PEER/FACULTY SEXUAL HARASSMENT

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20th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1999
1. The Discussion Format

This presentation will be in a discussion format, comparable to interviews with Professor Kaplin conducted by Gary Pavela for Synthesis: Law and Policy in Higher Education.

The discussion is not rehearsed. It is designed to provide a comprehensive overview of law and policy issues concerning peer/faculty sexual harassment, particularly as defined by recent court decisions.

Audience participation is encouraged. Gary Pavela will stop at various points in the discussion to solicit relevant questions and comments from the audience. Please focus your questions or comments on the issues being addressed at the time.

2. Additional Commentary available

Professor Kaplin and Gary Pavela have collaborated on a case study related to peer sexual harassment, Title IX, freedom of expression, and electronic communications. The case study can be found online at www.law.edu/kaplin or at www.umd.edu/Ethics. A 1999 "update" interview with Professor Kaplin will be included, addressing many of the issues being discussed in today's presentation.

3. Overview and analysis

In Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), the United States Supreme Court clearly determined that a student could sue a school district for money damages under Title IX for a teacher's alleged sexual harassment of that student. See generally Kaplin and Lee, The Law of Higher Education, sec. 7.5.3, pp. 816-818 & sec. 7.5.9, p. 848 (3d ed., 1995); or Kaplin
and Lee, A Legal Guide for Student Affairs Professionals, sec. 12.4.3, pp. 561-562, & sec. 12.4.9, pp. 587-588 (1997). But Franklin did not definitively establish a standard of liability for determining when a school district (or other educational institution) would be liable for harassment perpetrated by its teachers and other employees. Nor has the United States Supreme Court yet established a standard of liability for determining when a school district would be liable for a student's sexual harassment of another student.

Both of these questions about liability, however, were extensively discussed in the lower courts after the Franklin case. No pattern emerged; different courts took vastly different approaches in determining when liability would accrue to an educational institution for the actions of its teachers, employees, or students. At one extreme, some courts have determined that an educational institution could be vicariously liable on the basis of common law agency principles and the principle of respondeat superior. At the other extreme, some courts have determined that an educational institution should not be liable at all for the actions of its students and should be liable for the actions of its teachers only in certain narrow circumstances where the district had actual notice of the harassment and failed to respond. See generally Kaplin and Lee, 1997 Supplement to The Law of Higher Education, sec. 7.5.3, pp. 314-326 (1998), or Kaplin and Lee, A Legal Guide for Student Affairs Professionals, sec. 6.2, pp. 296-301 (1997). The U. S. Supreme Court has now resolved the disagreements regarding an educational institution's liability for a faculty member's harassment of a student; see Gebser v. Lago Vista Independent School District, discussed below. Although the Court has not yet ruled on liability for peer sexual harassment under Title IX, a case presenting that issue is currently on the Court's docket and should be decided by the summer of 1999; see Davis v. Monroe County Board of Education, cert. granted, 119 S. Ct. 29 (1998), also discussed below.

The Gebser Case: Faculty/Student Sexual Harassment

In Gebser v. Lago Vista Independent School District, 118 S. Ct.1989 (1998), the United States Supreme Court determined the extent to which a school district may be held liable in damages under Title IX for a teacher's sexual harassment of a student. In a 5-4 decision, the Court majority held that Title IX damages liability is not based upon common law agency principles of respondeat superior nor upon principles of constructive notice. Instead, the Court held that students may not recover damages from a school district under Title IX for teacher-student sexual harassment "unless an official of the school district who at a
minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct" (Gebser, 118 S. Ct. at 1993). According to the Court, "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" (Gebser, 118 S. Ct. at 1997). The Court thus concluded that "until Congress speaks directly on the subject . . . , we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference" (Gebser, 118 S. Ct. at 2000).

Applying these principles to the student's claim, the Supreme Court determined that the student had not met the Gebser standards. The Court therefore affirmed the lower court's award of summary judgment to the school district. In reaching this decision, the Court acknowledged that the school district had not implemented any sexual harassment policy or grievance procedure for implementing such a policy. Nonetheless, the Court held that the school district's failure in this regard was not evidence of "actual notice and deliberate indifference," nor did this failure "itself constitute 'discrimination' under Title IX" (Gebser, 118 S. Ct. at 2000).

