must take to preserve private enforcement.

Sexual harassment in education occurs in many forms. Whether it consists of teachers playing bizarre sex games with students [8] or peer harassment through touching or sexual taunting, [9] sexual harassment can have devastating effects. For years, educators and even courts were prone to dismiss such behavior as normal, if not acceptable, and certainly beyond their control. [10] It is only in the last decade that society has become increasingly aware of the prevalence of sexual harassment in schools. [11] A now famous survey by the American Association of ***391** University Women (AAUW) presented truly shocking statistics on the frequency and devastating effects of sexual harassment in schools. [12] An update of the AAUW survey, published in May 2001, again demonstrated that a vast majority of students in public schools experience sexual harassment in their school lives. [13] Sexual harassment is more than unpleasant; it has the potential to torture the recipient, diminish interest in education, reduce ability to complete an education program, and inflict psychological scars that remain long after the experience ends. [14]

***392** Recognition of sexual harassment as a species of sex discrimination [15] and the ability of private individuals to bring damages ***393** actions [16] for Title IX violations have reinforced, and perhaps speeded, an institutional imperative to prevent and redress harassment under Title IX. Title IX, which was first used to redress sex-discriminatory spending in institutions receiving federal funding, [17] has become the primary federal vehicle [18] for addressing sexual harassment in education. [19] State tort law [20] and state education or civil rights laws [21] ***394** sometimes supplement Title IX, but rarely supplant it. [22] Noncompli-ance with Title IX carries the potential penalty of discontinuation of federal funding. The gravity of this sanction (not to mention its disuse) [23] led the Supreme Court to hold in Franklin v. Gwinnett County Public Schools that the implied private right to action it had recognized earlier included a right to seek damages. [24] Because virtually every court that considered the

issue has rejected individual liability under Title IX,[25] institutional liability has become the focal point of litigation.[26] Given the constraints on administrative[27] and private ***395** injunctive enforcement[28] of Title IX, and the lack of state legislation in many instances, accountability for violations of Title IX often hinges completely on damages actions against the federal funding recipient.

Questions of entity liability are not new; they have been debated in the context of Title VII[29] for years. But the Supreme Court has sent decidedly different messages about the nature of institutional responsibility depending upon whether the entity is covered by Title VII or Title IX. In particular, institutional liability in educational settings appears threatened by the Court's rulings because the standard appears so hard to meet. The survival of institutional accountability depends on the direction that lower federal courts take in interpreting the guidelines that the Supreme Court has handed them.

This Article begins by examining and comparing the standards for entity liability under Titles VII and IX.[30] The Supreme Court's ***396** decisions reveal what most commentators view as a somewhat hospitable climate for entity liability under Title VII and a positively dismal climate for Title IX suits.[31] After a brief consideration of why private enforcement of Title IX remains important,[32] the Article examines scholarly commentary on the implications of the entity liability standards. Criticism of the standards revolves around two central questions: whether the standards undercut private enforcement and whether they give incentives for prevention of sexual harassment.[33]

Although the legal scholarship adds much clarity in terms of critique and predictions, none of the solutions advanced are completely satisfactory.[34] To my mind, there are legitimate reasons to distinguish sexual harassment in education from sexual harassment in employment.[35] The key concern is whether the Title IX standard can adequately serve the goal of permitting private enforcement and spurring prevention. The short answer is that the Title IX standard is workable if it is properly understood. Proper understanding hinges on the realization that the policy goals underlying both the Title VII and Title IX standards are the same; they are manifested differently because of the Courts' perception of differences in the context and structure of the statutes.[36] As they grapple with the Title IX standard, lower courts must use underlying policy as their compass.[37]

In Part IV, the Article takes a look at lower courts' interpretations of the Title IX standard. It appears that many lower courts have construed the Supreme Court's rulings in ways that are favorable to plaintiffs and, at the same time, respectful of the Supreme Court's unique concerns about entity liability in the context of Title IX; other lower courts have applied the directives in draconian fashion.[38] It quickly becomes obvious that the standard has generated confusion and that, to reason through it, courts need to ground themselves in the underlying policy. I offer some suggestions about how they should do so.[39]

At the risk of revealing too much too soon, there are several conclusions that flow from my analysis. Contrary to the most dire ***397** predictions, private enforcement of Title IX through actions for damages is still possible.[40] But no one should underestimate how much is riding on the interpretation of the standard for entity liability. The viability of damages claims impacts not only compensation, but also prevention incentives. I consider this effect in the last Part, ultimately concluding that potential damages liability is still a powerful, though imperfect, inducement to get institutions to address sexual harassment issues with an eye toward prevention.[41] Simply put, damages liability is an important piece of a broader picture.

Title IX can continue to serve as a powerful enforcement tool for victims of sexual harassment; however, if the wrong choices are made, institutional liability will be greatly reduced.

II. The Supreme Court Decisions and Their Implications for Entity Liability

During 1998 and 1999, the Supreme Court issued four opinions that clarified its position on institutional liability for sexual harassment. [42] These opinions explained the Court's reservations about the issue, revealed its priorities, and attempted to settle longstanding confusion. In the process, the Court's analysis distinguished between Titles VII and IX. In essence, the Court resolved the same issue differently because of the differences between the statutes. [43] The irony of these decisions is that plaintiffs bringing damages actions under Title VII are better situated to recover than plaintiffs bringing suit for the exact same conduct under Title IX. [44]

A. A Brief Description of the Law's Development

For many years, entity liability for sexual harassment was thought to turn on whether the harassment was characterized as quid pro quo [45] ***398** or hostile environment. [46] These distinctions, though first recognized by the Equal Employment Opportunity Commission (EEOC), [47] were followed by the Court and served as the linchpins for deciding entity liability. The thought was that employers were vicariously liable for quid pro quo harassment, but not for hostile environment claims. [48] But the precise contours of entity liability remained unclear, with the Supreme Court seemingly deferring to EEOC standards and periodically issuing cryptic clarifications. [49] Lower courts and litigants assumed that entity liability under Title IX would mirror treatment of the issue under Title VII. [50] The Court's decisions in 1998 and 1999 dispelled these assumptions and changed the way entity liability is approached.

B. The Title VII Standard

In its Title VII decisions, Burlington Industries Inc. v. Ellerth [51] and Faragher v. City of Boca Raton, [52] the Court adopted rules that both ***399** reflected its overriding concern about the fairness of attributing harassment by employees to the entity and emphasized prevention and conciliation. The standard the Court adopted rejected the notion that the entity's liability depended entirely on characterization of the sexual harassment as quid pro quo [53] or hostile work environment. [54] Instead, using the Restatement (Second) of Agency [55] as a starting point, the Court concluded that vicarious liability could be justified under the "aided by agency relation" rule. [56] The easiest case for vicarious liability is presented when a supervisor takes a tangible employment action against an employee. [57] The supervisor's power to make such employment decisions is uniquely tied to the agency relationship and ***400** hence vicarious liability should always follow. [58] The Court believed the "aided by agency relation" standard was less persuasive when a supervisor engages in harassment that stops short of a tangible employment action. [59] Yet the Court concluded that creation of a hostile environment "by a supervisor with immediate (or successively higher) authority over the employee" could properly be viewed as a form of constructive job detriment and hence the entity should be subject to vicarious liability in that instance as well. [60]

To temper this seemingly less persuasive application of vicarious liability, the Court recognized an affirmative defense to a sexual harassment claim where no tangible employment action is taken. [61] The employer may prove "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." [62] The Court believed this affirmative defense would promote conciliation instead of litigation by putting a premium on early reporting and prompt response. [63] The Court did not specifically address liability of employers for harassment

committed by a coworker not acting in a supervisory capacity or by third parties, but referred to the EEOC rule adopting a negligence standard [64] and the virtually unanimous holdings of district courts and courts of appeals. [65] It viewed this negligence standard as consistent with its limited view on the scope of liability for supervisory actions. [66]

These opinions demonstrate the Court's concern about the fairness of attributing harassment by employees, even supervisors, to ***401** the entity. Although the Court recognized that "vicarious liability" essentially involves a policy judgment about whether a loss caused by an employee should be considered a normal risk of business, the Court did not give this principle a broad construction. [67] Vicarious liability applies when a supervisor inflicts tangible or constructive detriment to a subordinate's career--both circumstances that an employer can guard against and monitor. [68] The standard for peer harassment follows suit; the entity is liable only if it engages in a form of wrongdoing that rises to the level of negligence. [69] In addition, the Court's recognition of the affirmative defense and the negligence standard for peer harassment reflects a belief that the entity ought to have the opportunity to remedy workplace discrimination before paying damages. In the case of tangible employment detriment--the only instance in which liability is imposed without the benefit of the affirmative defense--the damage has already been done.

C. The Title IX Standard

In the Title IX arena, the Supreme Court took a different approach, one that can be viewed as even more protective of entities. Relying on the differences between Titles IX and VII, the Court in Gebser v. Lago Vista Independent School District held 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." [70] The Court differentiated Title IX's Spending Clause origins [71] and the contractual nature of the entity's promise of nondiscrimination from Title VII's outright prohibition of discrimination and express private right of action. [72] The Court characterized Title VII's purpose broadly (i.e., as an eradication of discrimination throughout the economy) and Title ***402** IX's focus narrowly (i.e., as protection of individuals from discrimination by entities receiving federal funds). [73] The idea that liability under the narrower statute--the one without an express right of action--could potentially exceed liability under Title VII, which contains damages caps imposed by the Civil Rights Act of 1991, [74] was disturbing. [75] The Court concluded that a funding recipient's contract with the federal government encompassed only a promise not to discriminate, not an agreement to be held liable when employees discriminate. [76]

Title IX's structure gave further support to the Court's ruling. The statute does not permit enforcement procedures to cut off federal funding until recipients have been given notice of noncompliance and attempts have been made to secure voluntary compliance. [77] The Court reasoned that if a statute's express enforcement mechanism requires notice to the funding recipient, it would be unsound and anomalous to permit judicially implied enforcement actions [78] to impose substantial liability, possibly in excess of the federal grant, without a similar requirement. [79] Accordingly, the Court held that there would be no liability "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the ***403** recipient's programs and fails adequately to respond." [80] The Court held further that a response would not be inadequate unless it amounts to "deliberate indifference to discrimination." [81] Deliberate indifference, according to the Court, is the appropriate standard because it ensures that the recipient of federal funds would be held liable only for its own official decisions, and not for its employees' independent actions. [82] The precedents the Court cited suggest that the Court did not intend deliberate indifference to mean that malice or

purposeful discrimination must be shown; [83] however, it remains somewhat unclear what threshold the Court actually intended to meet this element.

The dissenters [84] perceived sexual harassment of a student by a teacher to fit the same "aided by agency relation" ground that justified vicarious liability in an employment context. [85] Justice Ginsburg indicated that she would have structured the rules parallel to the employment area, recognizing an affirmative defense based upon an entity's adoption and implementation of an effective prevention and ***404** compliance program. [86] The dissenters believed, from a policy perspective, that the new standard would give school districts an incentive to insulate themselves from knowledge of harassment to claim immunity or to structure themselves so that only a few insulated persons actually had authority to institute corrective measures on the institution's behalf. [87]

In 1999, in Davis v. Monroe County Board of Education, the parameters of entity liability under Title IX shifted again. [88] The legal issue was whether a student could recover damages from a school district because of persistent harassment by another student. [89] To the surprise of some, the justices who dissented in Gebser, joined by Justice O'Connor, held that a private damages action was available. [90] However, the majority maintained the same rigid restrictions it had imposed on entity liability for the acts of teachers and other supervisory personnel. [91] It held that damages may be imposed only if the funding recipient is deliberately indifferent to sexual harassment of which it has actual knowledge, in a context subject to the school district's control. [92] Even then, damages can only be awarded in cases ***405** where the harassment is "so 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." [93]

The Court's holding revealed continued conviction that both vicarious liability and negligence standards would be inconsistent with Title IX's unique structure, and that a deliberate indifference standard would serve the purpose of imposing liability only for conduct fairly attributable to the entity. [94] From a policy standpoint, the deliberate indifference standard also ensured an entity's discretion to resolve peer sexual harassment complaints as it deemed appropriate. [95] To escape liability, the school district need only respond to known peer harassment in a manner that is not "clearly unreasonable." [96] The Court contemplated that during pretrial motions, a trial court could identify a district's response as not "clearly unreasonable," thus protecting entities from litigation that seeks simply to second guess decisions made by administrators. [97] In the majority's view, this standard, in conjunction with the other significant hurdles placed on plaintiffs by the ruling, ensured that school districts would retain the discretion to evaluate complaints and formulate age appropriate solutions. [98]

The dissenters [99] would have disallowed any action based on peer harassment. [100] They believed such actions place school districts in a ***406** no-win situation. [101] Schools are required by federal law to protect children with severe emotional disabilities that might lead to antisocial and inappropriate behaviors. [102] The strict limits placed on the ability of schools to discipline students with behavior disorders, coupled with the duties some states impose to educate even students who are suspended and expelled, make it risky to take disciplinary actions against students who engage in some modicum of inappropriate behavior. [103] On the other hand, failure to take disciplinary action against such individuals may expose the district to suits for damages under Title IX. [104]

The dissenters voiced a number of other policy concerns as well. They predicted that, despite the purported narrowness of the majority opinion, liability of schools would be widespread. [105] Lawsuits would flood the courts, with few ending in pretrial

dismissal for defendants. [106] Administrators would patrol schools mindlessly enforcing rigid requirements without regard to the age of the students in question. [107] Every square inch of turf in universities, including dorms, would be subject to workplace constraints. [108] First Amendment rights would be violated with impunity. [109] However, what most concerned the ***407** dissenters was the prospect that children would begin to resolve their differences with classmates--differences that inevitably arise in the course of growing up-- through litigation of a federal right and demands for particular remedies. [110]

Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as leit motifs, running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to “minor” annoyances and insults. [111] Under both Titles VII and IX, the Court believes that institutions should be held liable because of their own conduct. [112] Further, decision makers within entities need to have discretion to resolve complaints that are reported, as reflected in the affirmative defense's focus on reasonable efforts to prevent and respond, [113] and on the deliberate indifference standard in education. [114] The Court also believes an institutional response is impossible unless the institution has notice of ***408** the problem. In employment this emphasis on obtaining notice is reflected by the second prong of the affirmative defense requiring reasonable efforts on the part of the employee to utilize employer policies to obtain redress; [115] in education, it is satisfied by the actual knowledge requirement. [116]

III. The Importance of Private Enforcement of Title IX and Implications of the Court's Decisions

Shortly after publication of the Court's decisions, lawyers and scholars began to think about how such decisions would play out and what they would mean, not only to litigants, but also to the efforts of entities to prevent and remedy this form of sex discrimination. The topic has generated much debate and numerous predictions. To appreciate the importance of this question, one must recognize the role private enforcement plays both in compensation and prevention of sexual harassment.

A. Does Private Enforcement Still Matter?

The Supreme Court thought private enforcement important when it recognized a private right of action for damages in Franklin v. Gwinnett County Public Schools. [117] Although the Court has not retracted that view, the standard for institutional liability gives some reason to doubt the Court's commitment to that position. The ability to enforce Title IX by private right of action for damages offers compensation to those who experience harassment and provides some deterrent effect that motivates prevention of further incidents. [118]

Title IX is the most prominent federal statute for securing compensation for sexual harassment. [119] State tort law is also available, ***409** particularly against the perpetrators of sexual harassment, but poses difficult hurdles in suits against school districts. [120] State statutes can and do serve as a strong incentive to address sexual harassment in some jurisdictions. The law may require districts to prepare sexual harassment policies. [121] California's Education Code, for example, ***410** specifically defines sexual harassment as distinct from sex discrimina-tion. [122] However, state codes may not be enforceable by a private right of action and they vary in terms of what they require. [123] As school attorney John Walsh argued in a recent analysis of peer harassment in California, schools in that state have made considerable efforts to train staff about sexual harassment and to comply fully with the California Education Code for a decade. [124] State laws can thus be a powerful factor; but, they are an uneven influence because not all states legislate on the issue, and the provisions of those that do vary.

Public enforcement of Title IX by OCR is another means of addressing violations and securing compliance. Title IX regulations require federal funding recipients to include sexual harassment in their basic nondiscrimination policy, but they need not have separate policies for sexual harassment. [125] OCR enforces Title IX primarily by investigating and resolving complaints filed with the agency, by initiating compliance reviews, [126] and by offering technical assistance upon request. [127] Noncompliant funding recipients face potential ***411** administrative enforcement, such as termination or suspension of their federal grant, or judicial proceedings brought by the Department of Justice. [128] However, termination of funding simply does not occur and less draconian measures have not been implemented as standard protocol. [129] As I discuss later, this does not mean that OCR's enforcement of Title IX is insignificant; it simply points out the importance of private enforcement. Private damages actions are what really give Title IX some teeth, and it is for that reason the Court's standard for entity liability provoked such concern.

