KIDS WITH THE KISSIES AND SCHOOLS WITH THE JITTERS: FINDING A REASONABLE SOLUTION TO THE PROBLEM OF STUDENT-TO-STUDENT SEXUAL HARASSMENT IN ELEMENTARY SCHOOLS

INTRODUCTION

In 1993, a five-year-old Minnesota boy brought a female classmate into their school's art resource room, pulled down both of their pants, got on top of her, and began to simulate sexual intercourse.[1] Equally alarming is the story of seven-year-old Cheltzie Hentz, whose bus driver apparently thought it was funny that boys called Cheltzie a "bitch" and told her to perform oral sex on her father, on her way to school every day.[2] Meanwhile, a Montana elementary school had a long-standing tradition that Friday was "flip-up day," when boys would compete to see the number of girls' skirts they could lift.[3] More recently, a male classmate tormented Tianna Ugarte, an eleven-year-old girl at Bidwell Elementary School in California, for months by calling her names, threatening her with

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[1] *See* Ruth Shalit, *Romper Room: Sexual Harassment—by Tots,* NEW REPUBLIC, Mar. 29, 1993, at 13 (discussing the above incident and the attempts of the California and Minnesota legislatures to address the problem of sexual harassment in schools).

[2] *See* Jerry Adler & Debra Rosenberg, *Must Boys Always Be Boys,* NEWSWEEK, Oct. 19, 1992, at 77 (summarizing how in the wake of the Clarence Thomas hearings young girls are suing their schools to battle sexual harassment); Sylvia Hermann Bukoffsky, *School District Liability for Student Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX,* 42 WAYNE L. REV. 171, 185 (1994) (examining the historical development of Title IX, reviewing the analyses courts have applied, and concluding that courts should award Title IX damages to victims of student-based sexual harassment only when the Title IX violation is intentional, when the school is put on notice that it faces financial liability, and when the school is given a chance to redress the injury but fails to take adequate measures to stop the sexual harassment).

[3] *See* Adler & Rosenberg, *supra* note 2, at 77. Frustrated by school official's ineffective response to her daughter's harassment, Cheltzie's mother filed a complaint about the matter with the Minnesota Department of Human Rights. *See id.* The department determined that Cheltzie was the victim of sexual discrimination. *See* Norman Draper, *Woman Sues Eden Prairie Schools, Alleging Harassment of 11-year-old daughter,* STAR TRIBUNE (Minn.), Mar. 26, 1996, at B3. The U.S. Department of Education's Office for Civil Rights also decided that the girl's civil rights were violated and her school district did not properly respond to the sexual harassment. *See id.* As part of a settlement with the federal government, the school district agreed to increase its efforts to fight sexual harassment. *See* Pat Doyle, *Elementary Student's Harassment Suit Dropped,* STAR TRIBUNE (Minn.), Sept. 15, 1996, at B1. Cheltzie's mother later sued the school district for compensation for her daughter. *See id.* Cheltzie's mother subsequently dropped the private lawsuit, however, claiming that pursuing the claim would be a painful experience for her daughter. *See id.*

violence, and making obscene gestures.[4] And finally, in 1995, two ten-year-old boys were charged with raping a fellow classmate at North Bend Elementary School in Baltimore, Maryland.[5] At the time of the incident, the Baltimore district was the only district that had not followed the state Education Department's recommendation that all schools adopt policies on student sex-related behavior.[6]

While teasing has long been a problem in elementary schools, authorities claim the problem has gotten worse.[7] At the same time, American society has become aware of the problem of sexual harassment in the employment context.[8] Subsequently, lawmakers, educators, parents, and students have made educational institutions, including elementary schools, the latest arena in the fight to end sexual harassment.[9]

Unfortunately, once elementary schools became this new battlezone, some schools have had difficulty drawing the line between sexual harassment and childhood antics.[10] In the fall of 1996, for example, Jonathan Prevette, a six-year-old boy from North Carolina, kissed a classmate on the cheek at his elementary school.[11] Jonathan's school separated him from his class and forced him to miss a class ice cream party for violating the school's behavior code, which prohibits unwanted touching.[12]

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[4] *See* Tamar Lewin, *Kissing Cases Highlight Schools' Fears of Liability for Sexual Harassment,* N.Y. TIMES, Oct. 6, 1996, at A22. A lawyer representing the family said that the male classmate called Tianna a "bitch" and a "whore" and told her to "watch her back." *Id.* Tianna's father reports that despite his repeated complaints, the school did nothing to stop the harassment and Tianna became visibly upset. *See id.* "She became very sullen and isolated. And she would come home and lock the door to her room. . . . Her self-esteem withered away." *Id.*

[5] *See* Jean Thompson, *City Schools Lack Policy on Students' Sex Offenses,* BALTIMORE SUN, May 9, 1995, at 1B. The school suspended the alleged rapists and the alleged victim, a ten-year-old girl. *See id.* After protests from the mayor and others, the school reinstated the alleged victim. *See id.* Many parents, child advocates, and educators say that the school system's failure to have a sexual-misconduct policy led to the school administrator's inappropriate response. *See id.*

[6] *See id.*

[7] *See* Adler & Rosenberg, *supra* note 2, at 77; Susan J. Berkson, *Sex Harassment is the Enemy, Not This Curriculum,* STAR TRIBUNE (MINN.), Dec. 8, 1994, at A27. Fayne Mahaffey, a Wisconsin teacher says: "To many teachers, incidents of improper touching, innuendo, humiliation and intimidation seem to be increasing at an uncontrollable speed." *Id.*

[8] *See* Adler & Rosenberg, *supra* note 2, at 77.

