

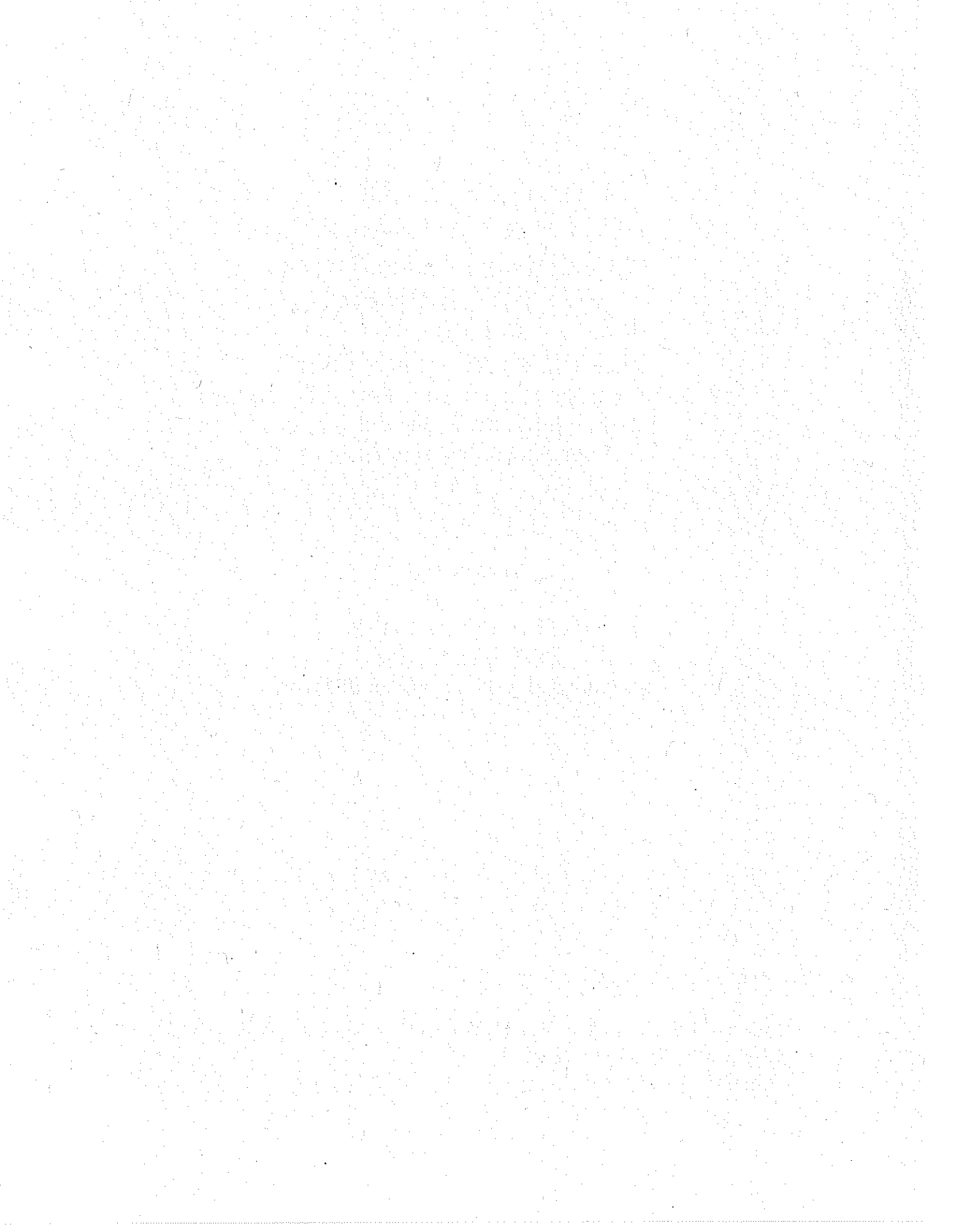
**INSTITUTIONAL LIABILITY FOR  
STUDENT PEER HARASSMENT:  
The Continuing Tension Between  
the Title IX Standard  
and the  
Title VII Workplace Standard  
(Is the University More Responsible to Employees  
Than to Students Under the Law of  
Peer Sexual Harassment?)**