Four justices vigorously dissented from the majority's holdings in Gebser. Point by point, the dissenting justices refuted the majority's reasons for rejecting the application of agency principles under Title IX and for concluding that Title IX is based upon a different model of liability than Title VII. In addition, the dissenting justices provided an extended argument to the effect that the refusal to provide meaningful protection for students subjected to harassment flies in the face of the purpose and meaning of Title IX. See, e.g., Gebser, 118 S. Ct. at 2001-2007 (Stevens, J., dissenting).

**Title IX Liability Standards Compared with Title VII Liability Standards**

The Gebser case establishes a four-part test for determining when a school district would be liable in damages for a teacher's sexual harassment of a student:

1. an official of the school district must have had actual notice of the harassment;
2. this official must have authority to institute corrective action to resolve the harassment problem;
3. the official must have failed to adequately respond
to the harassment; and
(4) in failing to respond, the official must have acted with deliberate indifference.

Although Gebser involved a public school district, its four-part test clearly applies to public and private colleges and universities as well.

The Gebser test will be a difficult one for potential plaintiffs to meet, and it therefore provides scant opportunity for successful Title IX damages actions against educational institutions. In this respect, the Gebser test stands in stark contrast to the liability standards under Title VII of the Civil Rights Act of 1964. In two recent cases decided in the same term as the Gebser case, the United States Supreme Court determined that liability under Title VII is based upon agency principles and a respondeat superior model of liability. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998). Thus, under Title VII but not under Title IX, an employer may be liable in damages for a supervisor's acts of harassment even though the employer did not have either actual knowledge or constructive knowledge of the harassment. Or, to put the matter another way, employees have more protection against harassment under Title VII than students have under Title IX.

The Davis Case: Peer Sexual Harassment

The U. S. Supreme Court now has before it another Title IX liability case involving peer sexual harassment. Davis v. Monroe County Board of Education, 120 F. 3d 1390 (11th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998). In Davis, a U. S. federal district court had dismissed the plaintiff's Title IX claim. A panel of the U. S. Court of Appeals for the 11th Circuit then reversed, determining that, in a peer sexual harassment case, a school district would be liable in damages under Title IX if it knew or should have known of the harassment and if it failed to take "prompt and remedial action to end the harassment" (74 F. 3d 1186, 1195 (11th Cir. 1996)). The full 11th Circuit, sitting en banc, reversed the panel and affirmed the district court's dismissal of the complaint. The en banc court held that school districts did not "accept responsibility for remedying student-to-student sexual harassment when they chose to accept federal financial assistance under Title IX" (120 F. 3d at 1406), and they therefore cannot be liable in damages under Title IX for student-to-student harassment. The U. S. Court of Appeals decision in Davis, therefore, takes a more extreme approach than the United States Supreme Court took in the Gebser case. When
the Supreme Court reviews the 11th Circuit’s decision in Davis, the question will be whether the Supreme Court will apply the same standard of liability to peer sexual harassment claims that it applied to faculty/student harassment claims in the Gebser case. If the Court does not do so, it would presumably affirm the no-liability position of the 11th Circuit or create some other liability standard that is more minimal than the Gebser standard. In other words, Gebser appears to create a liability ceiling above which the Supreme Court would not go in the Davis case.

Types of Harassment Cases and Issues

The cases discussed above all involve complaints by students who have allegedly been sexually harassed. In terms of litigation, such student complaints can be organized into four categories or types of suits, each one of which will be analyzed somewhat differently from the others. These are the four pertinent categories:

(1) A student sues an educational institution for acts of a teacher who allegedly harassed the student. These types of cases would be decided under the Gebser liability standard discussed above.

(2) A student sues an educational institution for acts of a staff member who allegedly harassed the student. These types of cases would likely be decided under the Gebser liability standard, but there could be difficult issues concerning whether the standard would change if the staff member does not have supervisory or other authority over the student who (as a teacher does). See Faragher, above, 118 S. Ct. at 2286-90.

(3) A student sues an educational institution for acts of an officer or administrator who allegedly harassed the student. These types of cases will likely be decided using the Gebser standard; but application of the standard may be complicated by difficulties in determining who would have the authority to correct a harassment situation perpetrated by a high-level officer or administrator.
A student sues an educational institution for acts of other students who allegedly harassed the student. These types of cases will be governed by the standard that the U.S. Supreme Court establishes in the *Davis* case discussed below. The standard that the Court establishes is likely to be comparable to the *Gebser* standard or to be an even more minimalist standard such as that adopted by the 11th Circuit in *Davis*.