[9] *See id.*

[10] *See* Lewin, *supra* note 4, at A22.

[11] *See* Diana Dworin & Nichole Monroe, *Issue of Harassment in Schools Heats Up,* AUSTIN-AMERICAN-STATESMAN (Tex.), Oct. 8, 1996, at A1 (summarizing recent cases of young children disciplined for kissing classmates and discussing how these cases sparked a national debate regarding the line between children's innocent behavior and sexual harassment).

[12] *See* Dworin & Monroe, *supra* note 11, at A1; Ellen Goodman, *The Truth Behind "The Kiss,"* BOSTON GLOBE, Oct. 13, 1996, at D7. Goodman points out that contrary to

Around the same time, De'Andre Dearinge, a seven-year-old boy from New York, kissed the girl next to him at lunch and pulled a button from her skirt.[13] De'Andre claimed that he had gotten the idea from a popular children's book about the adventures of a bear missing a button on his overalls.[14] De'Andre's school suspended De'Andre for three days for sexual harassment.[15]

When school officials called these kisses sexual harassment, the public, educators, sexual harassment experts, and child development authorities called it ridiculous.[16] Jonathan's superintendent, Jim Simeon, eventually apologized to Jonathan and his family for what Simeon termed a "misunderstanding."[17] Unfortunately, when it comes to the behavior of their students, elementary school authorities have more than little kisses to be concerned about.[18] According to Susan Strauss, a sexual harassment consultant and author, "[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."[19]

But, while the punishments of Jonathan Prevette and De'Andre Dearinge were widely ridiculed, they exemplify the confusion among school administrators as they confront the fear that they may be sued for failing to intervene when one student sexually harasses another.[20] While some schools overreact in these situa-

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the initial reports of the Prevette case, Jonathan's teacher only put Jonathan into a separate room and did not suspend him. *See id* at D7. His kiss was not defined as sexual harassment, but was technically labeled as unwanted touching in violation of the student behavior code. *See id.*

[13] *See* Dworin & Monroe, *supra* note 11, at A1.

[14] *See id.*

[15] *See id.*

[16] *See* Rex Bowman, *Schools Agree: Kissing Not Kid Stuff, 'Ridiculous' Rule Also Applies Here,* WASH. TIMES, Sept. 27, 1996, at A3 (containing the opinions of Washington D.C. area school officials of Jonathan Prevette's case); Linda Chavez, *The Legal Roots of Zealotry in Schools*, DENV. POST, Oct. 6, 1996, at D4 (reporting that feminist groups and their allies in the Department of Education and on the federal bench have made elementary schools the latest frontier in the fight against sexual harassment); Dworin & Monroe, *supra* note 11, at A1; Lewin, *supra,* note 4 at A22 (examining the 1996 kissing cases as well as two cases where elementary school girls sued their schools on the grounds that the schools failed to prevent sexual harassment by fellow students).

[17] *See* Dworin & Monroe, *supra* note 11, at A1.

[18] *See* Inara Verzemnieks, *When Children Kiss: Is it Child's Play or Sexual Harassment? Experts Disagree,* WASH. POST, Oct. 11, 1996, at D5 (containing educators', sexual harassment experts', and child development experts' opinions about the problem of sexual harassment in elementary schools).

[19] *Id.*

[20] *See* Dworin & Monroe, *supra* note 11, at A1. Carole Kennedy, the president of the National Association of Elementary School Principals, suggested that schools administrators are confused as to what constitutes sexual harassment because of those cases. *See id.* "There's not a lot of guidance for what to do yet, and it's not a problem that always has a simple solution. You can't take this lightly, but you also don't want to overreact." *Id. See also* Goodman, *supra* note 12, at D7. In an op-ed piece, the author reports: "Schools all over have instituted student conduct policies in a hurried response to legal and fund-

tions, many others fail to adequately respond to complaints of severe and pervasive harassment.[21] In the expanding area of law addressing sex discrimination in schools, student-to-student sexual harassment continues to be an area of uncertainty.[22] Considering the difficulties of how to approach the subject of sexual harassment with young children as opposed to junior high school and high school adolescents, finding a solution to this problem becomes an even more complicated task.[23]

As a result of this prevalent and complicated problem, individual states should enact legislation that directly addresses the extent of school officials' responsibility for student-to-student sexual harassment in elementary schools, because federal case law and the recently issued Department of Education guidelines are inadequate. Part I of this note addresses the particular difficulties surrounding the issue of student-to-student sexual harassment at the elementary school level. Part II summarizes the federal case law on the issue. First, it looks at the federal courts' less than enthusiastic recognition of a cause of action under Title IX of the Educational Amendments of 1972 against school officials who fail to prevent student-to-student sexual harassment. Second, it analyzes cases in which federal courts have not explicitly distinguished student-to-student sexual harassment in high schools from student-to-student harassment in elementary schools and allowed such claims to go forward, thus providing a disincentive for schools to respond to the conduct in an age-appropriate manner. Part III addresses the strengths and weaknesses of the new guidelines on sexual harassment issued by the Department of Education's Office of Civil Rights in March of 1997. Part IV examines how four states, Minnesota, California, Washington, and Florida, address this issue. Part V proposes a model statute for states to enact to address this issue. This note concludes that because of the peculiar problem of sexual harassment at the elementary school level and the current inadequacy of federal law to deal with this issue, individual states should enact laws requiring elementary school boards to address student-to-student sexual harassment at an age-appropriate level.