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**18th ANNUAL LAW & HIGHER EDUCATION CONFERENCE  
Clearwater Beach, Florida  
February 13-15, 1997**



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Written to accompany a panel discussion  
at the Opening Plenary Session  
of the

18th Annual  
National Conference on Law  
and Higher Education

February 13, 1997 at Clearwater Beach, Florida

The United States Supreme Court's decision not to review Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996)<sup>1</sup> gives effect to the Fifth U. S. Circuit's ruling that Title IX of the Education Amendments of 1972<sup>2</sup> does not support a private right of action against a school or school district by a victim of student peer harassment of a sexual

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<sup>1</sup> U. S. Cert. den., 65 U.S.L.W. 3261 (Oct. 7, 1996).

<sup>2</sup> 20 U.S.C. § 1681 *et seq.* (Herein "Title IX").

nature, unless the school treats claims of harassment differently based upon sex.<sup>3</sup> The Fifth Circuit's decision, based on a 2-1 vote of a three judge panel, is thus in conflict with the decision of a divided three judge panel of the Eleventh Circuit Court of Appeals in Davis v. Monroe County Board of Education, 74 F.3d 1186 (1996)<sup>4</sup>, holding that Title IX does impose liability on a school or school district for peer sexual harassment.

The facts of the Rowinsky case are important, because they depict peer harassment of a sexual nature that was repeatedly reported to school officials, and at least some attempt by school officials to deal with that harassment. Rowinsky's children<sup>5</sup> were first subjected to sexual harassment in September, 1992, when a male student (identified in the litigation as "G.S.") regularly "swatted Janet's bottom whenever she walked down the aisle [of the district school bus in which Jane and Janet rode to and from the Sam Rayburn Middle School]"<sup>6</sup>. G.S. also directed to Janet comments such as, "When are you going to let me fuck you? What bra size

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<sup>3</sup> 80 F.3d at 1016; *see also* dissenting opinion, Dennis, C. J., 80 F.3d at 1016.

<sup>4</sup> Petition for rehearing *en banc* granted, opinion vacated by Davis v. Monroe County Board of Education, 91 F.3d 1418 (August 1, 1996); oral argument held on October 23, 1996.

<sup>5</sup> Rowinsky claimed standing under Title IX both for her own claim of discrimination and as next friend of her daughters. The daughters were identified in the litigation as Jane and Janet Doe. See 80 F.3d at 1008, and 1009, footnote 4 of the Court's opinion. The Court summarily rejected Rowinsky's claim of standing in her own right as a parent.

<sup>6</sup> 80 F.3d 1008.

[what size panties] are you wearing?”<sup>7</sup> G.S. also called Janet a “whore” and groped her genital area. On at least *eight* occasions, Janet complained of these incidents to Bob Owens, the district employee assigned to drive Janet’s bus. Owens entered names on a pad of paper.

Following an incident on September 24, when G.S. grabbed Jane’s genital area and her breasts, the students and their parents visited the assistant principal of Rayburn Middle School to complain of the incidents and seek action from the school.<sup>8</sup> The assistant principal admitted that the actions of G.S. warranted his expulsion. However, the assistant principal stopped short of expulsion, and instead suspended G.S. for three days and required him to sit in the second row of the bus, behind the driver.

G.S. ignored the directive to sit in the second row, and in response Owens directed Jane and Janet to sit where G.S. had been directed to sit. The Rowinsky’s complained of Owen’s action to the assistant director of the District’s transportation office, and were advised that the matter would be discussed with Owens. In November, in Owens’ presence, G.S. slapped Janet’s buttocks and called her offensive names. Owens did nothing and the girls did not file a complaint.

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<sup>7</sup> 80 F.3d 1008.

