

“De-pantsing” Isn’t Cool Anymore:
Peer-Inflicted Sexual Harassment

[author name here]

MLA

Executive Summary

In a 1993 survey 80% of public school students reported experiencing some type of sexual harassment before reaching the twelfth grade; their classmates were usually the perpetrators. In recent years students have brought their cases to the courts when the schools have failed to respond adequately. The Supreme Court has yet to determine whether Title IX of the Education Amendments of 1972 extends to victims who were sexually harassed by other students. Having no clear judgment on the issue, lower courts need a uniform approach to follow. When hearing lawsuits of peer-peer sexual harassment, U.S. courts should defer to the Department of Education's Office of Civil Rights' 1997 guidelines, which validate schools' liability for peer-inflicted sexual harassment under Title IX. By formally acknowledging that schools are responsible when given notice of peer-inflicted sexual harassment, students will be more sure of their rights, and schools will be more sure about the conditions of their liability, thus producing a pro-active anti-harassment stance within education.

As students across the country have come to the court system to resolve problems of peer-inflicted sexual harassment in their schools, the answers from courts have been inconsistent, with courts disagreeing over whether the scope of Title IX is broad enough to reach peer sexual harassment (Hochberg 247). It is necessary to resolve the contradictions courts are having in their interpretation of Title IX in order to protect children. The Department of Education and several Circuit Courts have found that schools are liable to protect children. When hearing lawsuits of peer-peer sexual harassment, U.S. courts should defer to the Department of Education's Office of Civil Rights' 1997 guidelines, which validate schools' liability for peer to peer sexual harassment under Title IX.

The intent of this paper is to show the precarious position in which children are put when their geographic location rather than the merits of their claim determine their right to money damages for peer sexual harassment. It will then examine the Department of Education Office of Civil Rights' interpretation of Title IX and will assert that the OCR's recommendations are the best precedent to follow. Additionally, the paper will give a background of the development of sexual harassment suits under Title IX and the different interpretations of the courts in modern peer-inflicted sexual harassment cases. Contrary to what some of the courts have found, it will be demonstrated that a cause of action in peer-inflicted sexual harassment suits is within the legal bounds of Title IX. Finally it will be argued that schools and their students are offered increased protection when the courts recognize the Department of Education's guidelines.

The problem in schools

In 1993, at the end of her fifth-grade year, LaShonda Davis wrote a suicide note. She said that she was going to end her life because of the sexual abuse she had endured in school. LaShonda had been tormented by a boy in her class throughout the year, whom the courts named G.F. During that year, LaShonda's classmate G.F. would try to touch her breasts and vaginal area. He said to her: "I want to get in bed with you," and "I want to feel your boobs." During one incident, G.F. put a doorstop in his pants and mimicked sexual acts. Eventually, G.F.'s harassment became so intense that he was charged and pled guilty to sexual battery.

The officials of LaShonda's school, however, did not protect her. LaShonda's teacher would not let her switch seats, away from G.F., nor would she let her speak to the principal. She told LaShonda, "If he [the principal] wants you, he'll call you." When LaShonda finally did make it to see the principal he asked her "why she was the only one complaining" (Karpenko 1271-2). LaShonda's case will be the first case of peer-inflicted sexual harassment to be heard by the Supreme Court in *Davis v. Monroe County Board of Education* this term.

Peer-inflicted sexual harassment is not a new phenomenon in secondary schools. Calling the actions sexual harassment, however, is the modern classification for what used to be called "boys will be boys" or plain childhood antics. Sexual harassment consultant and author Susan Strauss stated: "[Sexual harassment] is happening at younger and younger ages. . . . The bullying and teasing that has been rampant in our schools for eons, much of that has become sexualized" (Kelsey 119). A 1993 survey of boys and girls in eighth to eleventh grades by the American Association of University Women Education Foundation showed that 80% of the students reported that they had

been sexually harassed; usually a peer had been the perpetrator. The survey's definition of sexual harassment included: making sexual comments, jokes, or looks; spreading sexual rumors about a student; flashing or mooning; touching, grabbing, or pinching in a sexual way; pulling off or down clothing; and forcing sexual acts (Hochberg 240). Such treatment should not be normalized as child's play. Recipients of repeated harassment cannot learn effectively in a hostile environment. Being trapped in a situation beyond a child's control can make her feel scared and depressed about going to class and may even lead her to consider suicide (Joslin 201).