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ing worries. They don't always negotiate the line between policy and common sense." *Id.*; Lewin, *supra* note 4, at A22. Naomi Gittins, a lawyer at the National Association of School Boards said: "Of course it's an overreaction to suspend a 6 or 7-year-old for a kiss on the cheek. . . . But I can sympathize with schools' thinking that they'll try to avoid liability by having some definite policy saying anything like this is sexual harassment. We're getting more calls than ever from boards who are confused." *Id.*

[21] *See* Lewin, *supra* note 7, at A22.

[22] *See* Lewin, *supra* note 7, at A22 (suggesting that to avoid overreaction, schools need a clear explanation of the extent of their liability for student to student sexual harassment).

[23] *See* Verzemnieks, *supra* note 18, at D5.

I. STUDENT-TO-STUDENT SEXUAL HARASSMENT: THE PECULIAR PROBLEMS OF ADDRESSING IT IN ELEMENTARY SCHOOLS

A. *Addressing Peer Sexual Harassment in Elementary Schools Protects Both Victims and Harassers*

The exploits of little Jonathan Prevette and his stolen kiss caused a national stir and quite a few laughs.[24] Many experts and educators argue that this case highlights the need for regulation of the methods elementary school administrators use to discuss sexual harassment.[25] When addressing the problem of sexual harassment, schools must design, discuss, and implement age-appropriate policies.[26] Experts argue that schools should protect victims of peer sexual harassment[27] because children can intimidate one another even at young ages.[28] Additionally, as Leslie Wolfe of the Center for Women Policy Studies in Washington warns, "[i]f no one teaches boys that harassment is wrong, why should they stop harassing women as adults?"[29] Likewise, Doug Holmes, director of student services for Fairfax County, Virginia public schools claims that "[t]here's no question that introducing these concepts at an early age is not just to protect victims in the future, but also to protect the perpetrator in the future."[30] Elementary schools must help their students understand sexual harassment to prevent those students from engaging in sexually offensive or illegal conduct in the future.[31]

Some child development experts, however, are concerned that adults discuss "too much too soon."[32] Still others suggest that, when discussing sexual harassment with small children, adults actually project their own worries onto the children.[33] According to Marguerite Kelly, who writes about family issues in her

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[24] *See* Bowman, *supra* note 16 at A1 ("Whether huddled around the office coffee pot or standing in supermarket checkout lanes, people yesterday chatted endlessly about the 'ridiculous' and 'bizarre' case of the 6-year-old North Carolina boy accused of sexual harassment for kissing a classmate."); Chavez, *supra* note 16, at D4 ("Now that everyone's had a good laugh at the North Carolina school that punished 6-year-old Jonathan Prevette for kissing a classmate . . . ."); Robert Greene, *New Guidelines Vindicate Young Kisser,* COLUMBIAN, at A1, Mar. 14, 1997 (summarizing the provisions of the Department of Education's guidelines on sexual harassment in schools and how they developed, in part, due to the uproar surrounding the Prevette case).

[25] *See* Bowman, *supra* note 16, at A1. Many officials agree that because their sexual harassment policies apply across the board to all grade levels, they could theoretically have the same result as the Prevette case. *See id. See also* Verzemnieks, *supra* note 18, at D5.

[26] *See* Verzemnieks, *supra* note 18, at D5.

[27] *See* Berkson, *supra* note 7, at A27. Child victims of peer sexual harassment report that they experience depression, self-doubt, fear, and shame. *See id.*

[28] *See* Verzemnieks, *supra* note 18, at D5.

[29] Adler & Rosenberg, *supra* note 2, at 77.

[30] Verzemnieks, *supra* note 18, at D5.

[31] *See id.*

[32] *Id.*

[33] *See id.*

syndicated column, "[t]he adult who talks about sexual harassment to a six-year-old is talking about her own concerns . . . . It's just silly business to put adult terms on kids' play."[34]

Others disagree. Susan Strauss, a sexual harassment consultant, claims that many adults are simply uncomfortable addressing this new phenomenon.[35] "We get into denial, because we don't want to think that our child might receive the harassment — or, even worse, that our child might be the one who is doing it."[36] Strauss further argues that while many adults may want to pass this behavior off as "just part of growing up," it might be better for children to forego such things as "Flip-Up Fridays."[37] Just because most children experience some form of peer sexual harassment, school officials should not accept such conduct as normal or healthy behavior.[38]

B. *Addressing Peer Sexual Harassment Using Language and Methods Children Can Understand*

In attempting to address the problem of peer sexual harassment, many educators are looking for a reasonable approach that treats the behavior not as a crime, but as a part of social development.[39] According to David Elkind, a professor of child development at Tufts University and author of several books, including *The Hurried Child: Growing Up Too Fast Too Soon*, because most adults have difficulty understanding what is and is not sexual harassment, it is unrealistic for adults to expect children to comprehend the distinction.[40] T. Berry Brazelton, a professor of pediatrics at Harvard Medical School and author of *What Every Baby Knows,* agrees that adults should not discuss sexual harassment with children in adult terms.[41] According to Brazelton, "t]he only thing you can talk about, that makes any sense, is to say 'You need to be sensitive to other people's feelings.' "[42] Further, he explains, "[u]sing punitive measures and exposures and ruining a child's life is not the way we should do this."[43]