<sup>8</sup> The Rowinsky’s also filed criminal charges against G.S. with the Bryan, Texas city police.

In December, 1992, another male student on Owens' bus (identified as "L.H.") reached under Janet's skirt and grabbed her genital area. Janet complained to Owens while the bus was stopped at the next traffic light, but Owens did nothing.<sup>9</sup> Approximately one week subsequent, L.H. reached up Jane's skirt. Jane did not report the incident to Owens. Again, the Rowinsky's complained to the director of transportation who promised an investigation of the matter. One month later, the Rowinsky's inquired as to the investigation, and were informed that it had not been conducted, but that L.H. had been suspended for three days. The Rowinsky's also had discussions with the district's director of secondary education. He referred the matter back to the district's transportation office, which assigned a new driver to replace Owens. The new driver assigned Jane a seat on the bus next to G.S. The Rowinsky's responded by removing their daughters from the bus, and demanding that G.S. be removed from the bus. An assistant director of transportation denied the request, indicating that G.S. could not be removed absent "juvenile records" proving the assaults.<sup>10</sup>

A final incident occurred in March in a classroom, when another male student reached under Janet's shirt and unfastened her bra. Both students

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<sup>9</sup> The decision reports that Owens "just stared into space". 80 F.3d at 1009.

<sup>10</sup> 80 F.3d 1009.

were sent to the office of a vice-principal, who suspended the offending male student for the balance of that day and the following day.<sup>11</sup>

Ultimately, the Rowinsky's met with the district superintendent, who advised that appropriate action had been taken by the district.

Unsatisfied, the Rowinsky's brought this lawsuit in federal court, alleging that the district's employees had condoned and caused hostile environment sexual harassment of their daughters. The district court held that they stated no cause of action under Title IX because the school district had not discriminated against Janet and Jane because of their sex.<sup>12</sup> On appeal, a three judge panel of the Fifth Circuit affirmed the dismissal of the action. The court disagreed with the Eleventh Circuit's holding in Davis v. Monroe County Board of Education that the standard applicable to claims of hostile work environment sex harassment should be applied to student peer harassment. Specifically, the Rowinsky court rejected the notion that a school district should be liable for its failure to abate peer harassment which it knew or should have known was taking place.<sup>13</sup>

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<sup>11</sup> The vice-principal indicated that she did not consider the assault to be sexual in nature. 80 F.3d at 1009.

<sup>12</sup> 80 F.3d, at 1010.

<sup>13</sup> The Davis court held that Title IX subsumes a claim for damages due to a sexually hostile educational environment, just as Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* encompasses a claim for a sexually hostile work environment created by co-workers and tolerated by the employer. Liability under Title VII, and hence Title IX, is imposed when supervising

The court's opinion relies upon the arguably inappropriate nature of a theory of *respondeat superior* in the school setting where students, and not employees of the district, are engaged in sexual harassment. The court justifies the application of the *respondeat superior* rule in employment cases because of the unequal power enjoyed by male harassers and female victims. From this premise the court reasons that, since the inequality of power in the educational setting is between the student and the school, it would be inappropriate to impute liability in student peer harassment cases.<sup>14</sup> In my opinion, such reasoning misses the mark and ignores the scope of Title VII precedent. *Title VII allows a claim of hostile environment sex discrimination against an employer even in cases of harassment by co-workers who do not hold positions of power over victims of the harassment, on a theory of negligence.*<sup>15</sup>

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authorities knowingly fail to act to eliminate the harassment. 74 F.3d at 1193 (1996).

<sup>14</sup> 80 F.3d at 1011, footnote 11.