Each of these types of cases should be distinguished from three other types of harassment cases that commonly are of concern to educational institutions. The first of these contrasting categories includes suits that are not against the educational institution, but rather against the individual teacher, staff member, officer, administrator, or student that allegedly caused the harassment. These types of cases will not be decided under Title IX at all, since there is no individual liability under Title IX. Instead, these cases will be brought under some other source of law such as 42 U.S.C. Sec. 1983 (see Kaplin and Lee, *The Law of Higher Education*, sec. 2.4.3 (3d ed., 1995)) or the common law of tort. The second contrasting category includes student suits against educational institutions that assert claims other than Title IX claims in order to avoid the minimalist liability standard under Title IX. These types of cases might include claims under 42 U.S.C. Sec. 1983 (see Kaplin and Lee, *The Law of Higher Education*, sec. 2.3.3 (3d ed., 1995)), state common law principles of negligence, or a state civil rights statute that adopts a liability standard more manageable than that of Title IX. The third contrasting category includes harassment suits brought against educational institutions by teachers, staff members, or administrators rather than by students; these cases typically would involve harassment by a supervisor in the workplace and would be brought under Title VII using the U.S. Supreme Court’s standards from the *Faragher* case and the *Ellerth* case (discussed above). These three contrasting categories would, of course, be analyzed differently from the four categories above.

In these four categories of cases, there are three ways in which a Title IX claim may be packaged and asserted. The three ways are as follows:

1. A student sues the educational institution in court seeking monetary damages. These types of claims would be governed by the liability standards suggested in the four categories set out above, and the applicable
standard may differ depending upon the identity of the alleged harasser.

(2) A student sues an educational institution in court seeking only injunctive or declaratory relief. This type of claim, since it does not itself seek any monetary damages, is apparently not governed by the Gebser case — whose rationale seems to depend on the negative impact of monetary damage awards upon educational institutions. It is therefore not clear what the liability standard would be for an injunctive or declaratory relief claim. It is likely, however, that the standard would not be as minimalist as that in Gebser. At any rate, since injunctive relief is generally prospective, the educational institution would have actual notice before it is obligated to comply with the court order.

(3) A student delays filing suit and instead files an administrative complaint against an educational institution with the U.S. Department of Education, seeking to initiate the agency’s processes for administrative compliance. This type of claim would probably not be governed by Gebser, which appears limited to the court litigation context. In the administrative process, the U. S. Department of Education is presumably free to use whatever standard of non-compliance it chooses so long as that standard is consistent with the basic non-discrimination prohibitions in the Title IX statute and regulations. Since the educational institution would always receive notice of its non-compliance and the opportunity to make appropriate adjustments before any penalty is imposed, and since an administrative proceeding would never result in a monetary damages remedy against the educational institution (see Gebser, 118 S. Ct. at 1998), there seems to be no reason why the U. S. Department of Education would need to adhere to the liability standard adopted in Gebser. Indeed, the Office for Civil Rights at the U. S. Department of Education has already issued its own guidance on Title IX liability, and it adopts much different standards than those created by the U. S. Supreme Court.

See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,
Post-Gebser Cases

The standards in the Gebser case have already been applied to higher educational institutions in several cases. In Morse v. Regents of the University of Colorado, 154 F. 3d 1124 (10th Cir., 1998), for instance, female students in a campus ROTC program stated a valid Title IX claim against the university for the alleged harassment of a fellow student who was a higher ranking cadet in the ROTC program. The Gebser standards applied to this situation, even though it was student-on-student harassment, because "the ROTC program is a University-sanctioned program and ... a fellow student acting with authority bestowed by that program [allegedly committed the harassment]" (Morse, 154 F.3d at 1128). See also Burtner v. Hiram College, 9 F. Supp. 2d 852 (N. D. Ohio 1998) (Student plaintiff could not meet Gebser standards because college received notice of the harassment just before her graduation and did not have adequate opportunity to correct the problem); Klemencic v. Ohio State University, 10 F. Supp. 2d 911 (S. D. Ohio 1998) (Student plaintiff could not meet the deliberate indifference element of the Gebser standard).