Many parents echo experts' concerns regarding the difficulties involved in as-

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[34] *Id.*

[35] *See id.*

[36] *Id.*

[37] *See id.*

[38] *See id.* According to Strauss: "We need to start questioning why we automatically make a comment about that being a part of growing up. . . . Let's compare it to adolescent drinking. That's something that all kids go through. Indeed, it's become the norm. That doesn't mean it's okay. That doesn't mean it's healthy." *Id.*

[39] *See id.* Judy Madden, an elementary counselor specialist says: "We're striving for a very reasonable view. Not that we're going to let little guys run around and kiss little girls if they don't want to be kissed. We're just not seeing that as a heinous crime, but as a piece of social learning that kids must understand." *Id.*

[40] *See id.*

[41] *See id.*

[42] *Id.*

[43] *Id.*

sisting young children to understand sexual harassment.[44] While many parents admit that their own childhood behavior might today be considered questionable, they recognize that times have changed.[45] While most parents think it is unreasonable for elementary school administrators to consider a kiss on the cheek between classmates sexual harassment, some admit that a more persistent pattern of behavior could indicate a problem.[46] However, parents agree with child development experts that schools need to be cautious when addressing such an adult concept to small children.[47]

How to address student-to-student sexual harassment becomes complicated when discussing elementary school victims and harassers. Many experts argue that elementary schools should call attention to such behavior to eliminate the attitudes that cause and perpetuate sexual harassment.[48] On the other hand, many experts argue that elementary school children are too young to understand such a difficult concept.[49] In order to address both of these concerns, individual states should develop policies that encourage schools to address sexual harassment in an age-appropriate manner.

II. THE FEDERAL REMEDY FOR PEER SEXUAL HARASSMENT CREATES PROBLEMS FOR SCHOOLS

A. *Background*

Many schools do not have sexual harassment policies and procedures, and most states do not have legislation on sexual harassment in schools.[50] Therefore,

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[44] *See* Adler & Rosenberg, *supra* note 2, at 77; Dworin, *supra* note 11, at A1 (containing parents' opinions about the Prevette and Dearinge kissing cases); Verzemnieks, *supra* note 18, at D5 (containing parents' opinions about the problem of sexual harassment in elementary schools).

[45] *See supra* note 44.

[46] *See id.*

[47] *See* Dworin & Monroe, *supra* note 11, at A1. Judy Allen, a parent whose daughter attends the first grade in an elementary school in Texas, asks: "How do we expect 7- or 8-year-olds to understand what sexual harassment is? . . . Inappropriate behavior is different from sexual harassment, and adults can talk to kids about what is appropriate behavior." *Id.* This author recognizes that many parents of elementary school children may believe that it is their responsibility to teach their children about sexual harassment and not the school's responsibility. However, as discussed in Part II of this note, elementary schools may be liable under Title IX for failing to prevent peer sexual harassment. To address both schools' responsibilities under Title IX, their responsibilities to parents, and their responsibilities to students, this author suggests that elementary schools' obligation to develop peer sexual harassment includes an obligation to receive input from parents in the community. *See infra* Part V of this note.

[48] *See* Verzcemnieks, *supra* note 18, at D5.

[49] *See id.*

[50] *See* Monica Sherer, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment,* 141 U. PA. L. REV. 2119, 2143 (1993) (analyzing the problem

many victims of peer sexual harassment may only be able to seek relief at the federal level.[51] Title IX of the Education Amendments of 1972 prohibits discrimination in federally funded schools.[52] Congress, under the Spending Clause of Article I, Section 8 of the Constitution, designed the statute to end discrimination on the basis of sex in federally funded education programs.[53] Title IX reads in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity."[54] The Department of Education's Office for Civil Rights ("OCR") enforces Title IX and its regulations.[55]

Congress developed Title IX to meet two distinct objectives.[56] First, Congress hoped to stop the use of federal funds to perpetuate discriminatory practices.[57] Its primary enforcement mechanism to achieve this goal is the ability to with-

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of peer sexual harassment in schools, describing how it is being dealt with on the local and state level, and evaluating the Title IX statutory and regulatory scheme). Sherer advocates the use of Title IX as a means to communicate to males and females that sexual harassment is wrong and intolerable. She suggests prima facie elements of a Title IX hostile educational environment sexual harassment claim that would hold a school liable for its failure to remedy repeated incidents of peer sexual harassment. *See id.* Currently only Minnesota, California, Washington, and Florida have such legislation. *See* MINN. STAT. ANN. § 363.01.41 (West 1991); MINN. STAT. ANN. § 127.46 (West 1994); CAL. EDUC. CODE § 212.6 (West 1994); CAL. EDUC. CODE § 48900.2 (West 1993); WASH. REV. CODE § 28A.640.020(2)(a)-(f) (West 1994); FLA. STAT. ANN. § 230.23 (6)(d)(8) (West Supp. 1998). For a more thorough analysis of these laws, *see infra* Part IV.

[51] *See* Sherer, *supra* note 50, at 2143.