<sup>15</sup>Although the U.S. Supreme Court appears to reject a notion of strict liability of the employer in peer harassment, or co-worker harassment cases [See Meritor Savings Bank FSB v. Vinson, 477 U.S. at 72; Karibian v. Columbia University, 14 F.3d 773 (2nd Cir. 1993), *cert. den.* 114 S.Ct. 2693 (1994)], it does approve of liability in hostile environment cases where the employer (or its agents or supervisory employees) *knows, or should know, of peer or co-worker harassment and fails to take prompt remedial action reasonably calculated to end the harassment.* See e.g., Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994); Murray v. New York University, 57 F.3d 243, 249 (2nd Cir. 1995). Stated theoretically, an employer is not liable for sexual harassment of an employee by a nonsupervisory co-worker unless the employer was negligent. Zimmerman v. Cook County Sheriff's Dept., 96 F.3d 1017, 1018 (7th Cir. 1996); Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991); Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990); Jones v. Flagship Intl., 793 F.2d 714 (5th Cir. 1986); Tomkins v. Public Service Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) [Liability where employer knew of the conduct, or of an atmosphere generating



The Rowinsky court is correct in suggesting that the doctrine of *respondeat superior* is based in principles of agency, and thus is arguably inappropriate in cases of student peer harassment.<sup>16</sup> However, the court fails to make any analogy to the doctrine of *in loco parentis*, which imposes upon district employees a duty of supervision of students, an authority to intervene for the safety and dignity of students, and a privilege to discipline students engaged in behavior which violates the physical security or dignity of other students. If *in loco parentis* principles fail to support liability under Title IX for the district's failure to respond to known offensive battery, such as that repeatedly evident in the instant case, then liability may arguably be imposed under common law

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such conduct, and failed to respond].

The critical element in establishing liability of the employer is a showing that the employer failed to remedy or prevent a hostile work environment of which management-level employees knew or, in the exercise of reasonable care, should have known. Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572 (10th Cir. 1990); Fleenor v. Hewitt Soap Co., 81 F.3d 48, 50 (6th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3240 (1996). Despite suggestions that the employer must know of the harassment, liability may be found where the employer lacks actual knowledge, but has constructive knowledge of harassment. Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988), cited in Murray v. New York University, *supra.*, 57 F.3d at 249-50. Common issues under this theory are facts available to the employer, and whether the employer's response upon learning of the harassment was reasonably adequate. Actual or constructive knowledge may arise where pervasive sex harassment is present in the workplace, or where an employee or employees complain about incidents of harassment. See Zimmerman v. Cook County Sheriff's Dept., *supra.*, 96 F.3d at 1019 (The sheer pervasiveness of the harassment might support an inference that the employer must have known of it). In single incident cases, where no atmosphere of sex harassment is present, the employer's duty to investigate may not arise until the employee complains of sex harassment, or information comes to the employer's attention from some other source. Zimmerman v. Cook County, *supra.*, at 1019; Jeffries v. State of Kansas, Dept. of Social and Rehab. Serv., 1996 U.S. Dist. LEXIS 17899 (D. Kan. 1996); Murray v. New York University, *supra.*, 57 F.3d at 250-51.

<sup>16</sup> The court does recognize a Title IX claim for sexual harassment of a student by a teacher or other employee of the district. 80 F.3d at 1011, footnote 11.

notions of negligence.<sup>17</sup>

The Fifth Circuit reasoned that its rejection of a Title IX claim for student peer harassment was also in accord with the language and legislative history of Title IX. Admitting that the language of Title IX is ambiguous, the court nonetheless held that such “open-ended language” does not support an inference that Title IX imposes liability on a school district for the sexually harassing conduct of persons other than its employees.<sup>18</sup> Fundamental to this aspect of the court’s holding is its statement that the Constitutional authority for Title IX is found in Congress’ spending power, and not its power under Section 5 of the Fourteenth Amendment.<sup>19</sup> What seems questionable is the court’s assertion that liability would be incompatible with a spending condition because “grant recipients have little control over the multitude of third parties who

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<sup>17</sup> The dissent in *Rowinsky* describes this argument in the context of peer harassment in the workplace. In such cases, employer liability is not strictly based upon *respondeat superior* principles, but rather the rule that the employer is negligent if it knew or should have known of the misconduct and unreasonably failed to take corrective action. 80 F.3d at 1021, footnote 7.