B. Scholarly and Community Reaction to the Court's Decisions

Given the importance of retaining a viable private right of action under Title IX, it is important to acknowledge the outpouring of concern and criticism about entity liability that followed in the wake of the Court's decisions. Almost everyone that has read these decisions seems to find them lacking in some respect. The Title VII cases garnered criticism from people who thought the Court had opened the door to unending litigation over employer liability and from those who thought the Court's recognition of an affirmative defense would weaken protection of employees and do nothing to heighten prevention of sexual harassment. With regard to the Court's Title IX decisions, scholarly reaction was uniformly negative; most writers concluded that the Court had done nothing less than slam the door in the faces of plaintiffs seeking damages. [130] Educators, however, viewed the Court's decisions as exposing them to liability that previously would not have existed. [131] Interestingly, as flawed as some found the Title VII standard, others urged that it should have been used as the standard for entity liability under Title IX. [132] The following were the primary concerns.

1. Private Enforcement Will Be Severely Undercut

Scholars voiced concern about the future of private damages actions under both Titles VII and IX, but the Court's approach to Title IX was viewed as the most problematic. With regard to Title VII, Professors Fisk and Chemerinsky offered a scathing criticism of the ***412** affirmative defense approach of Ellerth and Faragher, [133] asserting that it will undermine the ability of employees to prevail on harassment claims. They reasoned that the average employee will not realize until after he or she has quit the job that a complaint must be filed pursuant to the employer's policy during the employment period and prior to initiation of a lawsuit. [134] Once that moment passes, the employee is virtually guaranteed to lose his or her lawsuit. [135] They believe that employers will have no incentive to eliminate harassment unaccompanied by adverse job actions or to try to find out which supervisors are harassers. [136] Nor do they believe the Court's emphasis on policies will spur employers to make policies more comprehensible or to encourage employees to make claims. [137] As long as an employer has a policy, publicizes it, takes actions on complaints, and tries to prevent supervisors from discriminating, there is little reason to worry about institutional liability. [138] They envision that an employer might well construct a policy that would meet a jury's definition of reasonableness, yet include provisions that, in effect, discourage employees from reporting sexual harassment. [139] Anne Lawton, in a study of sexual harassment at the university level, questions whether the affirmative defense is so vague and subject to interpretation that lower courts may apply it in a manner that significantly harms plaintiffs. [140] For example, they may deem a policy to be proven and effective despite documented underreporting at the workplace. [141]

***413** Other commentators have suggested that the effect of the Title VII decisions will be to embroil employers in protracted litigation. Whether this extension of the litigation process would foster private enforcement through settlement is completely unclear. Following Faragher and Ellerth, some employment lawyers predicted that summary judgment would be almost impossible to obtain because judges would interpret words such as "reasonable care" and "tangible job detriment" to pose factual issues. [142] Justice Thomas, dissenting in Ellerth, also believed employers virtually never would be able to resolve a case on summary judgment. [143] He argued that if read literally, the affirmative defense would be unavailable to an employer if the plaintiff utilized the published procedures to report harassment. [144] A recent study of the emerging case law on entity liability under Title VII in sexual harassment cases lends credence to Thomas's prediction. [145] However, another study, discussing the overwhelming significance of the existence of a policy and employee reporting (even before the affirmative defense was formalized), suggests that a defense focusing on the same factors would make little difference in plaintiffs' success rates. [146] All in all, it is debatable whether the affirmative defense has or will undercut private enforcement of Title VII. [147]

***414** There is even more skepticism about the continued viability of private enforcement under Title IX. Although educators and insurance companies perceived increased potential for liability, [148] legal scholars, on the whole, viewed the cases as extremely hostile to private damages actions for sexual harassment. [149] Professor Lawton, for example, suggests that the Court overruled Franklin v. Gwinnett County Public Schools sub silentio because it will now be so difficult for plaintiffs to obtain damages. [150] Another critic, Professor William Kaplin, believes the Court favored school districts at every turn. [151] One of the school district's attorneys in Gebser noted that the hurdles under Title IX seem almost impossible to surmount. [152]

2. Entities Will Have No Incentive to Prevent Sexual Harassment

The other concern was whether the standards adopted give entities any incentives to prevent harassment. Given the statistics on ***415** underreporting in both the employment [153] and education contexts, [154] commentators realized that individuals may not have recourse to damages under either statute. Prevention becomes paramount. Under Title VII, the requirement of a harassment policy is key to establishing the affirmative defense. Some have argued that the Court's decisions encourage prevention because the employer must show, under the first prong, that the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." [155] An employment lawyer predicted that the decisions would give employers an incentive to have a broad no-harassment policy, training of supervisors and employees, constant reminders about what may constitute harassment, an open door policy for reporting harassment, and measures to make sure employees read and acknowledge grievance procedures. [156] Yet ***416** another report on the decisions predicted that they would give birth to a whole new industry of trainers who will assist employers in preventing workplace harassment. [157] Fisk and Chemerinsky, on the other hand, questioned whether the Court has given employers disincentives to discover and prevent sexual harassment in the workplace by focusing upon the existence of a harassment policy and the employee's use of that policy. [158] Anne Lawton also believes that the Court wrongly equated procedures with prevention, thus allowing institutions to focus on passive strategies to reduce and eliminate sexual harassment. [159] This, Lawton claims, is clearly insufficient given the evidence that sexual harassment persists in institutions of higher education despite now longstanding policies and procedures. [160]

Scholars are equally adamant in their assertion that prevention is ignored in the Title IX standard. Professor Lawton believes that despite the Department of Education's recognition of the value of specific policies and procedures to govern sexual harassment, the Court has given institutions no incentive to develop such policies. [161] Fisk and Chemerinsky likewise believe that the actual knowledge and deliberate indifference standard leaves school children "at the mercy of the schools in a way that employees and most other victims of discrimination are not." [162] They believe the message is that usually "schools . . . are not responsible

for the harms students suffer at ***417** school"--a position the authors find incredible given that the law requires the victims to spend most of their day in the school's care. [163]

C. Evaluation of Implications

The scholarship plants troubling doubts about both the potential for private enforcement of Title IX and incentives for prevention. If scholars are correct in predicting that the standard for entity liability under Title IX will be almost impossible to meet, a problematic incongruity exists. Vicarious liability will never apply in Title IX cases, even if the harassment is committed by a school employee in a context that is virtually identical to that of a supervisor in a company or firm, and even if a tangible detriment, such as a lower grade for refusal to have sex, is suffered. [164] Fisk and Chemerinsky make a powerful case, justified primarily by the vulnerability of the class of plaintiffs, [165] for imposing vicarious liability on an entity any time its employees harass students.

Another troubling asymmetry is that, unlike the workplace, an educational institution will never be held liable for peer harassment it should have known, but did not know, existed. [166] Given the flexibility of the concept of reasonableness, [167] one would think a fact-finder could apply it in an educational context in a manner that takes into account the unique circumstances in a given setting.

If I could waive a wand over the Court and turn back time or convince Congress to legislate, I would favor vicarious liability in cases where employees harass students primarily because the harm ***418** inflicted is so egregious in many cases and the prospects of actually recovering from the perpetrator are so slim. [168] I probably would impose liability only for a "clearly unreasonable" institutional response in peer harassment cases, mainly to permit easier pretrial resolution and to offer the entity some modicum of protection. However, lacking either a wand or confidence that Congress will change the outcome in Gebser and Davis, the goal of this Article is to focus on where the Court's standard will take us.

In my view, the standard the Court created is workable, if it is properly understood and applied in a manner consistent with the basic policies common to entity liability under Titles VII and IX. In addition, there are enough significant differences between educational and workplace harassment to lend support for a higher standard in Title IX cases than in Title VII cases, particularly with regard to liability for peer harassment. [169] It is worth identifying some of these distinctions before looking at how the lower courts interpret Gebser and Davis.

The institutional structure and culture of a school, at any level, is different than that of a typical company. Teachers, while certainly employees, are not equivalent to the managers whose conduct prompts vicarious liability, or even vicarious liability subject to the affirmative defense, in employment cases. While there are similarities due to their authority over students, particularly when grades are bestowed in exchange for sexual favors, the relationship between teachers and their employer is much more diffuse and autonomous than in the corporate world.

The relationship between the entity and students also differs from the relationship between managers and employees. At an elementary level, a school may have more control over students than a company does over its employees. This changes as students proceed to middle and high schools and, ultimately, to universities; often teachers and administrators at these levels catch only brief glimpses of interpersonal relationships.

***419** With regard to peer harassment, disparate levels of anticipated maturity and impulse control are much greater among students than among employees in a company. As the Court recognized, at some ages, inappropriate behavior and language run

rampant. [170] Society's expectations include some tolerance of behavior that would probably give rise to a hostile environment claim ten years later in a company. [171]

These differences do not suggest that educational institutions should be protected from responsibility for sexual harassment, but they help explain how sexual harassment in education differs from sexual harassment in employment. In some respects, the differences cut in favor of heightened responsibility because of the youth and inexperience of the students and the fact that the entire mission of an educational institution is to serve its students. But, on the other hand, the nature of the institutional structure and the differences in behavioral norms in student populations could make liability unfair in certain instances. In peer harassment cases, where these differences manifest themselves most prominently, the use of a negligence standard would create the possibility that lawsuits could survive a summary judgment motion simply because a plaintiff alleged that employees should have noticed one student's harassment of another student and that the institution should have taken action to end the harassment. The real risk of loss educational entities would face from this standard would be the resource expenditures from defending lawsuits without the prospect of prompt pretrial resolution.

It is tempting to argue, as some commentators have, that at the very least, the Supreme Court ought to use Titles VII's standard in Title IX cases. [172] I disagree. First, differences in the context of harassment make it acceptable to have different standards as long as each ensures institutional accountability. Second, it is not clear that the Court's approach to entity liability under Title VII is worth emulating, certainly not in its entirety. The criticisms discussed above are positively scathing. [173] And, as discussed below, the Title IX standard has some advantages if interpreted properly. [174] Finally, even if the Court's Title VII standard looked attractive in theory, the case law emerging on the ***420** affirmative defense evidences considerable confusion. [175] Indeed, some courts find the standard so flawed that they refuse to apply it literally. [176]

While it is arguable that a stricter standard of entity liability would further the goals of private enforcement and prevention, there are enough legitimate differences between education and employment to plausibly suggest that a divergence in treatment is warranted. Although the Gebser/ Davis standard is not, in my view, ideal, whether it inhibits or precludes private enforcement ultimately depends on what it is interpreted to mean. In the next Part, following an overview of interpretational options, I argue that the Title IX standard can be interpreted to achieve thematic harmony with the Title VII standard and that such an interpretation is preferable to importing the Title VII standard outright.

IV. Institutional Liability Under Title IX in the Lower Courts

If we look at the portion of the glass that Gebser and Davis fill, as opposed to what they leave empty, then the overriding messages are that sexual harassment claims still can be redressed through private Title IX actions and that institutions must address responsibly complaints brought to their attention. [177] The extension of Title IX liability to peer harassment claims was not a foregone conclusion by any means, [178] and educators appear to have heard the message about ***421** potential liability clearly. [179] This endorsement of private enforcement, undercut by the restrictive standard, makes it difficult to ascertain when entity liability should apply.

An understanding of how courts interpret the standard is a useful place to begin because the array of facts and issues presented reveals the complexity and breadth of the decisions courts must make. To this end, my research assistants and I read every published and unpublished Title IX opinion the lower federal courts issued after Gebser and Davis making note of the types of cases, the outcomes, and the reasoning. [180] ***422** What emerges is a portrait that describes the breadth of litigation filtering through the federal court system. [181] Despite the limitations associated with the use of opinions as a data source, the opinions

provide a useful and accessible reflection of the types of issues that are generating confusion as they are litigated. By recognizing their depth and complexity, it is possible to suggest resolutions that are consistent with policy concerns underlying entity liability.

A. Analysis of Federal Litigation on Institutional Liability

Institutional liability, as we know, turns on three central issues: actual knowledge of the harassment by someone within the institution with the power to take corrective action, entity response indicating deliberate indifference to the harassment, and discrimination so severe and pervasive that the plaintiff is deprived of equal educational opportunity. [182]

1. Actual Knowledge of Harassment By Someone with the Authority to Take Corrective Action

The requirement that there be actual knowledge on the part of someone with the power to take corrective action is based on the assumption that the institution cannot properly respond to an allegation ***423** unless it is brought to the attention of someone who can do something about it. [183] It fulfills the Court's policy goals of allowing the entity to address and resolve sexual harassment complaints prior to being held liable for damages. [184] If applied too rigidly, the requirement could permit institutions to surround themselves in a cocoon of ignorance, both by prescribing the means by which actual knowledge must be obtained and by insulating the few individuals deemed to have corrective authority.

The first question to consider is: what does the Court mean by actual knowledge? [185] Because the Court did not frame this element as requiring a formal report, actual knowledge should be interpreted to mean that notice may be obtained through firsthand observation of particular events, reports from bystanders, and informal or formal reports from students. [186] Lower court opinions reveal flexibility as to how actual knowledge is obtained. Typically, the institution receives notice through a combination of formal and informal grievances. Oral complaints may precede a formal complaint. Courts seem to recognize that, in an educational context, rigid adherence to reporting according to formal grievance procedures is unrealistic. [187]

***424** This broad interpretation avoids a pitfall of employment cases, where there may be questions about whether an employee reported quickly enough or whether it was reasonable to deviate from a specified grievance procedure. It is entirely appropriate because students are less familiar with grievance procedures than are most adults and less prepared to evaluate how to redress a perceived injury. One downside to flexibility is that courts may have to decide when actual notice was actually given to gauge whether the response rose to the level of deliberate indifference. [188] But in light of the fact that the standard does not require federal funding recipients to have a separate sexual harassment policy, [189] it seems only fair to infer that the Court contemplated that actual knowledge could come through both formal and informal channels.

The most crucial question is: who qualifies as someone with authority to take corrective action? Lower court opinions evidence confusion. Many courts are well aware that this criterion could undercut accountability, and accordingly, are willing to assume that school employees such as principals have the power to take corrective action on a harassment complaint. [190] This result certainly makes sense, regardless of whether the alleged harasser is an adult or a peer. School principals clearly can take corrective steps, even if they lack the ***425** ultimate power to terminate the employee or expel a student. Some lower courts have found that knowledge of harassment by a teacher would suffice in certain circumstances, particularly when the alleged harasser is a peer of the plaintiff. [191] This result recognizes that teachers have corrective authority and an obligation to report, even if they have less than complete power to resolve a situation. [192]

Other courts, however, accept the argument that notice can and must be given only to particular representatives of the institution who may, in fact, have no relationship with any of the parties or the situation at the school. [193] In Baynard v. Lawson, for example, the court reached the odd result of finding a principal had exhibited deliberate indifference to sexual harassment by a teacher of a student, but that the school district could not be held liable based upon the principal's knowledge and failure to act. [194] The court made much of the fact that although the principal had authority to limit the teacher's contact with children during school, under Virginia law, she could only recommend transfer or dismissal to the division superintendent. [195] The court in Floyd v. Waiters defended its conclusion that the school board was the only body to whom notice could be given by asserting that members of the public could easily write letters or make phone calls. [196] The court believed that, under Georgia law, even actions by the superintendent ***426** would not necessarily subject a school district to liability. [197] Courts adopting this sort of reasoning enable a school district to minimize liability by enacting rigid limitations on the power of supervisory personnel. At the college level, the issue of who has corrective authority may be more problematic for courts because of the multiple layers of administration. [198] However, the applicable principles should not be fundamentally different. Courts should include anyone with some corrective authority over the alleged harasser. For example, in Frederick v. Simpson College, the court concluded that a department chair had authority within her department at some level to stop harassment if she knew it was occurring. [199]

The requirement of actual notice to a person with corrective authority is more complex than it appears on its face. A person who has corrective authority in one sphere, such as a teacher with regard to students in his class, may lack such authority in other contexts. While one can understand the potential unfairness to educational institutions if liability were imposed for failure to take action when harassing conduct is described in some general manner to someone who is not in a capacity to evaluate, investigate, or intercede in any way, courts cannot rely exclusively on a job description. The legal authority of individuals to receive notice is clearly relevant and a basis for their inclusion as parties to whom notice may be given, but courts must also evaluate the factual reality. Reference to legal power to take the ultimate corrective action gives an incomplete picture of how power is wielded. The Court's policy goals permit a construction that is broad and flexible, both as to what constitutes notice and who is in a position to take action. [200]

***427** 2. Response Indicates Deliberate Indifference

Not surprisingly, courts are confused about the meaning of the deliberate indifference standard. In Gebser, the Court indicated that deliberate indifference must amount to an official decision by the recipient (school district) not to remedy the violation. [201] In Davis the Court reaffirmed the deliberate indifference requirement, but defined it as an institutional response that is "clearly unreasonable." [202] Some lower courts believe that the only instance when the requirement could be met is where a decision has been made not to remedy the complaint. [203] Under this interpretation, virtually any response, or even negligent failure to process a complaint, seemingly would insulate the institution from liability. Several decisions interpret the deliberate indifference standard to be the same as the standard for punitive damages, thus requiring proof of subjective consciousness of a risk of injury or illegality. [204] A different interpretation would view an institution's decision not to remedy a situation as but one example of deliberate indifference. Courts with this view believe they are permitted to assess the reasonableness of the decision maker's actions, albeit with a strong preference for protecting institutional discretion in crafting resolutions. [205]

***428** It is a serious mistake to view deliberate indifference as requiring an explicit decision to ignore reported harassment. While clearly such a refusal would suffice, many other scenarios also warrant such a finding. As the cases reveal, deliberate indifference to reported sexual harassment may arise in a wide variety of circumstances; it is an issue with a much greater factual nuance than either the Gebser or Davis decisions convey. A few examples illustrate this point. Deliberate indifference may exist even if a school district did not make a decision to ignore the harassment. In Montgomery v. Independent School

District No. 709, for example, the court denied the defendant's motion for summary judgment on a Title IX claim.[206] The evidence showed that the defendants had responded to plaintiff's complaints of harassment by a variety of measures, including making the plaintiff attend group sessions with the harassers and removing him from classes, as well as verbally reprimanding the harassers.[207] The court suggested that because there was no evidence of any discipline other than the verbal reprimand, which was obviously ineffective, there was at least a question of fact as to whether the defendant's response indicated deliberate indifference.[208] Other plaintiffs have survived motions for summary judgment by showing that a school district conducted no investigation and found no remedy for reported harassment.[209] Thus, even in the absence of any formal decision, deliberate indifference could be shown.