The Department of Education and Title IX

In response to an influx of peer to peer sexual harassment cases, the Department of Education Office of Civil Rights, the agency charged with regulating and interpreting Title IX, has specifically issued new guidelines for schools. The OCR considers peer sexual harassment to be a form of hostile environment sexual harassment. It defines hostile environment harassment as follows:

Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment. (Office of Civil Rights 1997)

The guidelines state that they "provide educational institutions with information regarding the standards that are used by the Office of Civil Rights (OCR), and . . . institutions should use [them] to investigate and resolve allegations of sexual harassment of students engaged in by school employees, other students (peers) or third parties."

In its sexual harassment guidance from 1997 "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," the OCR states that schools will be liable under Title IX under certain conditions: ". . . a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action" (Office of Civil Rights 1997). The guidance states that it is not holding schools responsible for the actions of the harassing students, but rather it is for the school's own discriminatory action by failing to remedy the situation once the school has notice that it is or has occurred. According to the OCR, a school can receive notice in many different ways including: a student filing a grievance or complaining to a teacher; a student, parent, or other individual contacting other appropriate personnel; an agent or responsible employee of the school having witnessed the harassment; receiving notice from an indirect source such as a member of the school staff, educational or local community, or the media; or by receiving notice from flyers about the incident(s) posted around the school (Office of Civil Rights 1997). The letter of sexual harassment guidance goes into much detail regarding all aspects of peer sexual harassment and should be considered as a definitive source on the scope of Title IX.

A background of Title IX

Title IX was added into the Civil Rights Act in 1972 after Congress recognized that Title VI and Title VII of the Civil Rights Act failed to protect women in educational

institutions. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” The language of Title IX does not specify what types of sex discrimination constitute a violation of the amendment or the methods by which a plaintiff can make her case. Originally the amendment was used to prohibit sexually discriminatory admission procedures and employment practices, but it was unclear as to how the sexual harassment of students should be treated (Karpenko 1273-75).

In order to interpret Title IX the courts have drawn from established Title VI and Title VII case law. Title VI is considered to be the parent statute of Title IX. In Title IX’s provisions it says that Title VI’s regulations should be incorporated into Title IX. Title VI prohibits discrimination in programs or activities receiving Federal financial assistance but does not include the classification of sex. From Title VI, Title IX has the precedent established by the Supreme Court (in *Guardians Association v. Civil Service Commission of New York*) that plaintiffs are limited to injunctive relief for unintentional violations of Title VI, however a plaintiff proving intentional discrimination is entitled to compensatory relief. Title VII includes the classification of sex in prohibiting employers from discriminating. The Equal Employment Opportunity Commission (EEOC) was created to enforce Title VII. The EEOC pronounced in 1980 that sexual harassment violates Title VII’s prohibition of sex discrimination. The EEOC established guidelines delineating two types of sexual harassment: “quid pro quo” or “hostile environment” sexual harassment. It was a gradual process, however, for the courts to recognize the EEOC’s standards. It took six years for the Supreme Court to finally validate in *Meritor Savings Bank v. Vinson* that quid pro quo and hostile environment sexual harassment violate Title VII (Karpenko 1276-79).

In the development of Title IX as a tool for addressing sexual harassment, courts adopted Title VII case law. In 1977 a cause of action for quid pro quo was first recognized under Title IX in *Alexander v. Yale University* through the court’s analogizing Title IX to Title VII. In 1981, the Office of Civil Rights of the U.S. Department of Education, the agency administering Title IX, recognized the expansion of Title IX and promoted its own definition of sexual harassment. In 1981 the Supreme Court further expanded the scope of Title IX sexual harassment claims in *Cannon v. University of Chicago* by using Title VI jurisprudence to create a private right of action for Title IX plaintiffs (Karpenko 1280-1). In 1982 the Supreme Court stated in *North Haven Board of Education v. Bell* that when determining the scope of Title IX, courts should accord the title “a sweep as broad as its language” (qtd. in Karpenko 1282) (*North Haven Board of Education v. Bell*. 102 S.Ct. 1912 (1982)).