[52] 20 U.S.C. §§ 1681-86 (1994); 34 C.F.R. § 106.1 (1996).

[53] *See* 20 U.S.C. § 1681-86.

[54] *Id.* § 1681(a).

[55] *See* 34 C.F.R. § 106.1 *et seq.* Any person who thinks that a school may be violating Title IX may file a complaint with the Department of Education's Office of Civil Rights. *See id.* § 100.7(b). The OCR investigates Title IX discrimination complaints. *See id.* § 100.7(b)-(c). If the OCR determines that a school has violated Title IX, it may remedy the violation by informally requiring compliance with Title IX, by suspending or terminating funding, or by seeking enforcement through the courts with the Department of Justice. *See id.* §§ 100.7-100.8. As one commentator explains, under the OCR regulatory scheme, compliance with Title IX does not compensate the victim, but "entails merely structural changes—such as prohibiting particular conduct, requiring schools to establish grievance procedures, and dismissing the offenders—to correct past problems and prevent them in the future." Sherer, *supra* note 50, at 2151 (footnotes omitted). For a more complete analysis of the OCR's guidelines on sexual harassment, *see infra* Part III.

[56] *See* Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (holding that Title IX implied a private cause of action). *See also* Edward Cheng, *Boys Being Boys and Girls Being Girls— Student-to-Student Sexual Harassment From the Courtroom to the Classroom,* 7 UCLA WOMEN'S L.J. 263, 292-93 (1997) (presenting an overview of the histories of Title VII and Title IX and the debate over their application in student-to-student sexual harassment claims).

[57] *See Cannon,* 441 U.S. at 704-05.

hold federal funding from programs that discriminate on the basis of sex.[58] However, despite its power to do so, the OCR has never cut off funds to schools found to be discriminating against its students.[59] Second, Congress considered Title IX as a means to protect individuals against discriminatory practices.[60] To achieve Title IX's second goal, the Supreme Court recognized a private cause of action to provide relief for individuals who have been discriminated against on the basis of sex.[61]

Title IX was modeled after Title VI of the Civil Rights Act of 1964 ("Title VI").[62] Title IX used Title VI's language, with the word "sex" substituted for "race, color, or national origin."[63] When interpreting sexual harassment claims arising under Title IX, however, federal courts generally look to case law under Title VII.[64]

Courts separate sexual harassment employment claims under Title VII into two categories.[65] First, courts recognized the *quid pro quo* variety of sexual harassment, which occurs when a supervisor requires sexual favors from another employee in exchange for employment related benefits.[66] Second, courts recognized the hostile environment variety of sexual harassment, which occurs when a harasser's continuous behavior produces an offensive environment that unreasonably interferes with a victim's work.[67] As a result of the hostile working envi-

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[58] *See id.*

[59] *See* Tamar Lewin, *A Touchy Issue: Schools Run Scared As Sex Suits Increase*, COURIER-JOURNAL LOUISEVILLE (Ky.), June 28, 1995, at 01A.

[60] *See Cannon*, 441 U.S. at 704.

[61] *See id.* at 709.

[62] *See id. at* 694-95. Title VI provides in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activities receiving Federal financial assistance." 42 U.S.C. § 2000(d) (1964).

[63] *See Cannon,* 441 U.S. at 694-95.

[64] *See, e.g.,* Lipset v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988) (holding that Title VII standard should apply to Title IX sexual discrimination claims); Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX."), *cert. denied,* 484 U.S. 849 (1987); Patricia H. v. Berkeley Unified Sch. Dist., 830 F.Supp. 1288, 1290 (N.D. Cal. 1993) ("The entire legal theory of sexual harassment has been developed in the context of Title VII."). *See also,* Bukoffsky, *supra* note 2, at 176. Title VII states in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1964).

[65] *See* Bukoffsky, *supra* note 2, at 177; Cheng, *supra* note 55, at 289-90.

[66] *See id.*

[67] *See id.*

ronment doctrine, employers must maintain working environments devoid of sexual harassment.[68]

In *Franklin v. Gwinnett County Public Schools*,[69] the United States Supreme Court launched a major innovation for hostile environment sexual harassment claims in educational institutions.[70] In *Franklin*, a high school student sued her school because she was sexually harassed by her teacher.[71] Although the student told teachers and administrators of the sexual harassment, not only did they do nothing to stop it, but also they discouraged the student from pressing charges.[72] The court reasoned that the general rule that federal courts may award any appropriate relief in a suit brought pursuant to a federal statute applies because Congress has not expressly limited the remedies available in a suit brought under Title IX.[73] The court, therefore, held that a student who has been sexually harassed by a teacher may seek money damages from the school district for an intentional violation under Title IX.[74]

In *Doe v. Petaluma City School District*,[75] a United States District Court expanded the Franklin rule to apply to students who are sexually harassed by fellow students.[76] In *Petaluma*, classmates tormented a junior high student for more than two years.[77] Students insulted and ridiculed her, bombarding her with a constant taunts about having sex with hot dogs.[78] Although she reported the harassment on a weekly basis to her school guidance counselor, the school district did little to stop the continuing sexual jeers, thereby forcing the student to

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[68] *See* Cheng, *supra* note 56, at 289-90.

[69] 503 U.S. 58 (1992) (involving a female student's allegations that a teacher repeatedly engaged in sexually explicit conversations with her, forcibly kissed her on the mouth, and on three occasions subjected her to coercive intercourse in his office).