Another form of deliberate indifference occurs when the entity, through its employees, decides to redress a complaint, but never ***429** implements its plan. In Snelling v. Fall Mountain Regional School District, for example, a principal told two brothers complaining of repeated harassment by peers and coaches that name-calling and physical abuse were part of growing up.[210] When the superintendent was notified of the complaint, a memorandum was sent ordering certain corrective actions to be taken.[211] Thus, the institution had actually decided that some response was merited. There was no evidence that the principal or coaches had complied with the superintendent's directive.[212] Nor was there evidence that they had deliberately ignored it.[213] The court concluded that triable issues existed as to whether the defendants were deliberately indifferent.[214]

It is naïve to think courts deciding this issue can avoid examining the reasonableness of the entity's response to harassment.[215] Without this type of inquiry, federal funding recipients have unbridled discretion as long as they do something--no matter how poorly conceived--about reported harassment.

Courts can discern, even on a pretrial basis, the difference between responses that are so inadequate that they have the potential to meet the deliberate indifference standard and responses that addressed the complaint but left the complainants unsatisfied. The passage of time between complaint and response, and the efforts made to resolve the complaint, are telling. The Court's concerns that entities not be held accountable for acts that were not their own and that they be afforded discretion in the handling of complaints can be fully satisfied by interpreting deliberate indifference as a clearly unreasonable response.[216] In essence, courts should determine whether the response ***430** falls within the range of reason.[217] This approach, when coupled with the actual knowledge requirement, gives entities ample opportunity to resolve complaints without fear of litigation at every turn.

3. Harassment So Pervasive and Severe That the Plaintiff Is Deprived of Equal Educational Opportunity

The last hurdle, and a potentially impassable one, is that an institution will not be liable for sexual harassment, even if it exhibits deliberate indifference to a complaint, unless the harassment suffered is so pervasive and severe that the plaintiff is deprived of equal educational opportunity. The requirement that the harassment be severe enough to deprive the plaintiff of equal educational opportunity is designed to ensure that every misdeed does not become actionable as sexual harassment. The Supreme Court made it clear in Davis that name-calling, teasing, and other common schoolyard behavior should not be actionable even if the comments target gender differences.[218] The Court also noted that a decline in grades would not necessarily indicate deprivation of an equal educational opportunity.[219] These comments provoked justifiable concern that the Court was setting the threshold for injury too high.

The lower courts, however, have recognized that a wide variety of alleged harms might conceivably deprive a student of equal educational opportunity. Children respond to sexual harassment in a ***431** wide variety of ways: discontinuing use of a school bus,[220] avoiding lunch in the cafeteria,[221] refraining from using the restroom,[222] staying home from school,[223] quitting

a team, [224] withdrawing from school and having to do remedial work, [225] and fearing for physical and emotional safety. [226] Each of these instances can result in denial of an equal educational opportunity. In essence, the courts seem to be asking whether the victim suffered actual harm [227] as a result of an institution's response, and courts have been flexible in the type of harms they recognize. [228] The Davis Court, by referring to the likelihood that a variety of factors would influence the outcome of this issue, built in sufficient flexibility to warrant courts' examining the facts broadly to gauge deprivation of equal educational opportunity. [229] Courts are accustomed to making a determination about whether a given complaint rises to the level of a legally cognizable injury, and this type of scrutiny amply addresses the concern that Title IX not be converted into a civility statute.

B. Data Regarding Developing Case Law

In addition to understanding how lower courts may interpret the Title IX standard, it is useful to consider both the profile of litigants in the reported cases and the apparent rate of success. Although the number of reported cases in which courts actually apply the Title IX standard is small, [230] the makeup of the litigation pool--and the odds of ***432** surviving a pretrial motion--assist in assessing whether entity liability remains possible and in understanding which types of cases do best.

First, with regard to who brings suit, about sixty-six percent of the plaintiffs in the cases in this sample were high school or university students. [231] Adult/student harassment claims are by far the most common. In fifty percent of the cases we examined, the alleged perpetrator was a teacher, coach, or university professor. [232] In another fifteen percent, the alleged perpetrator was an adult such as a janitor, school bus driver, or school volunteer. [233] This litigation profile differs rather significantly from the social science research the AAUW collected in its survey of students, which indicated that peer harassment is far more common. [234] However, because the AAUW study also indicates that students are far less likely to report peer harassment, [235] it makes sense to anticipate a higher percentage of adult/student cases.

When we looked at who actually "won" on the issues pertaining to entity liability, [236] whether pretrial or post trial, we found defendants prevailed about sixty percent of the time and plaintiffs forty percent of the time at the district court level. [237] In the adult/student cases, the student prevailed about forty-seven percent of the time, while in peer harassment cases, the plaintiff only won about twenty-five percent of the time. [238] The vast majority of court of appeals cases involved appeals of decisions favoring defendants, and most of the time, the result was to affirm the decision below. [239]

***433** Based on this litigation profile, and the obvious conflict in the case law, we can draw a couple of conclusions. First, those who predicted Title IX cases would be virtually impossible to win were wrong. [240] Although surviving a pretrial motion is not really "winning," it is still important because it gives defendants a significant incentive for settlement. [241] Second, the Davis dissenters were wrong in their prediction that students would overwhelm the courts with their petty complaints. [242] If their percentage in the reported cases resembles their percentage in overall filings, peer harassment cases are much less frequently litigated than adult/student harassment and are hardly flooding the courts. One possibility, warranting further study, is that Davis inspired school districts to avoid Title IX liability by adopting and enforcing policies against peer harassment.

Further research using a study design that would produce statistically significant data is necessary to reach any conclusions as to how Title IX cases really fare in comparison to Title VII harassment cases and how both types of claim fare with respect to other types of actions. [243]

*434 C. Conclusions on Lower Court Interpretations

Despite the fact that some district courts recognize the nature of the task before them, there is an emerging and alarming inconsistency in the lower courts' interpretations of the standards for institutional liability. Some courts are willing to scrutinize the entity's response to complaints and hold the entity accountable when it is clearly unreasonable. Others have viewed Gebser and Davis as a license to insulate entity responses from review and to protect against liability on the most technical of grounds.

Even given the lower court confusion, plaintiffs are still finding it possible to litigate sexual harassment claims past the stage of pretrial motions. A consistent and policy-based interpretation of the Title IX standard would certainly further private enforcement and would do so without sacrificing the Court's overriding concerns about the fairness of entity liability. At the same time, the Title IX standard would continue to avoid aspects of the Title VII standard that, to my mind, are most troubling: litigation that focuses on the reasonableness of a student's conduct in reporting harassment and rigid emphasis on compliance with the exact terms of a grievance procedure.

Even the most broad-minded and policy-based interpretation of entity liability standards under Title IX does not solve all of the problems created by the legal asymmetries between Titles VII and IX. [244] Cases will arise where the distinctions between constructive and actual knowledge, and between unreasonable and “clearly unreasonable” responses make a difference in outcome. However, if courts apply the standard thoughtfully, giving some scrutiny to the nature of institutional response, they can preserve private enforcement of Title IX. This conclusion should encourage attorneys to represent sexual harassment plaintiffs; likewise, educational institutions should recognize that sexual harassment claims continue to be a real possibility.

V. Prevention and the Future

We turn now from the compensatory aspects of Title IX damages actions to their role as a catalyst for prevention of sexual harassment. ***435** While it would be a gross over-simplification to view damages actions as the only, or even the principal, inducement for prevention, I believe they play an important role.

A. Damages Actions as Prevention Incentives

Given the low rate of reporting sexual harassment, [245] the relatively small number of cases that appear to be litigated (particularly in the context of peer harassment), and the apparent lack of success in many cases, prevention of sexual harassment is crucial. Although some scholars have expressed doubt that Title IX litigation remains a useful incentive for prevention, [246] I think its potential is more mixed. Despite the comfort that educational institutions could take in the deliberate indifference requirement, they do not want their employees to treat complaints in a manner that even begins to approach the line between negligence and deliberate indifference. [247] In addition, although it is not required that funding recipients have policies that encourage and promote reporting, it is in school districts' self-interest to have problems dealt with immediately and effectively. Litigation costs time and money that school districts can ill afford. Mary Jo McGrath, whose firm offers training to school districts nationally, states that her firm trains people exactly as they did before Gebser and Davis, because no one wants to litigate. [248] In this sense, there is enough potential accountability left that the threat of damages should give incentives to prevent future injuries.

Of course, the threat of liability could potentially spur defensive actions that have nothing to do with prevention of sexual harassment. The threat of liability might instead spark the development of policies that exploit the ambiguity in the law and position the entity in a manner that better insulates it from liability. For example, school districts might well choose to revise

their policies to require reporting only to the superintendent or the local school board members on the ***436** theory that courts would defer to the judgment that these individuals alone have the power of corrective authority. [249] Or school districts might write policies with provisions that discourage, rather than encourage, reporting. [250] These possibilities point out the necessity for lower courts to construe this standard for entity liability in a manner that promotes accountability.

B. The Impact of Public Enforcement

Arguably, OCR's role is paramount in providing prevention incentives. OCR's enforcement power is broad, extending to cases that would clearly fall short of the legal standard for damages. [251] Under OCR's interpretation, Gebser and Davis apply only to private damages actions, and thus, administrative enforcement standards from the 1997 Guidance [252] remain in effect. [253] Institutional responsibility attaches whenever an employee providing "benefits, aid or services" [254] harasses a student, regardless of whether a responsible school employee knew, or should have known, about the harassment. [255] Where harassment by an employee does not take place in the employee's provision of aid, benefits, or services, but nonetheless is sufficiently serious to create a hostile environment, the school has a duty to take prompt action as soon as it receives notice of the harassment. [256] The same is true when harassment by other students or third parties occurs. [257] If, in fact, OCR is able to obtain positive resolution of complaints in cases where ***437** private actions for damages or injunctive relief [258] would not succeed, the agency's intervention may be a significant incentive for prevention. [259]

OCR's Revised Guidance, unlike Gebser and Davis, makes it clear to funding recipients that when the office is asked to investigate or resolve incidents of sexual harassment of students, it will consider whether the school had a policy prohibiting sex discrimination and effective grievance procedures, as well as the investigation and corrective action taken by the school. [260] If a school has not taken all of the appropriate steps, it will have the opportunity to take corrective action before a formal violation finding is made. [261] In theory, this encourages prevention of other incidents. [262] The Revised Guidance gives fairly specific advice regarding appropriate responses to complaints of harassment and identifies numerous elements that ought to be included in a grievance policy that is equitable. [263]

Despite its enormous potential, OCR has been criticized for failing to scrutinize compliance carefully enough, through desk audits, on-site visits, and other measures short of actual fund cut-offs. [264] OCR manages to resolve most of the approximately 5000 complaints filed each year, [265] though many are dismissed on procedural grounds. [266] Its ***438** compliance reviews are effective but uneven. [267] Even by OCR's own account, the decade of the 1990s brought an increase in workload and in case complexity, along with decreasing resources. [268] Despite these limits, OCR's technical expertise, evidenced in documents like the Revised Guidance, would be invaluable to funding recipients seeking information about the best practices and procedures to ensure full compliance with Title IX. The problem is whether OCR can effectively detect and influence recipients that merely want to get by.

C. The Impact of Public Awareness on Prevention

The most recent AAUW Survey found that seven out of ten students said that their school has a sexual harassment policy, [269] a significant increase from the prior survey. [270] Slightly more than one-third of the students said that their schools distribute the policy. [271] Judging from the educational literature, there is now widespread awareness of the deleterious effects of sexual harassment in the educational community. [272] Many educators have accepted and internalized the notion that sexual harassment

is deleterious to a stable learning environment.[273] While districts initially perceived sexual harassment law as being just another requirement with which to comply, the surveys on the damaging effects of sexual harassment have brought a much greater understanding of, and a wealth of literature about, this issue. Curricula exist to teach students and employees about sexual harassment prevention.[274] Sexual harassment training for educators is fairly common; some of it is conducted by attorneys in- ***439** house, and some by professional firms that provide it.[275] This internal acceptance of the need to address sexual harassment quickly and effectively motivates prevention.

Institutions that previously may have dismissed sexual harassment as political correctness gone awry now face public pressure to moderate the school atmosphere and to protect their students. In the wake of outbreaks of violence such as that which occurred in Columbine, Colorado, the public has come to accept the view that sexual harassment is but one facet of a prevalent, oppressive culture that pervades some educational institutions.[276] This is so much the case that Nan Stein warns that zero tolerance policies may replace dialogue and true education of students about sexual harassment.[277]

Stein and other educators consider bullying a precursor to sexual harassment.[278] Videos and other curricula address bullying in lower grades, moving gradually to address sexual harassment as students move into the middle school years.[279] Studies also tend to support a link between sexual harassment and sexual violence in schools.[280] In the 1999 Guidance issued by OCR and the National Association of Attorneys General, hate crimes and harassment are treated together.[281] The alignment of sexual harassment in education with the problems of ***440** school violence and bullying unmistakably moves generalized prevention efforts into the mainstream. Sexual harassment has become one of the facets of educational culture that commands public attention; its prominence heightens public awareness but has the potential to spawn corrective measures that do not really address the roots of the problem. Thus, despite this greater public awareness, which undoubtedly helps propel sexual harassment onto the radar screens of schools and certainly parents, there is still a need for focused and deliberate thinking about how to address sexual harassment, both when it is complained of and before it happens. The threat of private litigation reinforces that focus.

D. Some Suggestions on Prevention

As lower courts construe the Gebser/ Davis standard, they must be aware of how their interpretation of entity liability will influence the development of sexual harassment policies. It would be short-sighted to believe policies will not be changed to position entities more favorably in the event of a lawsuit. If courts are rigid and formalistic in their views of who has corrective authority, then they will promote institutional incentives to hide from problems.

My focus on enforcement through private actions for damages is not meant to denigrate or understate the value of public enforcement. No doubt, there are many ways to strengthen OCR's performance and these options should continue to be pursued.[282] At a minimum, educational institutions receiving Title IX funds should be required, not merely encouraged, to develop sexual harassment and grievance procedures apart from their generalized policy against sex discrimination and to disseminate and discuss these policies with staff and students. There is so much guidance about how to prepare policies and procedures, both from OCR[283] and other sources,[284] that there is no ***441** reason not to require it. The existence of separate policy and grievance procedures gives all stakeholders a clearer picture of what conduct is illegal and how to redress it. OCR should require that policies encompass certain basic attributes that make them simple to follow and effective. States should reinforce the requirement under their own law.