The scope of Title IX has continued to develop. In 1992, in *Franklin v. Gwinnett County Public Schools*, a case involving a student harassed by her teacher, the Supreme Court unanimously held that private plaintiffs could receive monetary damages for intentional violations of Title IX. The Supreme Court stated that Title IX imposes a duty on the school district not to discriminate on the basis of sex and analogized teacher/student harassment to Title VII employment discrimination cases. Left unsaid by the Supreme Court is what a plaintiff must prove to establish the school board’s liability. Four different standards have been developed by federal circuit and district court opinions: “(1) Title VII “knew or should have known” liability; (2) actual notice; (3)

intentional discrimination proven by direct and circumstantial evidence; and (4) disparate treatment.” The dominant interpretations and the source of the current federal split are the Title VII liability standard and the intentional discrimination approach (Karpenko 1284).

Peer-inflicted sexual harassment and the courts

The first case of peer-based hostile environment, *Doe v. Petaluma City School District*, came to the Ninth Circuit. In this case the junior high female victim had reported the harassment to her counselor weekly, but the school district’s response was “only to give a few warnings to the harassers, and two-day suspensions to a few students” (Bukoffsky 183). The plaintiff filed suit claiming that the defendant’s failure to remedy the hostile environment of sexual harassment was a Title IX violation. The court held:

Title IX . . . prohibit[s] hostile environment sexual harassment but that to obtain damages under Title IX (as opposed to declaratory or injunctive relief), one must allege and prove intentional discrimination on the basis of sex by an employee of the educational institution. To obtain damages, it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it. (Bukoffsky 183).

The standard set by the court was thus intentional discrimination on the basis of sex. So if the plaintiff had amended her claim to state that “[t]he school’s failure to take appropriate action . . . [is] circumstantial evidence of intent to discriminate,” the case could have been tried on the merits (Bukoffsky 184).

Though the Fourth, Seventh, and Ninth Circuits have recognized peer sexual harassment claims under Title IX, the Fifth and Eleventh Circuits have both held that Title IX does not provide for such a cause of action (Hochberg 237). If the Fifth and Eleventh Circuits would consult the OCR’s guidelines, however, these inconsistencies would be remedied. One of the reasons why the Fifth Circuit has not recognized peer-peer sexual harassment as a cause of action is because it reasoned that Title IX did not give participating school boards unambiguous notice that they were responsible for remedying peer sexual harassment (Hochberg 253). The OCR’s guidelines, however, do give this formal notice. The Fifth Circuit has also argued that imposing liability for the acts of third parties would diminish Title IX’s value as a spending condition. It is not illogical, however, for a school to be responsible for the actions of third parties because a plaintiff in a Title IX hostile environment case challenges a school’s own actions and not the actions of the relevant third parties. The Fourth Circuit has noted that “[a] defendant educational institution, like a defendant employer, is, of course, liable for its own discriminatory actions. . . . Responsibility for discriminatory acts includes liability for failure to remedy a known sexually hostile environment” (Hochberg 243).

The Fifth and Eleventh Circuits have focused on the congressional power used to pass Title IX. This analysis, however, deviates from the traditional methods of statutory interpretation. When determining the scope of a statute, the usual practice of the courts is to consider the text, legislative history, and agency interpretation of the statute (Hochberg 255). When combining these tools of interpretation, Title IX does reach peer sexual harassment. When the Seventh Circuit focused on Title IX’s judicial and legislative history it referred to the Supreme Court’s declaration that Title IX “be given a ‘sweep as broad as its language.’” Because Titles VI and VII are also to be used in interpreting Title IX, the court looked to Title VII and concluded that “students should be given at

least as much protection as adult employees . . . “ and extending this standard to the Title IX setting, “. . . the court concluded that a school is directly liable for its failure to take appropriate action in response to peer sexual harassment when it could have prevented it.” The court also found that school liability is consistent with the OCR’s interpretation of Title IX (Hochberg 257).

Title IX extends to peer-inflicted sexual harassment

If one reads the text and legislative history broadly as mandated by both the Court and Congress, it appears that Congress intended Title IX to extend to peer sexual harassment. Because the text prohibits sex discrimination in education programs that are federally funded and because the Supreme Court has recognized that sexual harassment is a form of sex discrimination, it follows that Title IX reaches peer sexual harassment. The presence of sexual harassment in schools denies equal access to education, which is what Title IX was intended to prevent. In the legislative history of Title IX, there are many statistics about the percentage of women admitted to professional and graduate schools; the inclusion of these statistics implies that an objective of the statute was to promote increased participation of women in schools. Permitting sexual harassment in schools hinders the accomplishment of this objective (Hochberg 257-9).