[70] *See* Bukoffsky, *supra* note 2, at 179.

[71] *See Franklin*, 503 U.S. at 63.

[72] *See id.* at 64.

[73] *See id.* at 72-73.

[74] *See id.* at 75-76. The court noted that monetary damages are a necessary remedy for a student victim because backpay is inappropriate and proscriptive relief is ineffective when the victim and/or harasser are no longer at the school. *See id* at 76. In dicta, the court analogized the teacher-student relationship under Title IX to the supervisor-employee relationship under Title VII, hinting that although damages are available only for intentional discrimination, *respondeat superior* liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so. *See id.* at 75.

[75] 830 F. Supp. 1560, 1575 (N.D. Cal. 1993) (holding that a hostile environment sexual harassment claim may be brought under Title IX), *rev'd in part on other grounds*, 54 F.3d 1447 (9th Cir. 1995) (holding that because the trial court's opinion was the first case to establish a duty to prevent peer sexual harassment, qualified immunity shields the school counselor, in this case, from individual liability), and, *motion for reconsideration granted* 949 F. Supp. 1415 (N.D.Cal. 1996).

[76] *See id.*

[77] *See id.* at 1564-65.

[78] *See id.*

switch to a private school.[79] The school district had merely given a few warnings to the harassers and two-day suspensions to a few of the students.[80] The court recognized a cause of action under Title IX for peer sexual harassment,[81] but held that in order to obtain damages (rather than a declaratory judgment or injunctive relief), one must allege and prove that a school employee engaged in intentional discrimination on the basis of sex.[82]

B. *Lack of Uniformity in Federal Case Law*

Although the Supreme Court established that Title IX prohibits sexual harassment through hostile educational environments created by a school employee,[83] federal courts do not uniformly favor the proposition that schools may be liable under Title IX for hostile educational environment sexual harassment created by their students.[84] In fact, at the appellate level, only a slight majority of United States Circuit Courts of Appeal have accepted Title IX claims for peer sexual harassment. The Fourth,[85] Seventh,[86] and Ninth[87] Circuits have recognized peer sexual harassment claims under Title IX.[88] The Fifth Circuit[89] and the Eleventh

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[79] *See id.* at 1565-66.

[80] *See id.* at 1564-65.

[81] *See id.* at 1571.

[82] *See id.* The court noted that because agency principles are inapplicable to the school district and its students, *respondeat superior* liability does not exist when the sexual harassment is perpetrated by students. *See id.* at 1575-76. However, allegations that a school failed to take appropriate action may be circumstantial evidence of discriminatory intent. *See id.* at 1576.

[83] *See* Franklin v. Gwinnett County Public Schools, 503 U.S. 58, 75-6 (1992).

[84] *See generally* Cheng, *supra* note 55, at 298, 312 (reviewing early Title IX decisions of peer harassment, including at the district level).

[85] Brozonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949, 957 (4th Cir. 1997), *reh'g en banc granted* (Feb. 5, 1998). The plaintiff in this case alleged that the defendant, university, failed to adequately punish fellow students who raped her. *See id.* at 952.

[86] Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998), *reh'g en banc, denied*, 1998 U.S. App. LEXIS (7th Cir. Ill. April 14, 1998), and *petition for cert. filed* (July 13, 1998).

[87] Oona R.-S.- by Kate S. v. McCaffrey, No. 95-16046, 1998 WL 216944, at *3 (9th Cir. Cal. May 5, 1998), *petition for cert. filed* (June 19, 1998).

[88] Several district courts have also addressed this issue, reaching various conclusions. *See, e.g.,* Doe v. Londonberry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (holding that school may be liable for peer sexual harassment); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1197 (N.D. Iowa 1996) (involving allegations that school district, superintendent, and principal failed to take appropriate remedial action in response to high school student's sexual harassment on a daily basis for nearly two years by a fellow student and holding that Title VII standards for hostile environment sexual harassment claims may be used for Title IX analysis); Linson v. Trustees of the Univ. of Pa., 1996 WL 479532, at *2 (E.D. Pa. 1996) (concluding that a school may be liable for failure to stop hostile environment sexual harassment under Title IX); Wright v. Mason City

Circuit,[90] however, have both held that Title IX does not provide for such a cause of action.

In 1996, the Fifth Circuit held that schools are not liable under Title IX for peer sexual harassment in *Rowinsky v. Bryan Independent School District*.[91] In this case, the plaintiffs, two female eighth grade students, alleged that their school did not adequately respond to their complaints of peer sexual harassment that took place during their school bus rides.[92] The court concluded that schools receiving federal funds under Title IX cannot be liable for sex discrimination when the perpetrator is a party other than the school or its agent.[93] Thus, without allegations that it directly discriminated on the basis of sex, a school district cannot be liable for sexual harassment perpetrated by a student.[94]

The *Rowinsky* court found that "three factors weigh in favor of interpreting Title IX to impose liability only for the acts of the grant recipients."[95] First, the court found that imposing liability for the acts of third parties would diminish Title IX's value as a spending condition (to induce the grant recipient to comply with the requirement in order to get the needed funds).[96] The court noted that if school districts could be liable for the actions of a variety of third parties over whom they have little control, the possibility of a violation would be so great that school districts would be induced to turn down the federal funding rather than risk Title IX liability, rendering the statute useless.[97] Second, the court found that the legislative history of the statute shows that Title IX's primary purpose was only to stop sexual discrimination by recipients of federal funds.[98] Third, the court determined that the OCR's previous interpretations of Title IX were supportive of refusing to make school's liable for third parties' actions.[99]