Another important step is one that neither private nor public enforcement can implement. That step is training staff so that they can fulfill their obligations to their employer in terms of reporting and handling of sexual harassment complaints and training students so that they will both report harassment and understand what they must do to avoid becoming harassers. [285] When asked about training, some of the students in the AAUW Survey groaned about the prospect of yet another video. [286] Educators need to grapple with how to approach students in ways that are not preachy or trite and, at the very least, teach them the lines they cannot cross. Judging by the wealth of information, diversity of approaches, and abundance of useful curricula, there are many models to try. [287]

VI. Conclusion

Protection from sexual harassment in an educational context is fundamental to the ability of students to reap the benefits of publicly-funded education and to prepare future citizens to work together in a manner that is positive and respectful. The cases lower courts have examined in the last few years are replete with enough horror stories to dispel any illusion that the issue is moot or minimal. The Supreme Court was deferential to educators in formulating the standard for institutional liability. Educators have the discretion to solve problems with a modicum of comfort that they will not be second-guessed by a jury. But the protection that the standard provides makes the role of the lower federal courts even more important. Without lower courts' ***442** willingness to impose some accountability and scrutinize institutional response, there are few legal incentives to institutions to redress and to prevent sexual harassment.

Footnotes

a1 Professor of Law, University of the Pacific, McGeorge School of Law. I wish to acknowledge the careful research assistance of Galen Shimoda, Alexandra McCleod, and Elizabeth Barravecchia. I have benefited from the comments of Ruth Jones, Larry Levine, and Brian Landsberg, as well as other faculty colleagues, who were kind enough to attend a presentation on this topic.

1 Title IX provides, in part: “No person ... 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 ....” 20 U.S.C. §1681(a) (1994). Title IX permits suspension or termination of federal funding to an educational institution if it fails to develop a nondiscrimination policy. 20 U.S.C. §1682 (1994). Every federally funded education program is required to develop and distribute an antiharassment policy. 34 C.F.R. §106.9(a)-(c) (2001). A formal grievance procedure is also required. 34 C.F.R. §106.8(b) (2001).

2 See 20 U.S.C. §1682.

3 See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

4 See infra note 50 and accompanying text.

5 See infra notes 51-116 and accompanying text.

6 See Erwin Chemerinsky, Federal Jurisdiction §8.5 (2d ed. 1994). One way to establish the municipal policy or custom required to impose liability is through proof that an action was taken by those with final authority for making a decision in the municipality. Id. §8.5.2. In Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986), the Supreme Court held that municipal liability attaches only where a deliberate choice to follow a course of action is made from among various alternatives. Another way to show that there is an official policy is to prove that there was inadequate training; this requires proof of deliberate indifference by the local government. See City of Canton v. Harris, 489 U.S. 378, 387 (1989). Courts have also applied the deliberate indifference standard to claims of inadequate supervision. Chemerinsky, supra, §8.5. Individual liability of supervisors under §1983 also requires deliberate indifference and a causal relationship between the supervisor's conduct and the plaintiff's constitutional deprivation. City of Canton,

489 U.S. at 386-89; see also Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, §§3.97, 6.23-6.50 (4th ed. 2002).

7 Several commentators have called for legislation to resolve this problem, but nearly four years have passed and none is on the horizon. See, e.g., Martha McCarthy, Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond, 12 Hastings Women's L.J. 177, 209 (2001) (proposing an affirmative defense for school districts based on the adoption and dissemination of policies and the enactment of damages caps similar to those applicable under Title VII); Tianna McClure, Note, Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of Davis v. Monroe County Board of Education, 12 Hastings Women's L.J. 95, 118-20 (2001) (urging Congress to adopt a constructive notice standard for peer harassment); Christine Hwang, Response to Peer Sexual Harassment of LGBT Youth in Schools: Advocacy, Legislation and Litigation, Speech at Hastings Women's Law Journal Symposium: Sexual Harassment in Public Schools (Mar. 3, 2000), in 12 Hastings Women's L.J. 131, 135 (2001) (urging legislation at the state level to protect students from antigay harassment and violence); Kaija Clark, Note, School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers, 66 Geo. Wash. L. Rev. 353, 354-55 (1998) (arguing pre- Davis and Gebser, that Title IX should be amended to include damages caps identical to those under Title VII).

8 See, e.g., Warren v. Reading Sch. Dist., 278 F.3d 163, 165 (3d Cir. 2002) (discussing how a fourth-grade teacher enlisted a student to play a "game" called "shoulders" that consisted of the student squatting with his head between the teacher's legs and shoulders between the teacher's thighs); Wills v. Brown Univ., 184 F.3d 20, 23 (lst Cir. 1999) (describing how a professor placed a student on his lap and purported to pray with her, subsequently placing his hand under her shirt to rub her stomach and breasts).

9 See, e.g., Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1167 (N.D. Cal. 2000) (stating that the plaintiff was "repeatedly threatened, insulted, taunted," and even assaulted and battered by fellow students because of perceived sexual orientation); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000) (describing how the plaintiff was attacked by fellow students because of perceived sexual orientation). These cases are actionable under Title IX in that the plaintiff is being harassed "because of his sex," meaning that he would not have been subjected to the same treatment had he been of a different gender. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (recognizing claims for same-sex harassment under Title VII). This type of harassment, which reinforces rigid gender stereotypes, is very common in the educational context. See infra note 15. If discrimination is alleged to be on the basis of sexual orientation, it is not actionable under Title IX because Title IX has not been construed to include sexual orientation discrimination as a form of sex discrimination. See Montgomery, 109 F. Supp. 2d at 1090. Such a claim would have to be litigated on due process and equal protection theories under 42 U.S.C. §1983 (1994). See, e.g., Nabozny v. Podlesny, 92 F.3d 446, 453-60 (7th Cir. 1996).

10 See McClure, supra note 7, at 95-97; Jehan A. Abdel-Gawad, Kiddie Sex Harassment: How Title IX Could Level the Playing Field Without Leveling the Playground, 39 Ariz. L. Rev. 727, 731 (1997) (stating that until recently girls who complained to school officials to stop sexual harassment were met with responses like "boys will be boys" or "just get on with your life"); see also Todd Woody, School Counselor Entitled to Immunity, Court Says, Recorder, May 15, 1995, at 3; Jim Herron Zamora, Ex-Student Can't Sue Counselor over Harassment, S.F. Examiner, May 13, 1995, at A3; Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1565 (N.D. Cal. 1993) (quoting school counselor Richard Homrighouse regarding a student-against-student sexual harassment claim), rev'd in part, 54 F.3d 1447, 1449 (9th Cir. 1995); Nina J. Easton, The Law of the School Yard, L.A. Times Mag., Oct. 2, 1994, at 16 (quoting Maryland junior high school student, Lisa Bye, who was the target of a boy who grabbed at her shirt and crotch: "I felt so sick and ashamed. My counselor said I should just get on with my life."); Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 777 (8th Cir. 1998) (stating that a school principal's response to a plaintiff's complaint that a student peer had drawn and showed her an inappropriate picture was "boys will be boys").

11 Sexual harassment, though not specifically addressed by federal statute, is a form of prohibited sex discrimination. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) (1994), and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a) (2000), have both been construed to prohibit sexual harassment. The Supreme Court has struggled to define sexual harassment, but has identified two major categories: quid pro quo harassment, in which unwelcome sexual conduct is a term or condition of employment, and hostile environment, in which unwelcome sexual conduct unreasonably interferes with job performance or creates a hostile or offensive work environment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-69 (1986). The same terminology has been applied in the context of educational harassment.

12 American Ass'n of Univ. Women Educ. Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America Schools 7 (1993) [hereinafter AAUW Survey]. Released in 1993, the survey reported that eighty-five percent of girls and seventy-six percent of boys in the eighth through eleventh grades have been sexually harassed at school. Id. Public school students of various races completed 1632 field surveys. Id. at 5. The most common form of sexual harassment reported was sexual comments, jokes, gestures, or looks. Id. at 8-9. The second most common form of harassment was touching, grabbing, and/or pinching in a sexual way. Id. The respondents indicated that among those who have been harassed, seventy-nine percent were harassed by current or former students at their school. Id. at 11. Only eighteen percent of the students who reported being sexually harassed reported being harassed by school employees. Id. at 10. The survey also documented the impact of sexual harassment and found that students who have been sexually harassed often do not want to attend school or participate when they are there. Id. at 15. They felt embarrassed, self-conscious, and less confident. Id. at 16-17. There have been many subsequent studies of sexual harassment in schools. See, e.g., Valerie E. Lee et al., The Culture of Sexual Harassment in Secondary Schools, 33 Am. Educ. Res. J. 383, 386-89 (1996). Professor Nan Stein describes a number of these studies and summarizes their findings as follows: sexual harassment is very common in secondary schools; students consider it a serious problem; it occurs in public places; and, although a majority of students have tried to get help, they have difficulty doing so. Nan Stein, Classrooms and Courtrooms: Facing Sexual Harassment in K-12 Schools 19-20 (1999).

13 See American Ass'n of Univ. Women Educ. Foundation, Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School 4 (2001) [hereinafter 2001 Survey]. The survey included 2064 public school students. Id. at viii. Eight out of ten students said that they experienced sexual harassment in their school lives. Id. at 4. Nine out of ten reported that students sexually harassed other students, and thirty-eight percent said that teachers and other school employees harassed students. Id. at 5.

14 See generally Nan Stein & Lisa Sjostrom, Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools (1994); Judith B. Brandenburg, Confronting Sexual Harassment: What Schools and Colleges Can Do (1997); Sexual Harassment: Communication Implications (Gary L. Kreps ed., 1993); Billie W. Dziech & Michael W. Hawkins, Sexual Harassment in Higher Education: Reflections and New Perspectives (1998) (containing various true accounts).

15 Catharine MacKinnon did much of the work that ultimately led to the recognition of sexual harassment as a form of sex discrimination. See generally Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979). Subsequently, there has been extensive debate about the theoretical basis of sex discrimination and various generations of scholarship. See Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 UCLA Women's L.J. 37 (1993) (providing a history of the early scholarship). Kathryn Abrams describes the sexual harassment scholarship as covering the "what," the "how," and the "why," and discusses the renewal of scholarship about the "why" in recent years. See Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169, 1170-71 (1998). Almost all of this scholarship addressing the "why"--the question of why sexual harassment is a wrong--deals specifically with the workplace. These articles are helpful in understanding the evolution of the concept of sexual harassment, and the authors use their theoretical grounding to examine the types of injuries that ought to be encompassed within Title VII. There are clearly some aspects of these theories that seem applicable to sexual harassment in education. For example, Katherine M. Franke's theory, which states that sexual harassment is a "technology of sexism" that constructs identities of men and women according to fundamental gender stereotypes, provides a good description of some sexual harassment in education and explains same-sex harassment. Katherine M. Franke, What's Wrong With Sexual Harassment?, 49 Stan. L. Rev. 691, 693 (1997); Katherine M. Franke, Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams, 83 Cornell L. Rev. 1245, 1253-54 (1998). Kathryn Abrams' view that sexual harassment serves to preserve male control and entrench male norms in the workplace seems less transferable. See Abrams, supra at 1172. By and large, federal funding recipients are coeducational institutions that place females and males on a footing that in reality is far more equal in opportunity than the workplace. See Yupin Bae et al., Trends in Educational Equity of Girls & Women, available at http:// nces.ed.gov/pubs2000/200030.pdf (last visited Nov. 1, 2002). But see Carol Gilligan, In A Different Voice: Psychological Theory and Women's Development (1993). Similarly, Vicki Schultz's view that sexual harassment is a "'competence-centered' paradigm, ... a means to reclaim favored lines of work and work competence as masculine-identified turf" seems less apt in an educational context. See Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1755, 1768-71 (1998) (arguing that the legal system is overly narrow in the way it views sexual harassment, and urging a "competence-centered account of harassment" that would de-emphasize what Schultz views as a sexual desire/dominance paradigm and instead recognize linkages between job segregation by sex, hostile work environments, and competence-undermining harassment). Anita Bernstein is a theorist whose description of sexual harassment seems apropos in light of the cases. Bernstein argues that, in hostile environment cases, "the plaintiff should be required to prove that the defendant ... did not conform to the standard of a respectful

person." Anita Bernstein, Treating Sexual Harassment with Respect, 111 Harv. L. Rev. 446, 450 (1997). Bernstein suggests that the concept of respect would offer a coherent and unifying theme in employer liability. Id. at 494. The employer would have an obligation to structure the workplace to reduce workplace pressures that can promote unlawful injury. Id. at 495. The employer would have the obligation to listen and respond to credible complainants; the obligation would extend beyond simply separating the complainant from the alleged harasser. Id. Bernstein argues that the current fault-based standard is flawed because it encourages remedies, but not prevention. Id. at 496-97. In a later reply to Professor Abrams, Bernstein describes her work as an examination of sexual harassment that may be valuable outside the workplace and one that looks at the topic with an eye toward "remediation, prevention and other pragmatics." Anita Bernstein, An Old Jurisprudence: Respect in Retrospect, 83 Cornell L. Rev. 1231, 1232 (1998).

16 In Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 65, 67 (1992), the Supreme Court held that the implied private right of action it had previously recognized in Cannon v. University of Chicago, 441 U.S. 677 (1979), supported a claim for damages.

17 Title IX addressed discriminatory admissions programs, denial of access to programs or resources, and discriminatory hiring. 20 U.S.C. §1681(a) (1994). The concept of sexual harassment as sex discrimination had not yet entered public consciousness in 1972. Catharine MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979), brought the idea to the forefront.

18 Title IX is enforced primarily by private damages actions and administratively by the Department of Education's Office for Civil Rights (OCR). OCR, according to its own program description, resolves complaints, monitors agreements, develops policy documents and guidance materials, initiates compliance reviews, and ensures that civil rights considerations are reflected in all Department of Education programs. Office for Civil Rights, About OCR, at http://www.ed.gov/offices/OCR/aboutocr.html (last visited Dec. 31, 2002). OCR also enforces other statutes that preclude discrimination in educational programs and activities that receive federal financial assistance, such as Title VI, 42 U.S.C. §2000d (1994) that prohibits discrimination on the basis of race, color, or national origin; section 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794 (1999); and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§12,134-12,165 (1995). Office for Civil Rights, supra. OCR can initiate formal administrative enforcement proceedings when resolution fails or refer the case to the Department of Justice for judicial enforcement. Id.

19 Sexual harassment claims can be litigated under other federal statutes, such as 42 U.S.C. §1983 (1994). See, e.g., Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996). The constitutional claims litigated under §1983 frequently include equal protection and due process claims. In order to establish liability of an entity such as a school district for Fourteenth Amendment violations, a plaintiff must establish that the district engaged in discriminatory actions that constitute an official policy or custom, or that the acts were taken by an official with final policymaking authority. Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978); Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986). In addition, a plaintiff must show that the municipal action was taken with deliberate indifference to its known or obvious consequences. City of Canton v. Harris, 489 U.S. 378, 388 (1989). Even if these prerequisites could be satisfied, it is extremely difficult to establish the merits of the constitutional claims. Under DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 194-97 (1989), the State's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. An Equal Protection Clause claim requires proof of purposeful discrimination. See Pers. Adm'rs of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Individual state actors sued under §1983 may invoke qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 806-808 (1982).

20 See infra note 120 and accompanying text.

21 See, e.g., N.Y. Exec. Law §290 (McKinney 2001) (stating that education free from discrimination on the ground of age, race, creed, color, national origin, sex, or marital status is a civil right); Cal. Educ. Code §220(a) (Deering 1998) (stating, in part, that no student may be subject to discrimination on the basis of sex by an educational institution that receives state financial assistance); Miss. Code Ann. §37-11-29 (1972) (requiring any principal, teacher, or school employee to report acts of sexual harassment to the superintendent); Mass. Gen. Laws ch. 151C §2(g) (2002) (making it an unfair educational practice "[t]o sexually harass students in any program or course of study in any educational institution"). It is apparent that these state statutes vary in their approach to sexual harassment.

22 See supra note 1.

23 OCR has never withheld funding from an institution for violation of Title IX. American Ass'n of Univ. Women Legal Advocacy Fund, A License for Bias: Sex discrimination, Schools, and Title IX 21, 25 (2000) [hereinafter License for Bias]; Sudha Setty, Leveling

the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement, 32 Colum. J.L. & Soc. Probs. 331, 344 (1999) (noting that, according to the Women's Sports Foundation's study, OCR has never decided to withhold federal funds of a noncompliant school). Setty presents two reasons for this failure: (1)OCR's willingness to designate a school as compliant as soon as the school assures changes will be made but before compliance is effectuated; and (2)lack of compliance reviews. Id. at 344-45; Carol Herwig, Federal Office Gets Tougher with Title IX, USA Today, July 21, 1994, at 7C (explaining that no university has lost funding due to violations of Title IX). Funding cut-offs are draconian sanctions that are harmful to students, so OCR's reluctance is not surprising. But intermediate measures, such as desk audits and postaward reviews, have been recommended. See U.S. Comm'n on Civil Rights, Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights Recommendations (2002) ch. 3, available at http://www.usccr.gov/pubs/10yr02/vol1/main.htm (last visited Dec. 18, 2002).