<sup>18</sup> 80 F.3d at 1012.

<sup>19</sup> The court admits that this finding is not certain, and that it is possible that federal funding of schools covered by Title IX could be conditioned upon the recipient’s duty to respond to sexual harassment of students by third parties (other students). The court argues however that the more likely inference is that the statute’s prohibitions apply only to conduct of the recipients themselves. The court relies in part upon the suggestion that Title IX subsumes purely private schools which are not a likely subject of Section 5 of the Fourteenth Amendment, in the absence of state action. 80 F.3d at 1012, footnote 14.

could...violate Title IX.”<sup>20</sup> While such an undifferentiated concern appears compelling at first, it artfully avoids a recognition of *in loco parentis* concepts which vest clear authority in the school to supervise and control the conduct of pupils, including on school busses.<sup>21</sup>

The court also relies upon legislative history and regulations of the Office of Civil Rights, observing that the purpose of Title IX is to prevent discrimination (*i.e.*, discriminatory practices) by grant recipients.<sup>22</sup> The court rejects, however Letters of Finding by OCR suggesting the application of Title IX to student peer harassment.<sup>23</sup> As noted at the outset of these comments, the U.S. Supreme Court has declined to review Rowinsky,

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<sup>20</sup> 80 F.3d at 1013. The court uses as an example of such lack of control the possibility of sex discrimination by parents themselves. See footnote 15 of the court’s opinion.

<sup>21</sup> It is settled law that a school district has a duty to supervise the conduct of pupils in settings where assault, or other threats to student safety may be predicted. Indeed, school bus drivers are privileged to restrain or discipline student riders for the safety of other students or the maintenance of order. In this regard, it must be recalled that the incidents in question in the instant case may be correctly described as constituting offensive battery as that term is defined by the Restatement Second, Torts. The dissent in Rowinsky recognizes this duty as relevant, citing Vernonia School District 47J v. Acton, 115 S.Ct. 2386 (1995), and Johnson v. Dallas Independent School District, 38 F.3d 198 (5th Cir. 1994), cert. den., 115 S.Ct. 1361 (1995) [Schools take care of children day after day...in public facilities. Schools may be said to control children’s environments to the same or even greater degree than state-sponsored foster care services, which have been held...to bear affirmative obligations to their client children \* \* \* That parents yield so much of their children’s care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during school hours].

<sup>22</sup> 80 F.3d at 1013, citing Cannon v. University of Chicago, 441 U.S. at 704 (1979). Also citing comments in the Congressional Record and Office of Civil Rights Regulations at 34 C.F.R. § 106.31 *re* discrimination by recipients.

<sup>23</sup> 80 F.3d at 1015-16. *And see* 59 Fed. Reg. 11448-49 (1994), applying the Title VII standard for race harassment to Title VI, which covers equal educational opportunity.

despite the fact that it is in apparent conflict with the view of the federal courts of appeals in the Second, Ninth, and Eleventh Circuits.<sup>24</sup>

In Davis v. Monroe County Board of Education, a divided three judge panel of the Eleventh Circuit Court of Appeals applied a Title VII standard to student peer harassment cases to find liability. Davis involved peer harassment much like that in Rowinsky, including the fondling of the female victim by a male student at school. As in Rowinsky, the Davis victim and her mother sought relief from school officials and filed criminal charges against the offending student.<sup>25</sup> Liability in Davis was based upon the school's failure to discipline the offending student. However, this factual distinction is of little consequence, as the Rowinsky holding goes to the victim's standing to maintain a claim under Title IX.<sup>26</sup> In his dissent in Rowinsky, Judge Dennis specifically agrees with the decision in Davis, and

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<sup>24</sup> Davis v. Monroe County Board of Education, *supra.*; see also Doe v. Petaluma City School District, 54 F.3d 1447 (9th Cir. 1994); and Murray v. New York University College of Dentistry, 57 F.3d 243 (2d Cir. 1995).