Community Sch. Dist., 940 F. Supp. 1412, 1426 (N.D. Iowa 1996) (involving allegations that school district failed to prevent peer sexual harassment and holding that a student may be entitled to damages from the educational institution for peer sexual harassment under Title IX if the student proves that the educational institution knew of the harassment and intentionally failed to take proper remedial measures because of the student's sex.); Mennone v. Gordon, 889 F. Supp. 53, 58 (D. Conn. 1995) (dismissing Title IX against high school teacher because his failure to protect student harassed by peers did not violate a clearly established constitutional or statutory right). *See also Cheng*, *supra* note 56, at 298-312.

[89] *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (1996) *cert. denied*, 117 S. Ct. 165 (1996).

[90] *See Davis*, 120 F.3d at 1406.

[91] 80 F.3d 1006, 1016.

[92] *See id.* at 1006, 1010.

[93] *See id.* at 1011-14.

[94] *See id.* at 1016.

[95] *Id.* at 1012.

[96] *See id.* at 1012-13.

[97] *See id.* at 1013.

[98] *See id.*

[99] *See id.* at 1014-15. The court found that the OCR's primary interpretation of Title IX could be found in its implementing regulations, which are focused on acts of the re-

Following *Rowinsky*, the United States Court of Appeals for the Eleventh Circuit also found that Title IX does not provide a cause of action for student-to-student sexual harassment in *Davis v. Monroe County Board of Education*.[100] The plaintiff, a fifth-grade student, alleged that school officials failed to remedy sexual harassment by her classmates.[101] Specifically, the plaintiff alleged that during the 1992-1993 school year, a classmate repeatedly tried to touch her breasts and vaginal area, directed vulgarities at her, and repeatedly behaved in a sexually suggestive manner.[102] The plaintiff reported eight separate instances of this harassment to various school officials.[103] The court found that Title IX did not allow a claim against a school board where a student's claim was based on school officials' failure to remedy a known hostile environment caused by another student.[104] The court reasoned that while Title IX was enacted pursuant to Congress' spending power, it did not give participating school boards unambiguous notice that they were responsible for remedying peer sexual harassment.[105]

In contrast, the Fourth Circuit explicitly rejected the *Rowinsky* court's analysis of peer sexual harassment claims in *Bronzonkala v. Virginia Polytechnic Institute*.[106] A plaintiff in a Title IX hostile environment case, the court explained, challenges a school's own actions, and not the actions of the relevant third parties.[107] Holding that Title VII standards apply to Title IX hostile environment claims, the court noted "[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."[108] Further, the court decided that as part of a Title IX complaint, a plaintiff only need show that the school "knew or should have known of the harassment."[109] On February 5, 1998, however, the Fourth Circuit vacated the *Brzonkala* decision, and granted a motion for rehearing *en banc*.[110]

The Seventh Circuit explicitly rejected both the Fifth and Eleventh Circuits'

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cipients (citing 34 C.F.R. §106.31). *See id.* Additionally, the court points to the OCR's Policy Memorandum, which includes in its definition of sexual harassment, conduct by a recipient's employee or agent, and specifically left the issue of peer sexual harassment unresolved (citing OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)). *See id.* However, this case was decided prior to the issuance of the OCR's new guidelines, discussed more fully *infra* Part III.

[100] *See Davis*, 120 F.3d 1390.

[101] *See id.* at 1393.

[102] *See id.*

[103] *See id.* at 1394.

[104] *See id.* at 1401.

[105] *See id.* at 1406.

[106] *See Brozonkala*, 132 F.3d at 958.

[107] *See id.*

[108] *Id.*

[109] *Id.* at 960.

[110] *See id.*

analysis of peer sexual harassment claims in *Doe v. University of Illinois*.[111] The plaintiff in *Doe* sued the University of Illinois, which managed her high school, because it did little or nothing in response to her numerous complaints of verbal and physical sexual harassment by male students.[112] She alleged that some administrators told her the harassment was her own fault and one official criticized her for potentially hurting the male students' futures.[113] The plaintiff eventually transferred to a private school.[114] The court held that a recipient of Title IX funds may be liable for failing to appropriately respond to peer sexual harassment "that takes place while the students are involved in school activities or otherwise under the supervision of school employees provided that recipient's responsible officials actually knew that the harassment was taking place."[115]

The Ninth Circuit, reviewing a district court's rejection of school officials' qualified immunity claims, also found that school officials have a clearly established duty under Title IX to prevent peer sexual harassment in *Oona R.-S.- by Kate S. v. McCaffrey*.[116] The plaintiff, a sixth-grade female student, claimed that school officials failed to take steps to prevent inappropriate conduct by a student teacher and by male students.[117] Following the Supreme Court's decision in *Franklin* and the reasoning employed in *Petaluma*, the court found that using Title VII standards is appropriate to resolve sexual harassment claims under Title IX and held "that the defendants are not entitled to immunity for their failure to take steps to remedy the hostile environment created by the male students in [plainitff's] class."[118]

The split among courts as to whether Title IX prohibits peer sexual harassment has led one court to note, "[g]iven the enormous social implications for students, schools, and parents, this court wishes that Congress would step in and simply tell us whether it intended to make school districts responsible for the payment of damages to students under these circumstances."[119] The Supreme

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[111] *See Doe*, 138 F.3d at 661-63.