24 503 U.S. 60, 76 (1992).

25 See Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999) (finding that the district court correctly dismissed the plaintiff's claim against the defendants in their individual capacity); see also Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999) (concluding that Title IX does not support an action against a teacher in her individual capacity); Floyd v. Waiters, 171 F.3d 1264, 1264-65 (11th Cir. 1999) (stating that Title IX claims may only be brought against a grant recipient, and not an individual); Niles v. Nelson, 72 F. Supp. 2d 13, 17 (N.D.N.Y. 1999) (stating that Title IX liability has been interpreted as holding school districts, and not individual teachers or school board members, liable).

26 Some argue that institutional liability, at least in hostile environment type suits, should be curtailed, and that tort suits against the actual perpetrator are a preferable means of redress for the injury suffered. See Mark McLaughlin Hager, Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed, 30 Conn. L. Rev. 375, 426-29 (1998). Of course, even if state tort claims lie against an offending perpetrator, the plaintiff may never be compensated. And state tort liability of a perpetrator would do little to reform an environment that may tacitly encourage behavior that creates a hostile environment for others.

27 License for Bias, supra note 23, at 13 (describing a disparity between the number of sex discrimination complaints in OCR's caseload (10%) and the percentage of sex discrimination compliance reviews (3.3%) during the four year period of the study). AAUW recommends numerous steps that OCR could take to improve its handling of complaints, its investigatory process, and resolution and monitoring of complaints. See id. at 9-26; see also U.S. Comm'n on Civil Rights, supra note 23 (summarizing past commission recommendations for federal agencies including OCR and assessing their progress); Crista D. Leahy, The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics, 24 J.C. & U.L. 489, 523-39 (1998) (providing a critique of OCR enforcement efforts).

28 In Alexander v. Sandoval, 532 U.S. 275, 285-86 (2001), the Supreme Court held that there is no private right of action to enforce disparate impact regulations under Title VI. Because the Supreme Court has viewed the private rights of action under Titles VI and IX as identical, it appears the same holding will restrict Title IX injunctive relief. The question remains whether disparate impact regulations may be enforced through §1983. One district court has ruled that they may. See S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 517-19 (D.N.J. 2001). But see S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790-91 (3d Cir. 2001) (finding that the disparate impact regulations did not create a substantive private right under §1993); Bonnie L. ex rel. Hadsock v. Bush, 180 F. Supp. 2d 1321, 1343-44 (S.D. Fla. 2001) (finding that the disparate impact regulations did not create a substantive private right under §1983). See Bradford C. Mank, Using §1983 to Enforce Title VI's Section 602 Regulations, 49 U. Kan. L. Rev. 321, 367-75 (2001) (discussing similarities and differences between Titles IX and VI with respect to this issue).

29 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1) (2000), prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” Although sexual harassment is not specified in the statute, the Supreme Court has viewed sexual harassment as a form of sex discrimination. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

30 Standards for entity liability under Title VII are found in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754-59 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 801-08 (1998). Standards for entity liability under Title IX are pronounced in Gebser

v. Lago Vista Independent School District, 524 U.S. 274, 290-92 (1998), and Davis v. Monroe County Board of Education, 526 U.S. 629, 638-53 (1999). See infra notes 42-116 and accompanying text.

31 See infra notes 133-165 and accompanying text.

32 See infra notes 117-129 and accompanying text.

33 See infra notes 133-165 and accompanying text.

34 See infra notes 164-176 and accompanying text.

35 See infra notes 169-171 and accompanying text.

36 See infra notes 70-79 and accompanying text.

37 See infra notes 111-116 and accompanying text.

38 See infra notes 182-229 and accompanying text.

39 Id.

40 See infra notes 182-229 and accompanying text.

41 See infra notes 245-287 and accompanying text.

42 Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998) (Title VII); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (Title VII); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (Title IX); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (Title IX).

43 See infra notes 71-79 and accompanying text.

44 See infra notes 164-171 and accompanying text.

45 Quid pro quo harassment is unwelcome sexual conduct that is a term or condition of employment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). This term took on meaning in the context of vicarious liability in various courts of appeal, which held that if the plaintiff established a quid pro quo claim, then the employer would be held strictly liable. See, e.g., Davis v. City of Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997); Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994); Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106-07 (3d Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1127 (10th Cir. 1993); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185-186 (6th Cir. 1992), cert. denied, 506 U.S. 1041, 1041 (1992).

46 Hostile work environment occurs when there is unwelcome sexual conduct that unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive work environment. Meritor, 477 U.S. at 66-67.

47 The EEOC regulation of 1980, in effect, provided that (1)harassment by an agent/supervisor would result in vicarious liability on the employer, and (2)entity liability for acts of harassment among fellow employees would be imposed if the employer knew or should have known of the harassment, unless the employer could show it took immediate and appropriate corrective action. See 29 C.F.R. §1604.11 (c)-(d) (1980). EEOC regulations have often been influential in development of the law, but the Court has, at times, chosen to disagree with them. See, e.g., Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (choosing not to follow the EEOC guidelines because of its prior inconsistent standards). The regulations recognizing sexual harassment are found at 29 C.F.R. §1604.11(a) (2002).

48 Meritor, 477 U.S. at 70-72; see also Mark A. Rothstein et al., Employment Law §4.4, at 386-89 (2d ed. 1999); Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 152 (1992).

49 See Meritor, 477 U.S. at 71. The Supreme Court declined to issue a definitive rule on employer liability, but concurred with the EEOC that Congress wanted courts to look to agency principles for guidance. Id. at 72. It also stated that absence of notice to an employer

does not necessarily insulate that employer from liability. Id. By the same token, the existence of a grievance policy, coupled with the plaintiff's failure to invoke the policy, does not assure that an employer will be insulated from liability. Id.

50 See, e.g., Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 248-49 (2d Cir. 1995) (adopting Title VII principles to impose liability); Lipsett v. Univ. of P.R., 864 F.2d 881, 896-97 (1st Cir. 1988) (drawing on Title VII cases to analyze the plaintiff's Title IX claim); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1289-92 (N.D. Cal. 1993) (looking to Title VII precedent to find that the defendant might be liable for sex discrimination under Title IX).

51 524 U.S. 742 (1998). Ellerth alleged that her supervisor constantly subjected her to sexual harassment in the form of remarks and gestures. Id. at 747-48. Although Ellerth interpreted her supervisor's comments as threats to deny her job benefits such as promotions, the Court found that she alleged no tangible job detriment. Id. at 766. Ellerth never reported sexual harassment to anyone at Burlington until after she had quit her job, despite admitted awareness of her employer's policy. Id. at 748.

52 524 U.S. 775 (1998). Faragher's action alleged that supervisors had "created a 'sexually hostile atmosphere' ... by repeatedly subjecting [her] and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms." Id. at 780. Faragher complained about the offending supervisors to another supervisor, but he did not report the comments because he did not feel it was his place to do so. Id. at 782-83. The City had a sexual harassment policy during most of the time Faragher was employed and harassed, but it never disseminated the policy to the employees in the Marine Safety Section. Id. at 781-82.

53 Quid pro quo harassment, as the Court explains in Ellerth, occurs when there are "explicit or constructive alterations in the terms or conditions of employment" as a result of an employee's rejection of demands for sexual favors. 524 U.S. at 752.

54 Hostile environment claims, according to Faragher, also relate to alterations of the terms or conditions of employment, but such alteration occurs by the creation or tolerance of a sexually demeaning environment that is pervasive or severe. 524 U.S. at 786. The Court views these distinctions as useful in helping to clarify that sexual harassment may occur by explicit or constructive alterations in employment and in justifying the requirement that constructive alterations be severe and pervasive. However, they are not a litmus test for employer liability. Ellerth, 524 U.S. at 751.

55 Restatement (Second) of Agency §219(2) (1958) provides, in pertinent part:
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

56 The Court did not intend to transplant the Restatement of Agency into Title VII or to defer to it mechanically. See Faragher, 524 U.S. at 802 n.3. But the Court found the rationale generally persuasive. Id.

57 A tangible employment action is one that constitutes a change in the terms and conditions of employment. Ellerth, 524 U.S. at 753-54. Unfulfilled threats are generally viewed as falling within the realm of hostile environment claims, "which require a showing of severe and pervasive conduct." Id.

58 See id. at 762-63.

59 Id. at 763.

60 Id. at 765.

61 Id.

62 Id. The Court stated that proof of "a stated policy suitable to the employment circumstances" is not required as a matter of law to satisfy the first element; the need for such a policy would be appropriately addressed in any case where the first element is litigated.

Id. In addition, the Court stated that an employee's "failure to use any complaint procedure ... will [ordinarily] satisfy the employer's burden under the second element of the defense." Id.

63 See Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

64 See id. at 799-800.

65 See, e.g., Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872-73 (6th Cir. 1997); Fleming v. Boeing Co., 120 F.3d 242, 246 (11th Cir. 1997); McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 480 (7th Cir. 1996). The dissenting justices in Faragher and Ellerth, Thomas and Scalia, urged that liability for a hostile work environment should attach only if an employer knew, or in the exercise of reasonable care, should have known, about the hostile work environment but failed to take action. Ellerth, 524 U.S. at 768-71 (Thomas, J., dissenting); Faragher, 524 U.S. at 810 (Thomas, J., dissenting).

66 See Faragher, 524 U.S. at 798-99.

67 See id. at 797. The Court recognized that, outside Title VII, scope of employment has been very broadly defined. Id. at 794-95.

68 Id. at 803.

69 Fleming, 120 F.3d at 246-48.

70 524 U.S. 274, 285 (1998).

71 Essentially, the Court concludes in Gebser that the Spending Clause, U.S. Const. art. I, §8, cl. 1, would preclude a school district's liability for a teacher's sexual harassment on a constructive notice or respondeat superior basis because the grantee would be unaware of the discrimination. Gebser, 524 U.S. at 287-88. But see Courtney G. Joslin, Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment, 34 Harv. C.R.-C.L. L. Rev. 201, 202-05, 219-29 (1999) (analyzing and critiquing the Spending Clause argument).

72 Gebser, 524 U.S. at 285-87.

73 Id. at 286. The Court stated that this might explain why, when it first recognized a private cause of action under Title IX, it referred only to injunctive or equitable relief. Id. at 287 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 705 (1979)).

74 Civil Rights Act of 1991, 42 U.S.C. §1981a(b)(3) (1994).

75 See Gebser, 524 U.S. at 286.

76 Id. at 285-88. The Court analogized to other cases in which the structure of statutes attaching conditions on federal funding had been examined. Id. at 287-90. For example, in Guardians Ass'n v. Civil Service Commission of New York City, 463 U.S. 582, 598 (1983), the Court concluded that relief for unintentional discrimination under Title VI "should be prospective only, because where discrimination is unintentional," the grantee may well be unaware that the program is violating the promise not to discriminate.

77 See 20 U.S.C. §1682(2) (2000).

78 Gebser, 524 U.S. at 289. The only enforcement mechanism explicitly authorized by Title IX is administrative. See 20 U.S.C. §1682. However, in Cannon v. University of Chicago, 441 U.S. 677, 717 (1979), the Supreme Court recognized an implied private right of action in favor of a woman allegedly denied admission to medical school. The Court recognized that an injunction would further the aims of Title IX in that it would be effective in ending discrimination against individual citizens and less severe than a cutoff of federal funds; thus, it might be used more frequently as a remedy. Id. at 704-05. In Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 65 (1992), the Court reaffirmed the propriety of a private right of action under Title IX in a case in which the plaintiff sought damages.

79 Gebser, 524 U.S. at 289-90. One author argues that the contractual nature of Title IX ought to strengthen the ground for imposing liability on the basis of constructive notice. See McCarthy, supra note 7, at 207. A contract suggests certain terms are attached and one may either take or leave them. Id. The same is not true with Title VII. Id.

80 Gebser, 524 U.S. at 290.

81 Id.

82 Id. at 290-91. The majority did not define "deliberate indifference" but gave the example of a funding recipient who knows of a Title IX violation and makes a decision not to remedy the violation. Id. at 290. The Court noted that these same considerations had led it to adopt "a deliberate indifference standard for claims under §1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." Id. at 291; see Bd. of County Comm'rs v. Brown, 520 U.S. 397, 411 (1997); City of Canton v. Harris, 489 U.S. 378, 392 (1989). The majority limited its holding in Gebser to cases based solely on Title IX; its decision does not "affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. §1983." 524 U.S. at 292. Although the majority does not address it, it is questionable whether Title IX may be enforced against school districts under §1983. See Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999) (remanding §1983 case for new trial, noting that it was not barred by Gebser). But see Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1129 (10th Cir. 1998) (affirming dismissal of §1983 claim).

83 See Deborah L. Brake, School Liability for Peer Sexual Harassment After Davis: Shifting from Intent to Causation in Discrimination Law, 12 Hastings Women's L.J. 5, 14-17 (2001). Brake suggests that "deliberate indifference" must be viewed in the context of the Court's commitment to provide funding recipients with "notice," so that they have an opportunity to correct the discrimination before being held liable for damages. Id. She demonstrates that this understanding is consistent with the interpretation of the deliberate indifference standard under §1983. Id. at 18-20. This is even true in Eighth Amendment claims, where the standard has been most stringently applied. Id. at 20-21.

84 Justice Stevens wrote a dissenting opinion joined by Souter, Ginsburg, and Breyer. Gebser, 524 U.S. at 298 (Stevens, J., dissenting). Justice Ginsburg wrote a dissenting opinion joined by Souter and Breyer. Id. at 306 (Ginsburg, J., dissenting).

85 Id. at 298, 299 n.9 (Stevens, J., dissenting). They argued that sexual abuse by teachers presents a paradigmatic example of a tort made possible because of the authority and control the school district delegated to the teacher. Id. at 299 (Stevens, J., dissenting).

86 Id. at 306-07 (Ginsburg, J., dissenting). On the facts of Gebser, the issue was not presented; plus, there were factual disputes about whether the district had such a policy. The National Education Association urged the adoption of such a defense in its Amicus Curiae Brief. Id. at 304 n.14.

87 Id. at 300-01 (Stevens, J., dissenting). Commentators have agreed. See B. Glenn George, Employer Liability for Sexual Harassment: The Buck Stops Where?, 34 Wake Forest L. Rev. 1, 24-25 (1999) (lauding the Court's clarifications in the employment arena, but asserting that in education, the Court has sent all the wrong messages); see also infra notes 133-163 and accompanying text.

88 526 U.S. 629 (1999). The district court had "dismissed petitioner's Title IX claim on the ground that 'student-on-student,' or peer, harassment" could not be sustained as a private action. See id. at 633 (reporting the district court's holding and disposition of the case). The United States Court of Appeals for the Eleventh Circuit affirmed. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1399-1402 (11th Cir. 1997) (en banc). These courts reasoned that because students are not agents of the school, the school could not be held accountable for their sexual harassment of others. Davis, 526 U.S. at 636-37.

89 Id. at 633.

90 Id. at 643. In addition to the Eleventh Circuit, other federal courts had suggested alternative reasons that school districts should not be held liable for peer harassment. The Fifth Circuit decision in Rowinsky v. Bryan Independent School District, 80 F.3d 1006, 1016 (5th Cir. 1996) held that an entity can be liable for ignoring peer harassment only if it does so on the basis of sex. In other words, if a district ignored complaints of both male and female students, or treated students of both sexes equally, it could not be liable. See Brake, supra note 83, at 8; see also Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1995) (finding that even if a school counselor may have had a duty to prevent peer harassment, he had qualified immunity).

91 See Davis, 526 U.S. at 650.

92 Id. The funding recipient's deliberate indifference must "subject" its students to harassment, in the sense of exposing them to it. Id. at 644-45. The harassment must take place in a context subject to the school district's control consistent with the statutory requirement that "the harassment ... occur 'under' 'the operations of' a funding recipient." Id. at 645.

93 Id. at 650. The majority cited, as the most obvious example of a claim that would trigger liability, a situation in which male students threaten their female counterparts daily and keep them from using a school facility, such as a computer lab, and the district knows of such conduct and ignores it. Id. at 650-51. The Court also stated that "[t]he relationship between the harasser and the victim [will affect] the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity." Id. at 653. Teacher/student harassment would be much more likely to meet these requirements. Id.

94 See id. at 642.

95 See id. at 648.

96 Id. at 648-49.

97 Id.

98 Id. at 646-47. The Court stressed its awareness that the issue of whether gender oriented conduct even rises to the level of harassment depends on factors including the ages of the offenders and stated that damages are not available for simple acts of teasing and name-calling among school children. Id. at 651-52. Moreover, the requirement that the discrimination be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity made it unlikely that a single instance of severe harassment would suffice. See id. at 652-53.