In addition, a pre-Gebser higher education case is still pending in the courts and may be decided in the wake of Gebser. See Brzonkala v. Virginia Polytechnic Institute and State University, 132 F. 3d 949 (4th Cir. 1997), where a three-judge panel used a liability standard of "knew or should have known", but the en banc court vacated the opinion and set the case for re-argument. In tracking these and later cases concerning Title IX sexual harassment claims against higher educational institutions, it is important to keep in mind that the Davis case should also be decided by July 1999 and may provide important additional guidance on institutional liability standards under Title IX.

4. Excerpts from the Gebser case*

[Facts of the case]

In the spring of 1991, when petitioner Alida Star Gebser was an eighth-grade student at a middle school
in respondent Lago Vista Independent School District (Lago Vista), she joined a high school book discussion group led by Frank Waldrop, a teacher at Lago Vista's high school . . . During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school in the fall and was assigned to classes taught by Waldrop in both semesters. Waldrop continued to make inappropriate remarks to the students, and he began to direct more of his suggestive comments toward Gebser . . . He initiated sexual contact with Gebser in the spring . . . The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following school year, and they often had intercourse during class time, although never on school property.

Gebser did not report the relationship to school officials, testifying that while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher. In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class. The principal arranged a meeting, at which . . . Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator. A couple of months later, in January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista terminated his employment, and subsequently, the Texas Education Agency revoked his teaching license. During this time, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal antiharassment policy.

Gebser and her mother filed suit against Lago Vista and Waldrop in state court in November 1993, raising claims against the school district under Title IX . . .
[Title IX distinguished from Title VII]

Petitioners, joined by the United States as *amicus curiae*, would invoke standards used by the Courts of Appeals in Title VII cases involving a supervisor's sexual harassment of an employee in the workplace . . .

In this case, moreover, petitioners seek not just to establish a Title IX violation but to recover damages based on theories of *respondeat superior* and constructive notice. It is that aspect of their action, in our view, which is most critical to resolving the case. Unlike Title IX, Title VII contains an express cause of action . . . and specifically provides for relief in the form of monetary damages . . . Congress therefore has directly addressed the subject of damages relief under Title VII and has set out the particular situations in which damages are available as well as the maximum amounts recoverable . . .

With respect to Title IX, however, the private right of action is judicially implied . . . and there is thus no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages . . .

Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute . . .

[Actual notice of the harassment required]

[W]e conclude 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. Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies . . .

As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs. When Title IX was
enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief . . . It was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer . . . Adopting petitioners' position would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available . . .

[Federal funds recipients need to know liability risks]

Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power . . . as it has in Title IX . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition . . . Our central concern in that regard is with ensuring "that the receiving entity of federal funds [has] notice that it will be liable for a monetary award. . ." [citation omitted]. . .

If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or respondeat superior, it will likewise be the case that the recipient of funds was unaware of the discrimination. It is sensible to assume that Congress did not envision a recipient's liability in damages in that situation. See Rosa H., 106 F.3d, at 654 ("When the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex").

Most significantly, Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice. Title IX's express means of enforcement—by administrative
agencies—operates on an assumption of actual notice to officials of the funding recipient. The statute entitles agencies who disburse education funding to enforce their rules implementing the nondiscrimination mandate through proceedings to suspend or terminate funding or through "other means authorized by law . . ." Significantly, however, an agency may not initiate enforcement proceedings until it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means . . ." The administrative regulations implement that obligation, requiring resolution of compliance issues "by informal means whenever possible . . ." and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and "the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance . . ."

Presumably, a central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures. The scope of private damages relief proposed by petitioners is at odds with that basic objective. When a teacher's sexual harassment is imputed to a school district or when a school district is deemed to have "constructively" known of the teacher's harassment, by assumption the district had no actual knowledge of the teacher's conduct. Nor, of course, did the district have an opportunity to take action to end the harassment or to limit further harassment . . .

[School officials must have "actual knowledge"]

Because the express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation . . . we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An "appropriate person . . ." is, at a minimum, an official of the recipient entity with authority to take corrective action to end
the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX 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 recipient's programs and fails adequately to respond.

["Deliberate indifference" required]

We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions . . .

Applying the framework to this case is fairly straightforward, as petitioners do not contend they can prevail under an actual notice standard. The only official alleged to have had information about Waldrop's misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class, which was plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student . . .

[An invitation for Congressional action]

The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent
misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our 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. . . .Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference . . .

5. Dissenting opinions and perspectives on Gebser

a. As indicated above, Justice Stevens—joined by three other Justices—wrote a dissenting opinion in Gebser, and argued that Title IX imposes an affirmative obligation to root out sexual harassment. Schools accepting federal funds, Stevens wrote, know they are undertaking a commitment "that is more significant than a mere promise to obey the law." Justice Stevens also observed that teachers acquire power over students by reason of authority delegated by schools. Accordingly, imposing liability on schools for sexual harassment seems just, and may "induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior."

b. The Stevens perspective was echoed by an editorial in the June 23, 1998 New York Times ("Harassment in the Schools"), contending that the majority in Gebser "ignore[d] the responsibility of schools for preventing abuse." A June 24 Washington Post editorial ("Sexual harassment") was less contentious, and foretells a series of legislative battles to clarify sexual harassment law:

[The Gebser] decision might well be correct; Title IX and Title VII are different statutory regimes, and the suits under them will, therefore, have different requirements. But the disparity does add to the growing
incoherence of sexual harassment law, an incoherence that is a direct result of the fact that this body of law is a creation of the courts, not Congress, under laws designed to prohibit discrimination. Congress needs to step in and write a coherent law . . .

c. from the June 22, 1998 issue of Synfax Weekly Report:

The dissenting judges in Gebser may not appreciate the consequences of imposing workplace standards of vicarious liability in the college and university setting. Those standards, fueled by the hothouse climate of gender politics on campus, can create incentives to inhibit lawful expression about human sexuality, and impose needlessly harsh punishments for incidents that reflect little more than adolescent confusion and miscommunication about sex. Elementary and secondary schools have already seen comparable consequences resulting from the fear of liability, highlighted in a June 24, 1998 New York Times story ("Teachers More Reluctant to Touch in the Classroom"). The Times reports that "many teachers and teachers groups" are increasingly "wary that a squeeze of the shoulders or a pat on the back" will result in legal action, or administrative sanctions. The result—lamented by specialists in early childhood education—can be a cold, distant, inhibited classroom climate—where the fear of litigation takes precedence over warmth and compassion.

5. Excerpt from the Davis case**

[T]he Supreme Court has never discussed student-student sexual harassment or generally applied Title VII jurisprudence to Title IX cases . . .

We decline appellant's invitation to use Title VII standards of liability to resolve this Title IX case . . . First, Title VII and Title IX are worded
differently. If Congress wished Title IX to be interpreted like the earlier-enacted Title VII, Congress would have written Title IX to read like Title VII. Congress did not. Interpreting the plain language of different statutes does not automatically produce the same result simply because both statutes prescribe similar behavior.

Second, Title VII was enacted under the far-reaching Commerce Clause and [Article] 5 of the Fourteenth Amendment . . . Title IX was not, and consequently its reach is narrower.

Third, the exposition of liability under Title VII depends upon agency principles . . . Agency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board . . . Therefore, even if employers owe to employees some sort of nondelegable duty to eliminate peer harassment in the workplace . . . schools owe to students no comparable duty.

6. What are the possible consequences if Title VII standards are applied to Title IX “hostile environment” claims?

Consider the legal (and social) evolution of “hostile environment” theory, reflected in Judge Susan Webber Wright's April 1, 1998 decision in Jones v. Clinton (E.D. Ar., No. LR-C-94-290). Excerpts follow:

[Facts pertinent to the "hostile environment" claim]

Plaintiff states that upon arriving at [a Little Rock hotel] suite . . . [allegedly at Clinton's invitation] the Governor shook her hand, invited her in, and closed the door . . . She states that a few minutes of small talk ensued, which included the Governor . . . mentioning that Dave Harrington, plaintiff's ultimate superior within the AIDC and a Clinton appointee, was his "good friend . . ." Plaintiff states that the Governor then "unexpectedly reached over to [her], took her hand, and pulled her toward him . . ." She states she . . . retreated several feet, but that the Governor approached her again . . . put his hand on her leg, started sliding it
toward her pelvic area, and bent down to attempt to kiss her on the neck, all without her consent . . .