Respecting the reservations of the Fifth and Eleventh Circuits, the Seventh Circuit delved into the question of whether Congress voided states’ sovereign immunity in passing Title IX. The Fifth and Eleventh Circuits have found that Title IX was passed solely under Congress’s Spending Clause powers. Several courts, however, have found that Title IX was passed pursuant to the Fourteenth Amendment, which in fact does abrogate states’ sovereign immunity. The Eighth Circuit in 1997 stated:

Section 5 of the Fourteenth Amendment expressly grants Congress broad authority to enforce the amendment’s substantive provisions “by appropriate legislation.” Because the Supreme Court has repeatedly held that those substantive provisions proscribe gender discrimination in education, we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by [Section] 5.

The Seventh Circuit also concluded that Title IX is Fourteenth Amendment legislation. The Sixth and Eighth Circuits have held consistently that Congress intended to abrogate sovereign immunity through Title IX (Hochberg 265-67).

The courts need to follow the OCR’s interpretation

Because of inconsistencies in the courts’ interpretations of Title IX, some children are being denied protection in cases of peer-inflicted sexual harassment. In the absence of the Supreme Court’s final word on peer-inflicted sexual harassment, the guidelines set forth by the OCR seem to be the best precedent to follow. The guidelines have taken specific care to show when an action is sexual harassment. They state that “factors in the Guidance confirm that a kiss on the cheek by a first-grader does not constitute sexual harassment.” The guidelines have concluded that courts not recognizing a private right of action for sexual harassment have erred (Kelsey 135-36). Precedent, furthermore, has shown that the Supreme Court listens to the OCR as experts in preventing school discrimination. The Supreme Court adopted the EEOC’s quid pro quo and hostile environment standards, and after the OCR expanded Title IX in 1981 by promoting its

definition of sexual harassment, the Supreme Court expanded the scope of Title IX sexual harassment claims (Karpenko 1281).

If the courts recognize the Department of Education's guidelines, schools and their students are offered increased protection. The OCR has recommended that schools:

Adopt and publicize a sexual harassment policy which includes a definition of sexual harassment; establish grievance procedures which protect the confidentiality of both victims and perpetrators; develop a mechanism to investigate complaints quickly and effectively; and educate students, teachers, administrators, parents, and staff about the definition of sexual harassment and the school's policy and grievance procedures. (Hochberg 241-2)

The OCR stated in its guidance that if it is asked to investigate or otherwise resolve incidents of sexual harassment of students, including that caused by other students, it will consider whether:

- (1) the school has a policy prohibiting sexual discrimination under Title IX and effective Title IX grievance procedures; (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate or appropriate corrective action responsive to quid pro quo or hostile environment harassment. (Office of Civil Rights 1997)

The OCR concluded that if the school was found to have taken these steps, the OCR would consider the case against the school to be resolved and would take no further action other than monitoring any agreement between the school and the agency (Office of Civil Rights 1997).

By holding schools liable for peer sexual harassment, schools will be induced to adopt anti-discrimination programs in order to limit their liability. Liability will be decreased in two ways: the number of potential plaintiffs who might recover damages from the school will be decreased; and by adopting an anti-harassment program, even if it is not completely successful in eradicating harassment, the school's actions are still likely to reduce their liability for harassment that does occur.

Conclusion

The current absence of a legal standard for assessing school liability is preventing schools from remedying the problem of sexual harassment. Because not all courts have followed the standards put forth by the OCR, schools do not know if they need to follow the standards or even if the standards will suffice. This confusion leaves student victims unsure of their rights. They may be discouraged from going to court to seek damages for their schools' failure to protect them. (Karpenko 1273).

Until the Supreme Court makes its final ruling, courts may continue to negate the validity of schools' liability for peer-inflicted sexual harassment. This, however, leaves victims subject to the inappropriate behavior of their peers as the students' protectors, teachers and school administrators, in a loco parentis situation after all, stand by complacently. The OCR has told schools to take reports of peer-inflicted sexual harassment from students seriously and has suggested that they implement anti-harassment programs and procedures (Hochberg 241). The condition of some courts taking the OCR's words seriously and others not doing so surely cannot be considered affording "equal protection of the laws."

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