99 Justice Kennedy wrote the dissent, joined by Rehnquist, Scalia, and Thomas. See id. at 654 (Kennedy, J., dissenting).

100 See id. at 664 (Kennedy, J., dissenting). Justice Kennedy argued that even under Title VII, which has an express private right of action and is not "Spending Clause legislation," an entity is never held liable for the acts of nonagents. Id. at 662 (Kennedy, J., dissenting).

101 Id. at 664-65 (Kennedy, J., dissenting).

102 See id. at 665-66 (Kennedy, J., dissenting); Individuals With Disabilities Education Act, 20 U.S.C. §1400 (2000).

103 The dissenters argue that if the behavior of the student deviates sufficiently from the normal teasing and horseplay that characterizes childish and adolescent behavior to put the school district on notice, then the student who engages in such behavior may arguably have a "colorable claim of severe emotional disturbance within the meaning of the [Individuals with Disabilities Education Act]." Davis, 526 U.S. at 666 (Kennedy, J., dissenting).

104 See id. at 665 (Kennedy, J., dissenting).

105 Id. at 681 (Kennedy, J., dissenting).

106 Id. at 680 (Kennedy, J., dissenting).

107 Id. at 666-67 (Kennedy, J., dissenting).

108 Id. at 668 (Kennedy, J., dissenting).

109 Id. at 667 (Kennedy, J., dissenting). Thus, a school district trying to prevent or rectify sexual harassment would face the prospect of litigation on behalf of the alleged harasser for violation of the First Amendment or other rights. Much more is available on the topic of First Amendment implications of sexual harassment in the workplace. See, e.g., Eugene Volokh, How Harassment Law Restricts Free Speech, 47 Rutgers L. Rev. 563, 563-76 (1995); Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1791-1872 (1992); Amy Horton, Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII, 46 U. Miami L. Rev. 403, 410-25 (1991); Nadine Strossen, The Tensions Between Regulating Workplace

Harassment and the First Amendment: No Trump, 71 Chi.-Kent L. Rev. 701, 707-27 (1995); see also Suzanne Sangree, A Reply to Professors Volokh and Browne, 47 Rutgers L. Rev. 595, 595-605 (1995).

110 Davis, 526 U.S. at 686 (Kennedy, J., dissenting). Professor Joan Schaffner thoughtfully addresses the dissent's arguments that this case will infringe on state prerogatives in violation of federalism principles, offend the First Amendment, and sweep into federal court childish conduct that is not sex discrimination. Joan E. Schaffner, Dispelling the Misconceptions Raised by the Davis Dissent, 12 Hastings Women's L.J. 141, 141-43 (2001).

111 The requirements that hostile environment claims contain proof of the severity and pervasiveness of discriminatory conduct and that quid pro quo claims include tangible detriment, among others, filter out what might be viewed as minor claims. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (stating that conduct that would not lead a reasonable person to find a hostile or abusive environment is beyond the scope of Title VII); Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 81 (1998) (stating that Title VII's requirement that the conduct be pervasive and severe is crucial to liability); Davis, 526 U.S at 652 (finding teasing and name-calling insufficient for Title IX liability).

112 Recognition of vicarious liability for tangible employment actions of supervisors in the employment context seems to defy this notion, but as the Court in Ellerth explains it,
[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act....
For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.
Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998).

113 As the Court explained in Faragher, recognition of the affirmative defense gives credit to employers who make reasonable efforts to discharge their duties. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

114 One author explains the deliberate indifference standard as the Court's way of providing funding recipients “an opportunity to correct the discrimination before being held liable in damages.” Brake, supra note 83, at 16-17.

115 The Court explained its reasoning for the affirmative defense in terms of the employee's duty to avoid or mitigate harm to herself, but the effect of the defense is to demand employees report discrimination or harassment pursuant to the employer's policy. See Faragher, 524 U.S. at 807-08.

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

117 503 U.S. 60, 76 (1992).

118 See infra notes 177-287 and accompanying text.

119 See supra notes 17-18 and accompanying text. There is also a possibility of liability under other federal statutes, such as 42 U.S.C. §1983 (1994), although the constitutional standard can be difficult to meet and qualified immunity may be invoked by individual defendants. See supra note 19. Suits against municipalities under §1983 must meet the difficult standards for municipal liability. Id. Some courts question whether suits against municipalities based on violations of Title IX are even cognizable. See supra note 82. Until recently, it also appeared that relief might be granted under the Violence Against Women Act, 42 U.S.C. §13,981 (2000), but the Supreme Court has held that Congress was not authorized to enact §13, 981. See McCarthy, supra note 7, at 203.

120 Tort-based claims against school districts often find challenges such as discretionary function immunity. See, e.g., Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 696 (E.D. Tex. 2001) (finding Texas law to indicate that an independent school district, as an agency of the state, is not answerable for its negligence while exercising governmental functions, and that the same is true for claims against individuals exercising judgment or discretion); Cal. Gov't Code §820.2 (Deering 1982) (“Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.”). Actions by school officials to investigate and impose discipline on students are likely to be viewed as discretionary, not ministerial. See, e.g., Nicole M. ex rel. Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1389-90 (N.D. Cal. 1997). Likewise, allegations that a district negligently failed to investigate an individual's background before hiring are often viewed as discretionary functions. See, e.g.,

Hackett v. Fulton County Sch. Dist., No. CIV.A.1:01-CV-0233-J, 2002 WL 31681313, at *32 (N.D. Ga. Aug. 12, 2002). Assuming this challenge can be surmounted, it may be possible to plead negligence or intentional tort theories. The intentional tort theories will pose agency issues that are not too dissimilar to those the Supreme Court has faced in Title IX cases. See John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 953-57 (Cal. 1989) (discussing vicarious liability of the school district in a case in which a teacher allegedly molested a student); see also Alma W. ex rel. Young v. Oakland Unified Sch. Dist., 176 Cal. Rptr. 287, 292-93 (Cal. Ct. App. 1981) (holding that school district was not liable for employee's conduct based on the doctrine of respondeat superior). Even if liability is imposed, insurance coverage may not cover the claim. See Robert E. Keeton & Alan I. Widiss, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices §5.4 (1988) (stating that most insurers will compensate for damages when the insured becomes legally responsible due to an accident and not an intentional act). Most courts will reaffirm this principle even if the terms of the insurance do not explicitly preclude coverage for intentional torts because of public policy. See Robert H. Jerry, II, Understanding Insurance Law 400-01 (2d ed. 1996).

121 See, e.g., Ark. Code Ann. §6-15-1005(b)(1) (Michie 1999) (“Every school and district will enforce school district policies to ensure the safety of every student .... These policies will include ... sexual harassment.”); Cal. Educ. Code §231.5(b) (2002) (stating that each educational institution must have a written policy on sexual harassment); Conn. Gen. Stat. §10a-55c(a)(6) (1997) (requiring sexual harassment policy for institutions of higher education only); Fla. Stat. §230.23(6)(d)(8) (1998) (making the violation of a school district's sexual harassment policy by a student grounds for suspension or criminal sanctions); Iowa Code §262.9(27)(c) (1996) (mandating that each school must “[d]evelop and implement a written policy, which is disseminated during registration or orientation, addressing ... sexual abuse [in education, including] the rights and duties of students and employees of [each] institution”); Ky. Rev. Stat. Ann. §344.555(1) (Banks-Baldwin 1994) (“No person 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 state financial assistance ....”); Mich Comp. Laws §380.1300a (1997) (stating that every school district shall adopt and implement a sexual harassment policy); Minn. Stat. Ann. §121A.03 (West 2000) (commanding that each school must “conspicuously” post a sexual harassment policy and must include such a policy in each student handbook); Or. Rev. Stat. §342.700 (1999) (stating that each school district must adopt a sexual harassment policy, make the policy available to students and parents, and post the policy in all grades 6 through 12 on a sign not less than 8.5 by 11 inches in size); R.I. Gen. Laws §16-76-2 (2001) (“Every institution of higher learning in the state shall develop a written policy to respond to sexual harassment ....”); Tex. Educ. Code Ann. §37.083(b) (Vernon 1996) (allowing each school district to develop and implement a sexual harassment policy); Wash. Rev. Code Ann. §28A.640.020(2)(b) (West 1997) (dictating that every school district must develop and implement a written sexual harassment policy).

122 Cal. Educ. Code §§212.5, 212.6 (Deering 2002). In California, violations of the Education Code are enforceable under the Unruh Civil Rights Act, Cal. Civ. Code §§51.9, 52 (Deering 1990). See, e.g., Martinez Unified Sch. Dist., 964 F. Supp. at 1388-89.

123 In Rhode Island, violation of the prohibition on sexual harassment subjects the noncompliant institution to a fine of not more than $500. R.I. Gen. Laws §16-76-3 (2001). In Washington, a private right of action for damages and equitable relief is provided. Wash. Rev. Code Ann. §28A.640.040 (West 1997). In other states, no enforcement provision is apparent.

124 John F. Walsh, Peer Sexual Harassment in California After Davis, 12 Hastings Women's L.J. 215, 215 (2001).

125 34 C.F.R. §106.8(b) (2001); see also Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,105 (Nov. 2, 2000) [hereinafter Revised Guidance Policy].

126 The compliance reviews were found to be more effective than “complaint resolution in addressing sex discrimination” in the AAUW study. License for Bias, supra note 23, at 62. AAUW found that “OCR found violations requiring corrective action in two-thirds of compliance reviews but in less than one-half of complaints filed with the agency.... The period for monitoring the compliance agreement was longer,” and compliance reviews were more effective in negotiating a compliance agreement. Id.

127 Id. at 24. Technical assistance includes information and training provided upon request.

128 Id. at 9.

129 Id. at 25; see also supra note 23.

130 See infra notes 133-163 and accompanying text.

131 See infra notes 148-149 and accompanying text.

132 See McCarthy, supra note 7, at 209 (urging adoption of an affirmative defense similar to that of Title VII's).

133 Catherine Fisk & Erwin Chemerinsky, Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 Wm.& Mary Bill Rts. J. 755, 786-89 (1999).

134 Id. at 787.

135 See id.

136 Id. at 788.

137 Id. at 787-88. Fisk and Chemerinsky believe that respondeat superior liability for tortious conduct of employees would be most appropriate. Id. at 795. Analogizing to the arguments for respondeat superior liability in tort law, the authors stress that it provides a financial incentive for employers to prevent harassment, ensures adequate compensation for victims, and spreads the risks of liability to shareholders, to consumers, or to all employees. Id. at 785.

138 See id. at 788.

139 They posit that employers could easily discourage employees from complaining without incurring liability. An employer might provide that complainants may not remain anonymous. Id. at 788-89.

140 Anne Lawton, The Emperor's New Clothes: How the Academy Deals with Sexual Harassment, 11 Yale J.L. & Feminism 75, 107-10 (1999) (discussing several issues that cast doubt on the likelihood that the Court's decisions will alter an employer's conduct in terms of addressing or preventing sexual harassment).

141 Id. at 107.

142 Dominic Bencivenga, Looking for Guidance: High Court Rulings Leave Key Terms Undefined, N.Y.L.J., July 2, 1998, at 5; see also Genevieve Frazier Bryant et al., Sexual Harassment in the Schools: Avoiding Liability 17-21 (2000) (giving employers the same tips on avoiding liability under Title VII).

143 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting).

144 Id. at 768 (Thomas, J., dissenting). Justice Thomas viewed this result as completely inconsistent with the way employer liability was treated in race discrimination case law as developed in the circuits. Id. at 768-69 (Thomas, J., dissenting). In addition, he viewed liability in the absence of negligence on the part of the employer as fundamentally unfair. Id. at 773-74 (Thomas, J., dissenting).

145 See David Sherwyn et al., Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges, 69 Fordham L. Rev. 1265, 1303-04 (2001). The authors' study finds that
the Supreme Court arguably created a regrettable situation when it articulated its two-prong affirmative defense. Employers are held liable when they do all that they can to prevent sexual harassment, but it nonetheless occurs and the employee reports it. They are liability-free, however, when they do a lesser job of preventing harassment, and they happen to be fortuitous enough to employ someone who fails to take reasonable steps to report his or her claim.
Id. at 1303-04.

146 See Ann Juliano & Stewart J. Schwab, The Sweep of Sexual Harassment Cases, 86 Cornell L. Rev. 548, 591-92 (2001).

147 See Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 La. L. Rev. 555, 568 (2001) (noting that it is too early to tell what the effect of the decisions will be but suggesting that they may signal a shift in judicial attitudes that make recovery in sexual harassment cases more difficult).

148 See, e.g., Rebecca Leung, School Teasing or Harassment? Court Ponders, available at http://abcnews.go.com/sections/us/DailyNews/scotus990111_ harassment.html (last visited Nov. 1, 2002) (reporting on floods of calls to legal experts about Davis and the increased training of students); Julie E. Lewis, Supreme Court Update: Davis v. Monroe County Board of Education, available at http://www.aasa.org/issues_and_insights/safety/06-01-99case.htm (last visited Dec. 18, 2002) (informing administrators that the clear message of the case is to implement clear and effective sexual harassment policies for students, teachers, and administrators, and to educate all employees so that they understand the policies).

149 See, e.g., Monica D. Hutchinson, What You Know About and Don't Deal With Can Cost You: A School District's Potential Liability for Student-on-Student Sexual Harassment, 65 Mo. L. Rev. 493, 510 (2000) (characterizing the decision in Davis as one intended to make everyone happy but which satisfies no one and allows school districts to ignore their duties to protect children and ensure quality of education). There are a few supporters. See Brake, supra note 83, at 30-37 (viewing Davis as a modest but important departure from sex discrimination claims under other theories, such as equal protection, which requires proof of discriminatory intent); Schaffner, supra note 110, at 143-56 (arguing that the majority's decision is justified by principles of federalism).

150 Lawton, supra note 140, at 114.

151 William A. Kaplin, A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis, 26 J.C. & U.L. 615, 619-22 (2000). Kaplin points out the irony of a decision that does not require districts to have a sexual harassment policy but predicates liability on receipt of actual notice. Id.

152 Wallace B. Jefferson explains that even if actual knowledge on the part of entities increases due to training of employees and effective publicity of grievance procedures, institutional liability does not attach unless there is deliberate indifference by an individual with a duty to take corrective measures. Bryant et al., supra note 142, at 6. Jefferson advises school districts to adopt efficient mechanisms to relay complaints, to educate students about the grievance procedures, and to develop written policy manuals. Id. He posits that the standard for entity liability would be met only in cases of a systematic failure to investigate. See id. at 7.

153 See Lawton, supra note 140, at 86-87. Most victims prefer to ignore the harassing incident or to take no action against the harasser. Id. Few women who experience sexual harassment will take any formal action against the offender. Id. Underreporting occurs for a variety of reasons: loss of privacy, fear of vulnerability in the workplace, and fear of retaliation by the employer. Id. at 124-38; see also Amy Holzman, Denial of Attorney's Fees for Claims of Sexual Harassment Resolved Through Informal Dispute Resolution: A Shield for Employers, a Sword Against Women, 63 Fordham L. Rev. 245, 251-53 (1994) (stating that a primary reason why sexual harassment is underreported is that women traditionally do not report crimes or incidents of a sexual nature). Sexual harassment, like rape, is a violation of personhood. Id. Loss of privacy is another main reason, as is fear of retaliation. Id. Women are also apprehensive of the reaction to their complaints and are wary of being viewed as blameworthy or unprofessional. Id.

154 2001 Survey, supra note 13, at 14-15. This study showed that not even half of the students responding would be likely to complain if they were harassed by another student. Id. at 14. Girls were much more likely to complain than boys (57% compared to 29%). Id. Seventy-one percent of the responding students would report harassment if an adult harassed them, with girls being somewhat more likely to report than boys (76% compared to 67%). Id. at 15.

155 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); see also Susan Bisom-Rapp, An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law, 22 Berkeley J. Emp. & Lab. L. 1, 8-12 (2001) (arguing that the Court sought to prevent sexual harassment by encouraging employers to promulgate new policies); Michael Taylor, Let's Talk About Sex: A Clarification of Employer Liability for Supervisor Sexual Harassment Under Title VII, 27 Ohio N.U. L. Rev. 607, 614 (2001) ("The Court [stated] that the affirmative defense is consistent with the primary objective of Title VII because it encourages forethought by employers ...."); Niloofar Nejat-Bina, Article, Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law, 20 Berkeley J. Emp. & Lab. L. 325, 338 (1999) (interpreting the holding of Ellerth as effectuating congressional intent to prevent harassment).

156 See Taylor, supra note 155, at 644-46; accord Kent Jonas & Stacey L. West, Sexual Harassment, in Continuing Education of the Bar, California, Selected Issues in Handling Discrimination and Wrongful Termination Cases 1, 12 (1998) (advising employer to

implement a strong and well articulated policy against sexual harassment, which includes an internal complaint procedure, a grievance procedure that is publicized and known to all employees, an assurance of confidentiality of the complaint procedure, and effective remedies for sexual harassment).