<sup>25</sup> In Davis, the offending student pled guilty to sexual battery.

<sup>26</sup> The Davis court found support for standing in the U.S. Supreme Court's decisions in Franklin v. Gwinnet County Schools, 503 U.S. 60 (1992) [Finding liability under Title IX for a district's failure to intervene in a teacher's sexual harassment of a student], and North Haven Board of Education v. Bell, 456 U.S. 512 (1982) [Holding that Title IX is broad in scope]. The court then transported the Title VII standard to student peer harassment, where that harassment is based on sex; was unwelcome; and was so severe or pervasive that the victim's educational environment could be described as abusive. The court noted that simple childish behavior, or offensive utterances are insufficient to establish liability. Rather, the existence of a hostile environment should be determined by examining the frequency and/or severity of the offending conduct; whether it is physically threatening; and whether it unreasonably interferes with the victim's performance, citing Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

cites Bosley v. Kearney R-1 School District, 904 F.Supp. 1006 (W.D. Mo. 1995) [Supporting liability where a school board intentionally fails to take remedial action in situations of student peer harassment].<sup>27</sup>

Davis does not break entirely new theoretical ground. Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), holds that a medical student holding a residency position may pursue, under Title IX, a claim that her supervisor had sexually harassed her in her capacity as an employee, and may seek to hold the university accountable under a Title VII analysis. And, the Second Circuit has observed in Murray v. New York University College of Dentistry, 57 F.3d 243 (2nd Cir. 1995) that, in a Title IX suit for gender discrimination based upon peer sexual harassment of a

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<sup>27</sup> 80 F.3d at 1017, footnote 1. At oral argument in Davis, Judge Rosemary Barkett expressed concern about the virtual immunity afforded school districts under Rowinsky, in peer sexual harassment cases, asking whether damages would be denied even in situations of pervasive patterns or practices of peer sex harassment at a school. See "Citadel Loses 2 Female Cadets," St. Petersburg Times, page 1A, January 13, 1997 (as reported by the Associated Press)[Two female cadets at The Citadel have announced that they are leaving the school because of fear for their physical safety. The FBI and state police were investigating allegations that male cadets set fire to the women's clothing, sexually harassed them, and put cleanser in their mouths].

It should be noted that, in defining the theory of hostile environment sex harassment, the United States Supreme Court's decision in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993) asks that employers consider the frequency of the offending conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee's performance of her/his job.

Judge Barkett explained at the *en banc*. argument in Davis that the opinion of the three judge panel did not impose liability for the actions of a third party (vicarious liability); rather liability is imposed on plaintiff's theory because of "the school's own actions or inaction" in not responding to the complaint of a student victim of sex harassment. The U.S. Department of Justice advanced a similar argument as *amicus curiae* for plaintiff, stating that a school should be subject to suit under Title IX if it "requires a student to submit" to a sexually hostile environment in order to obtain an education. See DeBenedictis, Don, "Two Sides Grilled on Harassment of Fifth Grader", Fulton County Daily Report, October 24, 1996 [e-mail: ddebenedictis@ecounsel.com].

student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.

Judge Kearse explains in Murray, that the United States Supreme Court's decision in Franklin v. Gwinnett County Public Schools<sup>28</sup> did not directly address the question whether Title VII standards would be applied to determine a school's liability under Title IX for student peer harassment. However, Judge Kearse notes, the Court cited its prior decision in Meritor Savings Bank, FSB v. Vinson,<sup>29</sup> to suggest that a Title VII standard should be applied in cases of the sexual harassment and abuse of a student by a teacher. Judge Kearse concludes that the Franklin Court's citation of Meritor in support of Franklin's central holding indicates that, in a Title IX suit for gender discrimination based on sex harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.<sup>30</sup>

If the Rowinsky holding is vindicated, female victims of student peer harassment in the lower and secondary grades will find no

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<sup>28</sup> 503 U.S. 60 (1992).

<sup>29</sup> 477 U.S. 57 (1986).