Plaintiff states . . . she was extremely upset and confused and, not knowing what to do, attempted to distract the Governor by chatting about his wife . . . Plaintiff states that she sat down at the end of the sofa nearest the door, but that the Governor approached the sofa where she had taken a seat and, as he sat down, "lowered his trousers and underwear, exposed his penis (which was erect) and told [her] to 'kiss it . . .' " She states that she was "horrified" by this and that she "jumped up from the couch" and told the Governor that she had to go . . . Plaintiff states that the Governor, "while fondling his penis," said, "Well, I don't want to make you do anything you don't want to do," and then pulled up his pants and said, "If you get in trouble for leaving work, have Dave call me immediately and I'll take care of it . . ." She states that as she left the room (the door of which was not locked), the Governor "detained" her momentarily, "looked sternly" at her, and said, "You are smart. Let's keep this between ourselves."

[A "hostile environment" was not created]

Considering the totality of the circumstances, it simply cannot be said that the conduct to which plaintiff was allegedly subjected was frequent, severe, or physically threatening, and the Court finds that defendants' actions as shown by the record do not constitute the kind of sustained and nontrivial conduct necessary for a claim of hostile work environment. Cf. Lam v. Curators of the Univ. of Mo., 122 F. 3d 654, 656-57 (8th Cir. 1997) (noting that single exposure to offensive videotape was not severe or pervasive enough to create hostile environment) . . . Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1366 (7th Cir. 1997) (five sexually-oriented incidents spread out
over the course of 16 months not sufficiently severe or pervasive enough to create hostile work environment); Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 (7th Cir. 1993) ("relatively limited" instances of unwanted sexual advances, which included the supervisor placing his hand on plaintiff's leg above the knee several times, rubbing his hand along her upper thigh, kissing her several seconds, and "lurch[ing] at her from behind some bushes," did not create an objectively hostile work environment . . .).

In sum, the Court finds that the record does not demonstrate conduct that was so severe or pervasive that it can be said to have altered the conditions of plaintiff's employment and created an abusive working environment . . .

7. Do incidents of "sexual harassment" raise issues of "sexual ethics?" An excerpt from the February 20, 1995 issue of Synfax Weekly Report:

Moving beyond legal perspectives

The sadness and anger that can result when men and women treat each other like "things" are not properly contained within legal structures--including "hostile environment" theories, Jesuitical definitions of "consent" in campus sexual assault policies, or endless debates about the scope of the First Amendment. They can only be fully addressed when seen from an ethical perspective, especially a perspective premised upon a rational and empathetic appreciation of the feelings and dignity of others.

Promoting sexual ethics, of course, can't be done by precept. It requires, first of all, a willingness to see and discuss ethical issues, undisguised by legal, political, or sociological terminology. If college administrators start with that premise, they might be surprised to find that students want to talk about sexual ethics--indeed, that sexual ethics is one of the most important issues in their lives.

There are many suitable discussions we can sponsor or promote. One topic that deserves special attention is the pressure men feel to engage in casual, unwanted sex. Research at the University of Kansas, for example, indicates that "men may engage in more unwanted sex than women, perhaps because of the societal expectation that men have stronger desires than women. . . .("Sex in America", U.S. News and World Report, October 17, 1994, p. 18)
That research, if supported by the experiences of students on your campus, is a starting point for addressing one of the most important issues in applied ethics: how all of us are molded—for good or ill—by our habits.

One habit associated with good sexual ethics is the habit of self-restraint. Self-restraint, especially when combined with a sense of empathy, lies at the foundation of the world's great ethical systems. Walter Lippmann, in his classic *Preface to Morals* (Macmillan, 1929) observed in this regard that:

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\text{[I]n all the great moral philosophies from Aristotle to Bernard Shaw, it is taught that one of the conditions of happiness is to renounce some of the satisfactions which men normally crave. This tradition as to what constitutes the wisdom of life is supported by testimony from so many independent sources that it cannot be dismissed lightly. With minor variations it is a common theme in the teachings of an Athenian aristocrat like Plato, an Indian nobleman like Buddha, and a humble Jew like Spinoza. . . (p. 156).}
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The value of self-restraint is also likely to be recognized by many of our students. The authors of a 1994 *New York Times* survey of American teenagers found that "while many sounded blase about drinking or cheating, they often made harsh moral judgments about themselves, wishing they could control their tempers, or be nicer to others" ("Worry and Distrust of Adults Beset Teen-Agers," July 10, 1994, p. 1) . . .

* from the June 22, 1998 issue of *Synfax Weekly Report* (98.27), "Defining the law of sexual harassment."

** from the October 20, 1997 issue of *Synfax Weekly Report* (97.44), "Defining Limits in Sexual Harassment Law."