157 Marcia Coyle, Sex Harassment Redefined, Nat'l L.J., July 6, 1998, at A1 (discussing interview with Professor David Oppenhiemer of Golden Gate University). Incentives to provide antiharassment training existed prior to Ellerth and Faragher. Some state laws actually require employers to train supervisory employees. See Conn. Gen. Stat. §46a-54 (15)(B) (1997) (requiring employers who have fifty or more employees to provide two hours of training and education to all supervisory employees regarding federal and state harassment provisions); R.I. Gen. Laws §28-51-2(c) (2001) (encouraging employers to conduct training and education program so that new employees are aware of how to ensure immediate and appropriate corrective action to address sexual harassment complaints). Even if such extensive measures are taken, not everyone would view them as likely to prevent harassment or improve the workplace environment for plaintiffs. Professor Mark Hager has argued that Title VII's incentives for employers to educate their employees probably do not reduce serious harassment, but instead curtail "petty harassment and borderline tastelessness." Hager, supra note 26, at 390. Hager argues that tort liability of perpetrators of harassment is a far superior mechanism for deterring harassment. Id. at 390-91.

158 Fisk & Chemerinsky, supra note 133, at 788-89.

159 Lawton, supra note 140, at 109.

160 Id.

161 Id. at 114 (contending that the Court made it clear that policies and procedures are not necessary to protect the entity from liability).

162 Fisk & Chemerinsky, supra note 133, at 793.

163 Id.; see also Jill S. Vogel, Comment, Between a (Schoolhouse) Rock and a Hard Place: Title IX Peer Harassment Liability After Davis v. Monroe County Board of Education, 37 Hous. L. Rev. 1525, 1544-54 (2000) (reading OCR Guidelines and Davis together as sanctioning a school district's judgment that school officials will not be liable until the victim has suffered extreme, or perhaps irreparable, harm).

164 The issue was posed in the well-known case of Alexander v. Yale University, 459 F. Supp. 1, 4 (D. Conn. 1977), aff'd 631 F.2d 178 (2d Cir. 1980). For a modern example, see Crandell v. New York College of Osteopathic Medicine, 87 F. Supp. 2d 304, 318 (S.D.N.Y. 2000), a case in which a medical resident threatened to fail the plaintiff if she refused to have lunch with him and spend time with him regularly.

165 They argue that regardless of structural differences between Titles VII and IX, or the existence of damages caps under Title VII, the committed wrong is the same and should be treated the same. Fisk & Chemerinsky, supra, note 133, at 793-94. Furthermore, they argue that even broader liability should apply under Title IX because the harassment is committed against a group of individuals--students, most under the age of majority--who are particularly vulnerable and far less capable of recognizing and reporting sexual harassment than employment plaintiffs. Id.

166 Fisk and Chemerinsky urge a negligence standard for peer harassment. Id. at 795-97.

167 Dan B. Dobbs, The Law of Torts §118, at 280-81 (2000).

168 Also, according to the AAUW Survey, this type of harassment does not occur very often so liability, though always burdensome, would not be enormous. See 2001 Survey, supra note 13, at 26-27. One writer describes a different legislative approach suggesting that if Title VII's damages caps applied to Title IX, Congress or the Court might well believe it would be appropriate to apply the Title VII standards to analyze school-setting sexual harassment claims. See Clark, supra note 7, at 355.

169 Both the majority and dissenting opinions in Davis allude to some differences. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 632-54, 654-86 (1999). One difference concerns disciplinary constraints on school administrators imposed by the Constitution and other statutes. See supra notes 99-104 and accompanying text.

170 Davis, 526 U.S. at 651.

171 Id.

172 See Lawton, supra note 140, at 142; Clark, supra note 7, at 345-55.

173 See supra notes 133-166 and accompanying text.

174 See infra notes 177-179 and accompanying text.

175 The case law is so confusing that it is hard to evaluate whether Title IX plaintiffs are clearly worse off. If Title VII cases are being resolved summarily for employers based on the courts' belief that employers who respond properly to complaints about harassment should not be liable, as Sherwyn, Heise, and Eigen suggest, then plaintiffs who suffer harassment by supervisors without constructive job detriment may be no better off than students who suffer harassment from teachers and gain some response from the school district. Sherwyn et al., supra note 145, at 1294-95. If, on the other hand, the affirmative defense is construed as it is written, then the outcomes might be different. An employer that did respond properly to a complaint by the employee would lose the affirmative defense, while a school district that responded properly (in a manner not clearly unreasonable) would escape liability. Id. at 1292.

176 See id. at 1294-98.

177 See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 630-31 (1999).

178 See, e.g., Haines v. Metro. Gov't of Davidson County, 32 F. Supp. 2d 991, 996 (M.D. Tenn. 1998) (addressing the confusion of peer sexual harassment claims); Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 621 n.2 (S.D. W. Va. 1998) (stating that it is a difficult question whether a cause of action exists for peer to peer sexual harassment); see also Alton v. Bd. of Educ., No. 1:96-CV-564, 1997 U.S. Dist. LEXIS 20046, at *14 (W.D. Mich. Nov. 25, 1997) (finding the issue of whether student could bring peer harassment action unclear); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1211 (E.D. Pa. 1997) (stating that the law is unsettled as to whether student could sue school district for monetary damages when the injury was caused by another student).

179 Anand Vaishnav, Classroom to Courtroom: Parents Suing Over Recess Mishaps, Proms, The Boston Globe, July 21, 2000, at A1 (noting that schools are more aware of potential liability and that school committees have tightened up their policies to respond to potential sexual harassment liability); Lona O'Conner & Jeremy Milarsky, Schools Lose Shield in Sexual Harassment, Sun Sentinal (Fort Lauderdale, Fla.), Oct. 11, 1999, at 1A (discussing the effect of the Davis decision on educators and noting that principals were busy warning parents, students, and teachers not to ignore sexual harassment); see also Walsh, supra note 124, at 215-16. Walsh, a practicing school attorney, reports that his clients viewed the Davis decision as raising more questions than answers and wondered "why is the Supreme Court now imposing this new source of liability under Title IX and ... how does [it] affect our current harassment policies and investigation procedures?" Id. at 216.

180 The study of opinions to ascertain trends and success rates has definite limitations. First, the character of disputes, including the pivotal issues, may change through the litigation process. Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 19 (1983). Second, it can be hard to know what inferences to draw from success rates or apparent trends. See James A. Henderson, Jr. & Theodore Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479, 499-502 (1990) (giving as an example the possibility that if plaintiffs are losing a lot of cases, one might infer the law disfavors them, yet noting that it might be the case that the law is changing to favor them and defendants are settling a larger portion of the types of claims that previously went to trial, and thus the claims actually proceeding to trial are weaker than they were before). Another limitation is that cases yielding opinions represent only a fraction of the district courts' caseload, with some cases having been settled and others having been resolved without a published opinion. Id. at 502.
Notwithstanding these limitations, opinions are useful for understanding how courts see the issues and in gaining a picture of the types of questions they are confronting. In looking at the outcomes, we excluded cases that included a Title IX claim but were resolved on a basis unrelated to the standard for entity liability. For example, a number of decisions focused on the issue of whether Title IX can be enforced under §1983's "and laws" language against an individual or an entity. See Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) (stating that a constitutional challenge existed to a district's antiharassment policy); Bonnell v. Lorenzo,

241 F.3d 800, 802 (6th Cir. 2001) (discussing a §1983 action by a professor to enjoin an educational institution from enforcing an antiharassment policy). Compare Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997) (allowing recovery under both statutes), and Seamons v. Snow, 84 F.3d 1226, 1234 (10th Cir. 1996) (same), and Doe v. Old Rochester Reg'l Sch. Dist., 56 F. Supp. 2d 114, 116-20 (D. Mass. 1999) (same), with Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756-57 (2d Cir. 1998) (holding that Title IX subsumed constitutional §1983 claims), and Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862-63 (7th Cir. 1996) (same), and Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) (same).

181 It is possible to devise case studies that test the effect of independent variables on a dependent variable and produce statistically significant results. The results reported here do not employ that methodology. Two recent empirical studies reporting statistically significant results on Title VII litigation are Juliano & Schwab, supra note 146, and Sherwyn et al., supra note 145. The research in this Article is more in the vein of what Juliano and Schwab characterize as a traditional legal analytical approach, in that it grapples with nuances of particular cases. See Juliano & Schwab, supra note 146, at 249-53. However, because of the small number of Title IX cases, my study includes each district and circuit court case involving Title IX sexual harassment after Gebser and Davis. My study excludes cases that raise Title IX claims that were decided on other grounds, i.e., an alternative claim or an unrelated issue. In tallying the success rate, we counted only Title IX cases in which some disposition on the merits, at any procedural stage, was made in favor of the plaintiff or defendant. Because the study does not control for different variables, I cannot and do not attempt to attribute the results to any particular cause. What we tried to do was glean from the cases some basic information: where the harassment took place, what type, the components of the standard for entity liability, and the disposition of the case. We assigned code numbers to each category to correspond with outcome, enabling us to count, filter, and graph the data.

182 Kaplin, supra note 151, at 627. Professor Kaplin views the standard in Davis as similar to, but not identical to, the standard in Gebser. Id. at 628. He attributes the difference to the Court's desire to limit peer harassment actions by adding a couple of additional hurdles. Id. The lower courts do not appear to view the standards as distinct, although factors such as whether the harassment occurred in a context in which the school had control of the student harassment naturally arise more often in peer harassment situations.

183 See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998).

184 See id.

185 The Court uses the term “actual notice” synonymously with “actual knowledge” and in juxtaposition to “constructive notice.” See id. at 285-91.

186 There may be a question as to whether a reported incident puts an entity on notice. This was true in Gebser. The Supreme Court believed a report to the principal that a teacher had made inappropriate comments during class was insufficient to alert the principal that the teacher was involved in a sexual relationship with a student. Gebser, 524 U.S. at 291. First Amendment protection of academic freedom may be an issue when the conduct alleged to provide actual knowledge occurs in the classroom, particularly at the university level. See, e.g., Schaffner, supra note 110, at 172-75; Beverly Earle & Anita Cava, The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus, 18 Berkeley J. Emp. & Lab. L. 282, 283-322 (1997); Rodney A. Smolla, Academic Freedom, Hate Speech, and the Idea of a University, Law & Contemp. Probs. Summer, 1990, at 195, 221-22.

187 Crandell v. N.Y. Coll. of Osteopathic Med., 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000) (interpreting Gebser to mean that an aggrieved student need not follow the institution's official route for reporting sexual harassment, as long as she reports to someone with authority to take corrective measures); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1094-95 (D. Minn. 2000) (acknowledging that notice had been given to everyone, including bus drivers, teachers, principals, counselors, and finally, the superintendent, and stating that absence of a formal complaint at earlier stages did not matter because the policy permitted informal complaints); Norris v. Norwalk Pub. Sch., 124 F. Supp. 2d 791, 793 (D. Conn. 2000) (sustaining a complaint that alleged that a thirty-day “statute of limitations” policy for sexual harassment constitutes a failure to promulgate and implement reasonable policies); Litman v. George Mason Univ., 131 F. Supp. 2d 795, 803 (E.D. Va. 2001) (questioning a university's assertion that a failure to file a written complaint as required by its policy relieved it of obligation to investigate).

188 See generally Soper v. Hoben, 195 F.3d 845, 857 (6th Cir. 1999) (showing how majority and dissenting judges disagree as to when the district had actual notice).

189 The Court in Gebser viewed Lago Vista School Independent District's failure to produce a sexual harassment policy and grievance procedure as a violation of the Department of Education's administrative requirement, and not as “discrimination” under Title IX. Gebser, 524 U.S. at 291-92.

190 See, e.g., Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 384 (5th Cir. 2000) (assuming that the school's principal is an official with authority to take corrective action); Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 259 (6th Cir. 2000) (stating that numerous complaints to the principal over a two-year period, culminating in the filing of a Title IX complaint, are sufficient to establish the school district's actual knowledge); Murrell v. Colo. Sch. Dist. No.1, 186 F.3d 1238, 1247-48 (10th Cir. 1999) (stating that principal's knowledge may be charged to the school district because the sexual harassment policy stated that grievances are to be directed to the principal); Davis v. DeKalb County Sch. Dist., 233 F.3d 1367, 1372 (11th Cir. 2000) (assuming a principal would suffice as someone with authority to take corrective action); Warren v. Reading Sch. Dist., 82 F. Supp. 2d 395, 399 (E.D. Penn. 2000) (rejecting the defendant's argument that the principal is not an official with authority to institute a corrective measure on the district's behalf within the meaning of Gebser), rev'd on other grounds, 278 F.3d 162, 171-73 (3d Cir. 2002); Massey v. Akron City Bd. of Educ., 82 F. Supp. 2d 735, 744 (N.D. Ohio 2000) (holding that a school principal, as supervisor of the teacher who allegedly sexually harassed multiple students, was an official with corrective authority); Canty v. Old Rochester Reg'l Sch. Dist., 66 F. Supp. 2d 114, 116-17 (D. Mass. 1999) (denying summary judgment for the defendant in part because the principal privately acknowledged to parents that he believed the allegations of sexual misconduct).

191 See, e.g., Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 760 (2d Cir. 1998) (affirming judgment for the defendant in Title IX action, although favorably viewing evidence that indicated the teacher had actual knowledge of ongoing harassment of the plaintiff and stating that such proof would support a finding for the plaintiff on the notice element); Murrell, 186 F.3d at 1247 (stating that teachers would be included if they were in control of the harasser and the context); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1171 (N.D. Cal. 2000); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1098 (D. Minn. 2000) (“Because teachers ordinarily maintain at least some level of disciplinary control over their students, it is reasonable to infer that they had authority to take disciplinary action and to institute other corrective measures to end the harassment [by students].”).

192 Cases distinguish between the obligations of employees who may have a duty to report to higher authorities and the obligations of people with authority to take corrective action. One court assumed that every employee would have a duty to report, but that such failure to report was not sufficient to impose vicarious liability. See Liu v. Striuli, 36 F. Supp. 2d 452, 466 (D.R.I. 1999) (holding that a Financial Aid Director who knew of a faculty member's relationship with a student had no corrective authority).

193 See, e.g., Floyd v. Waiters, 133 F.3d 786, 790 (11th Cir. 1998) (stating that the local school board was the only entity to whom notice could be given under Georgia law); Baynard v. Lawson, 112 F. Supp. 2d 524, 533 (E.D. Va. 2000) (stating that a report must be made to a person in the chain of command whom the school board appointed to monitor and remedy complaints, not including the principal).

194 Baynard, 112 F. Supp. 2d at 531-34.

195 Id. at 533.

196 Floyd, 133 F.3d at 792.

197 Id. at 792-93.

198 If the university has a grievance policy, it will designate the process for initiating a formal complaint. However, because the Title IX standard places less emphasis on compliance with the formalities of a policy than Title VII, complaints to persons other than the compliance officer ought to be deemed as “notice” if the recipient is a person with corrective authority.

199 149 F. Supp. 2d 826, 837 (S.D. Iowa 2001).

200 To the extent the Court's precedents in the area of municipal liability are relevant by analogy, they support this interpretation. In City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988), a plurality of the Court held that the question of whether a person has final

decision-making authority is a question of law for the judge, not the jury. In Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989), a majority of the Court stated that the determination should be made on the basis of state law. State and local laws are relevant, but so are customs and practices. Erwin Chemerinsky notes that despite these decisions, the matter of who is a final decision maker is still being litigated in the lower courts. See Chemerinsky, supra note 6, at §8.5.2.

201 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). The Court analogized the deliberate indifference standard to the standard required to impose liability on a municipality under §1983 in Board of Commissioners v. Brown, 520 U.S. 397, 408 (1997), and City of Canton v. Harris, 489 U.S. 378, 388-92 (1989). Gebser, 524 U.S. at 291.

202 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999). The Court stated that funding recipients are deemed deliberately indifferent where the recipients' response, or lack thereof, is clearly unreasonable in light of the known circumstance. Id. In fact, this definition resembles gross negligence or recklessness. See Black's Law Dictionary 1057, 1277 (7th ed. 1999).

203 See Davis v. DeKalb County Sch. Dist., 233 F.3d 1367, 1375 (11th Cir. 2000) (quoting Gebser, 524 U.S. at 291); Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1083 (S.D. Iowa 2000) (requiring evidence that the school district turned a blind eye to a known risk).

204 Henkle v. Gregory, 150 F. Supp. 2d 1067, 1078 (D. Nev. 2001) (citing Smith v. Wade, 461 U.S. 30, 46-47 (1983)) (sustaining punitive damages allegation on the ground that the deliberate indifference standard would be sufficient to sustain a punitive damages claim); Baynard v. Lawson, 112 F. Supp. 2d 524, 530 (E.D. Va. 2000).