<sup>30</sup> 57 F.3d at 249. The Second Circuit affirmed the rejection of Murray's claims not on the basis of a rejection of the standard for liability, but because Murray failed to allege any facts from which it could be determined that the university knew or should have known of the harassment she experienced. Murray's claims were further burdened by the fact that she was being harassed not by a university employee, or student, but by a patient in the university's dental school clinic.

comfort in Title IX, unless their complaints are treated differently than those of male victims of peer misconduct. In other words, a school or school district will not be liable for student peer harassment, unless it ignores complaints of female students while addressing complaints of male students, or treats complaints by males more seriously than those of females.<sup>31</sup>

Schools and School Districts might be easily misled by such an outcome. Even assuming the rejection of federal jurisdiction based upon Title IX, cases like Rowinsky might arguably proceed on a theory of negligent hiring, or negligent retention of teachers, or breach of the duty to supervise students and exercise reasonable care for student safety and the maintenance of order. Dignitary torts which involve the offensive touching, groping or fondling of female students may be characterized as assaults and batteries. If the school or district knows or should provision such conduct, the failure to do so can be said to be negligence. Such negligence is arguably actionable in a private tort action because of the school's failure to control the conduct of a third party (the offending student) with whom it enjoys a special relationship.<sup>32</sup> Moreover, as to

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<sup>31</sup> See 80 F.3d at 1016.

<sup>32</sup> Liability may also be based upon the school's special relationship with the victim herself.

such a breach of duty, a public school district enjoys no immunity based upon its governmental status.<sup>33</sup> In sum, the issue of school, or district liability for peer sexual harassment which can be described as assault or battery is not settled by the Title IX cases. Rowinsky's principal value to the school or district would therefore appear to be in hostile environment sex harassment cases involving verbal harassment. Even in such cases, however, the issue of assault is present, raising the issue of the university's potential liability under common law causes of action.

If Davis and Murray are the correct analysis, the question for institutions of higher education becomes whether the absence of a custodial or surrogate parent relationship between student and institution relieves the university of liability, under Title IX or common law tort theory, for peer harassment, as contrasted with harassment of a student by a member of faculty or staff. The Eleventh Circuit has vacated its earlier opinion and has heard oral argument, *en banc*. Of course, the Eleventh Circuit's *en banc* opinion in Davis will not resolve the conflicting analysis of this issue among the circuits.

The choice of standards involves serious issues of fairness and social policy. In determining whether a duty is owed, a court must weigh the

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<sup>33</sup> See Trianon Park Condominium Association v. City of Hialeah, Florida, 468 So.2d 912.



considerations of policy which favor the injured party's recovery against those which favor limiting the defendant's liability. Waugh v. University of Hawaii, 621 P.2d 957, 970 (Hawaii 1981). Moreover, even if liability *under Title IX* were to be limited by the intent standard of Rowinsky, it is unlikely that the college or university could remove itself from situations of student peer harassment. Common law tort theories, and emerging statutory protections portray a gradual erosion of "no duty" rules historically applicable to the student-institution relationship in personal injury cases.<sup>34</sup> In the final analysis, the law aside, colleges and universities are constrained by their own sense of responsibility to respond to the issue of peer harassment.<sup>35</sup>

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<sup>34</sup> See, e.g., Tarasoff v. Board of Regents, 551 P.2d 334 (Cal. 1976)[Duty to warn identifiable victim of threat by another student communicated to university employee]; Furek v. University of Delaware, 594 A.2d 506 (Del. 1991)[Liability in tort where university knew or should have known of hazing activities which involved serious risk of physical injury to pledges]; Division of Corrections Dept. of Health and Public Services v. Neakok, 721 P.2d 1121 (Alaska 1986)[Duty to control a third person is not limited to situations where dangerous person is in defendant's actual control or custody].

<sup>35</sup> See, e.g., C. Palmer, *Violent Crimes and Other Forms of Victimization in Residence Halls* (1993)(Bowling Green State University, College of Education).