205 See, e.g., Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 260 (6th Cir. 2000) (interpreting deliberate indifference in light of the Supreme Court's opinion in Farmer v. Brennan, 511 U.S. 825, 847 (1994), and concluding that it is met when a defendant "knows of, and responds unreasonably to, 'a substantial risk of serious harm"'). The court goes on to explain that deliberate indifference would not require proof that the defendant fully appreciated the harmful consequences of discrimination. Id.; see also Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999) ("If the institution takes timely and reasonable measures to end the harassment, it is not liable under Title IX for prior harassment.... [I]f it learns that its measures have proved inadequate, it may be required to take further steps to avoid new liability." (citations omitted)); Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 384 (5th Cir. 2000) ("Officials may avoid liability under a deliberate indifference standard by responding reasonably to a risk of harm, 'even if the harm ultimately was not averted."' (quoting Farmer v. Brennan, 511 U.S. 825, 844 (1994))); Landon v. Oswego Unit Sch. Dist. 308, No. 00C1803, 2001 WL 649560, at *5 (N.D. Ill. June 8, 2001) (finding that an incomplete investigation, including a failure to interview the plaintiff, raised material questions of fact as to the deliberate indifference of the defendant); Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57, 61-65 (D. Me. 1999) (holding that a jury could find the district's responses unreasonable in light of known circumstances).

206 109 F. Supp. 2d 1081, 1100 (D. Minn. 2000).

207 Id. at 1085.

208 Id. at 1095.

209 See Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (denying a motion to dismiss where the plaintiff's complaint alleged that agents and employees with authority to correct "took no action to curtail the harassing conduct ... when they knew or should have known [another student] presented a specific threat to [p]laintiff's safety"); Hayut v. State Univ. of N.Y., 127 F. Supp. 2d 333, 338 (N.D.N.Y. 2000) (finding that the plaintiff's allegations that she reported a professor's harassment to two individuals with authority to address the discrimination and that they did nothing were sufficient to state a claim for violation of Title IX).

210 No. Civ. 99-448-JD, 2001 WL 276975, at *2 (D.N.H. Mar. 21, 2001).

211 Id. at *3.

212 See id. at *2.

213 Id.

214 Id. at *7.

215 Vance v. Spencer County Public School District, 231 F.3d 253, 256-61 (6th Cir. 2000), provides a perfect example of why this is so. The plaintiff had made informal complaints to teachers and principals for two years. Id. at 256-57. The school took no action until a formal complaint was filed and then further delayed a couple of months. See id. The defendant moved for summary judgment arguing that its response indicated that it had not been deliberately indifferent. Id. at 257-58. After a denial of summary judgment, the case went to trial and the plaintiff won. Id. at 258. On appeal, the court found a minimalist approach that incorporated methods found ineffective in past practice constituted deliberate indifference. Id. at 260-61.

216 See, e.g., K.F.'s Father v. Marriott, No. CA 00-0215-C, 2001 WL 228353, at *16-*17 (S.D. Ala. Feb. 23, 2001). In this case a first-grade girl allegedly sexually assaulted a classmate on two occasions. Id. The plaintiff contended greater disciplinary measures should have been taken and that the failure to do so met the deliberate indifference standard. Id. But the court, in view of the children's ages, the fact that the alleged harasser denied the occurrence of the assaults, the victim's failure to inform the school of the assaults immediately after they had occurred, and the school's prompt responses after reports were made, thought that the school's response was "not clearly unreasonable" and refused to second-guess the school's response. Id. at *17.

217 See Chontos v. Rhea, 29 F. Supp. 2d 931, 934 (N.D. Ind. 1998). The Chontos court quoted a pre- Gebser opinion:
School officials faced with knowledge of sexual harassment must decide how to respond, but their choice is not a binary one between an obviously appropriate solution and no action at all. Rather, officials must choose from a range of responses. As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.
Doe v. Univ. of Ill., 138 F.3d 653, 667-68 (7th Cir. 1998).

218 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652 (1999). The Court held that whether gender-oriented conduct rises to the level of actionable harassment "'depends on a constellation of surrounding circumstances, expectations, and relationships."' Id. at 651 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

219 Davis, 526 U.S. at 652.

220 Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000).

221 Id.

222 Id.

223 Id. at 1085.

224 Norris v. Norwalk Pub. Sch., 124 F. Supp. 2d 791, 793 (D. Conn. 2000).

225 Hayut v. State Univ. of N.Y., 127 F. Supp. 2d 333, 336 (N.D.N.Y. 2000).

226 Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1171 (N.D. Cal. 2000) (finding the allegation sufficient to survive a motion to dismiss).

227 The requirement that a monetary award be premised on a legally recognized harm is common in negligence cases and in civil rights cases. Dobbs, supra note 167, §§377-78, at 1047-54.

228 But see Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 695 (E.D. Tex. 2001) (utilizing the requirement of severity to reject the proposition that a Title IX claim could be based on the exposure of an assault victim to an "unchanged and unaddressed hostile environment"). The court stated that such a theory might work under Title VII, if a rape victim were forced to work next to the rapist, EEOC v. Regency Architectural Metals Corp., 896 F. Supp. 260, 269 (D. Conn. 1995), but that Title IX is less expansive than Title VII. Wilson, 144 F. Supp. 2d at 695.

229 See generally Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

230 There were fifty-two cases as of October 2, 2002. The plaintiffs prevailed in twenty-one and the defendants in thirty-one. Julie Davies, Post-Gebser Federal Court Title IX Sexual Harassment Cases: Collection and Analysis of Data (2002) (unpublished compilation) (on file with Tulane Law Review).

231 About twenty-nine percent of the plaintiffs were in high school and thirty-nine percent were at the college or graduate level. Id.

232 Id.

233 Id.

234 As of 2001, the vast majority of sexual harassment occurs among students. See 2001 Survey, supra note 13, at 14, 25. Survey respondents said nonphysical harassment by teachers comprised seven percent of all harassment; physical harassment was also seven percent. Id. at 26-27.

235 Only forty percent of students said they would complain if sexually harassed by another student, while seventy-one percent said they would report if they were sexually harassed by an adult. 2001 Survey, supra note 13, at 14-15.

236 As to the difficulty of drawing inferences from rates at which plaintiffs prevail, see Henderson & Eisenberg, supra note 180, at 502.

237 Davies, supra note 230.

238 Id.

239 See id. There were only twenty-four cases in all. Decisions favoring the defendant on some aspect of entity liability were affirmed about seventy-one percent of the time. Id.

240 See supra notes 133-152 and accompanying text.

241 See Galanter, supra note 180, at 26 ("[T]he vast majority [of disputes taken to court] are disposed of by abandonment, withdrawal, or settlement, without full-blown adjudication and often without any authoritative disposition by the court."); Samuel R. Gross & Kent D. Syverud, Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 1, 2 (1996) ("Of the hundreds of thousands of civil lawsuits that are filed ... the great majority are settled; of those [cases] that are not settled, most [will be] dismissed by the plaintiffs or by the courts; only a few percent [will be] tried to a jury or a judge."); Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, 76 Tex. L. Rev. 77, 77 (1997) ("[T]he rate of settlement is extraordinarily high-- approximately ninety to ninety-five percent or more of civil lawsuits not dismissed by courts in the early stages of litigation settle short of trial.").

242 See supra notes 99-110 and accompanying text.

243 Some excellent studies exist on various aspects of Title VII. With regard to sexual harassment, see Juliano & Schwab, supra note 146. On employment discrimination, see Selmi, supra note 147. For a study of reversal rates in employment discrimination, see Theodore Eisenberg & Stewart J. Schwab, Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeal (July 2001), available at http:// www.findjustice.com/ms/civil-just/schwab-report.htm (last visited Dec. 10, 2002) (finding that employment discrimination plaintiffs do dramatically worse on appeal than defendants). On the question of how civil rights cases compare to other civil filings, see, e.g., Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641, 690-93 (1987) (comparing the success rates of plaintiffs in constitutional tort cases); Theodore Eisenberg et al., Litigation Outcomes in State and Federal Courts: A Statistical Portrait, 19 Seattle U. L. Rev. 433, 434-53 (1996) (discussing win rates in both state and federal courts of general civil cases); Neil Vidmar, The Performance of the American Civil Jury: An Empirical Perspective, 40 Ariz. L. Rev. 849, 851-52 (1998) (finding the mean plaintiff win rate for all jury cases was forty-nine percent and reporting on win rates in a wide variety of substantive claims); Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi.

L. Rev. 1073, 1161-63 (1992) (looking at early and modern success rates of plaintiffs in both district and appeal cases concerning race discrimination).

244 See supra notes 164-176 and accompanying text.

245 Regarding the rate of reporting of adult/child harassment, seventy-one percent of students say they would complain if they were sexually harassed by a teacher or other school employee. 2001 Survey, supra note 13, at 15. Only forty percent say they would report peer harassment. Id. at 14. Students give many reasons for nonreporting, including the accepting of the behavior as "normal," not wanting to "make a mountain out of a molehill," a feeling that they could handle it themselves, and even liking it. Id. at 27.

246 Lawton, supra note 140, at 114-16.

247 Interview with Michael Dazey, Legal Compliance Specialist for Human Resources, Elk Grove Unified School District (July 13, 2001) (on file with author); Interview with Mary Jo McGrath, Owner, McGrath Systems Inc. (July 20, 2001) (on file with author).

248 McGrath Interview, supra note 247.

249 See supra notes 193-199 and accompanying text.

250 Lawton, supra note 140, at 116.

251 Revised Guidance Policy, supra note 125, at 66,092, 66,093.

252 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997 Guidance), 62 Fed. Reg. 12,034 (Mar. 13, 1997).

253 Revised Guidance Policy, supra note 125, at 66,093.

254 Id. at 66,094. By this interpretation, OCR asserts that if an employee who is carrying out responsibilities to provide "aid, benefits or services" to a student engages in sexual harassment, the funding recipient is responsible for the discriminatory conduct, and therefore responsible for remedying any effects of the harassment on the victim, as well as ending the harassment and preventing its recurrence. Id. at 66,094-95. The focus, then, is not on who within the entity discriminates, but on holding the entity accountable for discrimination in any of these spheres. Id. at 66,094; see Discrimination on the Basis of Sex in Education Programs or Activities Prohibited, 34 C.F.R. §106.31(b) (2001).

255 Revised Guidance Policy, supra note 125, at 66,095.

256 Id. at 66,100.

257 OCR maintains that a school has notice if a responsible employee "knew, or in the exercise of reasonable care should have known, about the harassment." Id. at 66,096 (internal quotations omitted). And a school can receive notice in many ways, including complaints to teachers and numerous other campus personnel. Revised Guidance, supra note 125, at 66,096, 66,101, 66,102.

258 See supra note 28.

259 OCR's intervention may in fact have more influence than the numbers alone reveal. See, e.g., Interview with Dorothy Landsberg, Partner, Kronick, Mockowitz, Tiedemann & Gerard (July 30, 2001) (on file with author). Ms. Landsberg, who represents school districts, expressed the view that OCR has had a lot to do with dissipation of the attitude that "kids will be kids." Id. She expressed the view that complaints are difficult to get resolved and that districts would be motivated to undertake training and look at their policies in response to complaints or possible compliance reviews. Id.

260 Revised Guidance Policy, supra note 125, at 66,102.

261 Id.

262 One of the problems documented by the AAUW study is that OCR does not monitor actual compliance by institutions. License for Bias, supra note 23, at 62. Instead, it considers a school compliant as soon as it agrees to a specified remedy. Id. at 62 n.2 (citing The Women's Sports Foundation, Report on Title IX, Athletics, and the Office for Civil Rights (1997)).

263 These elements include: notice to students, parents, and employees of the procedure; description of how the procedure applies to complaints alleging harassment carried out by employees, students, or third parties; provision for adequate, reliable, and impartial investigation of complaints; designated and reasonably prompt timeframes; notice to the parties of the outcomes of the complaint; assurance that the school will take steps to prevent recurrence of harassment and to correct the discriminatory effects; opportunity to appeal the findings; and a provision against retaliation. Revised Guidance Policy, supra note 125, at 66,106.

264 See infra notes 267 & 268 and accompanying text.

265 Office for Civil Rights, Fiscal Year 1999 Annual Report to Congress (1999), available at http:// www.ed.gov/offices/OCR/AnnRpt99/ resources.html (last visited Dec. 18, 2002).

266 Resolution may consist of a finding that there was insufficient evidence or that the complaint was not filed within the six-month limitations window OCR imposes on sexual harassment claims. License for Bias, supra note 23, at 37, 52.

267 Nan Stein's appraisal is that regional offices of OCR differ so greatly in their responses to complaints that it is as if litigants live in different countries. Stein, supra note 12, at 46. The AAUW study found wide variation among regional offices. License for Bias, supra note 23, at 31. Two of the twelve regional offices conducted more than half the compliance reviews related to sex discrimination and five conducted no compliance reviews at all. Id.

268 Office for Civil Rights, supra note 265.

269 2001 Survey, supra note 13, at 4.

270 Id. Twenty-six percent thought their school had a policy in 1993. Id.

271 Id.

272 See, e.g., Robert J. Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide for Administrators and Teachers 141-42 (1994); Bryant et al., supra note 142. Stein, supra note 12, at 95-98.

273 Dazey Interview, supra note 247; McGrath Interview, supra note 247.

274 Shoop & Edwards, supra note 272, at 273-74.

275 Id.

276 Nan Stein, Sexual Harassment Meets Zero Tolerance: Life in K-12 Schools Since Davis, speech at the 2000 Hastings Women's Law Journal Symposium (Mar. 3, 2000), in 12 Hastings Women's L.J. 123, 124-126 (2001). Stein observes that Davis was decided a month after Columbine and was rapidly converted into another justification for law and order with respect to juveniles. Id. at 124.

277 Id. at 126-29. Stein argues that expansion of zero tolerance policies from weapons prohibitions mandated by The Gun Free Schools Act in 1996 to drugs, symbols of drugs, toy weapons, and ultimately sexual harassment is a serious problem. Id. at 126-27. It results in many more children being kicked out of school with nowhere to go, having a disproportionate impact on students of color. Id. In Stein's view, zero tolerance policies are the wrong way to address sexual harassment because they exclude people rather than teach them how to conduct themselves properly at school. Id. at 129-30.

278 Stein suggests that in the debate over whether a kiss could constitute sexual harassment, the national press overlooked the fact that in young children, coercive, unwanted, and intrusive conduct exists. She characterizes this conduct as bullying, noting that it shares some characteristics with sexual harassment. Stein, supra note 12, at 50; see also Mary Jo McGrath, The Early Faces of Violence from Schoolyard Bullying and Ridicule to Sexual Harassment, available at http://www.mcgrathinc.com/articles-021.html (last visited

Nov. 25, 2002) [hereinafter Early Faces of Violence] (discussing training programs specifically addressing bullying as a precursor to sexual harassment).

279 Early Faces of Violence, supra note 278.

280 Stein, supra note 12, at 95-108 (citing and discussing numerous studies).

281 U.S. Dep't of Educ. for Civil Rights and Nat'l Ass'n of Attorneys General, Protecting Students from Harassment and Hate Crime: A Guide for Schools (1999), at http://www.ed.gov/pubs/Harassment (last visited Dec. 18, 2002) [hereinafter A Guide for Schools].

282 See Setty, supra note 23, at 340-46 (discussing ways to reform OCR). See generally License for Bias, supra note 23 (delineating a long list of improvements that ought to be made in all phases of OCR's operations).

283 Revised Guidance Policy, supra note 125, at 66,105-06; A Guide for Schools, supra note 281.

284 See Lawton, supra note 140, at 124-41. Professor Lawton's thorough study of university sexual harassment grievance policies and procedures yielded many specific recommendations. Id. These included: the need to develop policies that protect students from the risk of retaliation; elimination of false claims provisions, both because they contribute to the perception that false complaints are common and because they do not impose similar penalties against harassers who lie during university proceedings; and less reliance on mediation and revision of mediation procedures, among other recommendations. Id. at 143-48. See generally Bernice R. Sandler & Robert J. Shoop, Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students (1997) (attempting to help institutions revise sexual harassment policy and procedures).

285 See Thomas A. Mayes, Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers, 29 Fordham Urb. L.J. 641, 672-73 (2001) (urging training of staff and teaching and talking to students); see also A Guide for Schools, supra note 281.

286 See 2001 Survey, supra note 13, at 17. Students had many suggestions as to how institutions could raise awareness of harassment and prevent it. Id. Although there was little consensus, a number of students observed that talking honestly about the problem would be useful. Id.

287 See Shoop & Edwards, supra note 272, at 141-253.