[112] *See id.* at 655.

[113] *See id.*

[114] *See id.*

[115] *Id.* at 661. Writing in a separate opinion, Circuit Judge Coffey expressed his concern with the majority's liability standard. *See id.* at 668-69 (Coffey, J., concurring in part, dissenting in part). Making note of the Jonathan Prevette case and the increased number of peer harassment claims being raised in younger grades, Judge Coffey explained, "absent congressional or Supreme Court guidance in this area of the law, we must be mindful to approach it with an application of common-sense combined with utmost reflection and study." *Id.* at 676. In his concurring opinion, Circuit Judge Evans noted "[c]onsiderable deference must be given . . . to schools in meeting these demands, and a wide range of reasonable responses should be permitted." *Id.* at 678 (Evans, J. concurring).

[116] 1998 WL 216944 at *5. For discussion of this case at the district level including the facts of the case, *see infra* notes 129-38 and accompanying text.

[117] *See id.* at 1208.

[118] *See id.* at *4.

[119] *See Cheng, supra,* note 56 at 306 (citing *Wright*, 940 F. Supp. at 1414).

Court has never addressed the issue directly.[120] Therefore, as Sylvia Hermann Bukoffsky writes, "because of disparate interpretations and the lack of Supreme Court guidance, a plaintiff's right to money damages [for peer sexual harassment] may depend more on the fortuity of her geographic location than on the merits of her claim."[121] At the same time, many educators suggest that it is this confusion in the law coupled with the growing fear of liability that has led many schools to overreact to students' conduct.[122]

C. *Problems the Federal Remedy Created for Elementary Schools*

Although it remains unclear whether schools are generally liable for student-to-student sexual harassment, several districts[123] and at least one circuit court have allowed such claims to go forward even in cases involving elementary school students. By holding elementary schools to the same standard of liability as high schools, federal courts may deter elementary school officials from responding to such conduct in an age-appropriate manner as they struggle with the growing fear of private lawsuits. In *Bruneau v. South Kortright Central School District*,[124] for example, the United States District Court for the Northern District of New York found that a school may be liable for failing to prevent peer sexual harassment under Title IX.[125] The plaintiff in *Bruneau* was a sixth-grader who alleged that her fellow students had verbally and physically sexually harassed her at school.[126] Male classmates called the plaintiff and other girls names such as "lesbian", "prostitute", "retard", "scum", "bitch", "whore", and "ugly dog faced bitch."[127] The boys also snapped the girls' bras, ran their fingers down the girls' breasts, and spit, shoved, hit, and kicked them.[128] On motion for summary judgment, the court found that even though the alleged harassers and victim were in elementary school, a reasonable jury could find that the plaintiff was

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[120] *See Rowinsky*, 117 S.Ct. at 165. The Court did agree to review *Davis v. Monroe County Board of Education* for next term. *See* Aaron Epstein, *Supreme Court Takes Case of Student Harassed by Peer*, BOSTON GLOBE, SEPT. 30, 1998, AT A6.

[121] Bukoffsky, *supra* note 2, at 191.

[122] *See* Lewin, *supra* note 4, at A22. In 1996, a California jury awarded Tianna Ugarte damages of $500,000 to be paid by Antioch Unified School District and her former principle for having to endure months of sexual harassment from a sixth-grade classmate. *See id.*

[123] *See* Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995) (involving a female elementary school student); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996) (involving a sixth-grade student); Oona, R.-S.- by Kate v. Santa Rosa City Schools, 890 F. Supp. 1452 (N.D.Cal. 1995) *order affirmed by Oona, R.-S.- by Kate* 1998 WL 216944, *petition for cert. filed* (June 19, 1998) (involving a sixth-grade student).

[124] 935 F. Supp. 162.

[125] *See id.* at 172.

[126] *See id.* at 166.

[127] *See id.*

[128] *See id.* at 166.

subjected to unwanted sexual harassment that interfered with her education.[129]

Similarly, in 1995, the same district court that decided *Petaluma*, held in *Oona R.-S.- by Kate v. Santa Rose City Schools*[130] that under Title IX a school must take affirmative steps to stop peer sexual harassment.[131] *Oona R.-S.* also involved a sixth-grade student plaintiff who alleged that her male classmates had sexually harassed the girls.[132] Boys allegedly called girls' body parts "melons" and "beaver" and called the girls slang terms for whore.[133] One boy allegedly hit the plaintiff in the face, telling her to "Get used to it."[134] She also alleged that a teacher let students see MTV videos in class during which some of the boys made loud and vulgar sexually explicit comments about the women in the videos.[135] Based partly on the *Petaluma* precedent, the court found that Title IX prohibited student-to-student sexual harassment in schools and that a cause of action ripens when a school fails to take adequate measures to punish or prevent such conduct.[136] The court also found that the Ninth Circuit, in *Clyde K. v. Puyallup School District*,[137] strongly hinted at such a responsibility.[138] Additionally, the district court denied several school officials' motions for qualified immunity.[139]

In *Bosley v. Kearney R-1 School District*,[140] the plaintiff, an elementary school student, alleged that she was subjected to unwelcome sexual harassment on her school bus.[141] The United States District Court for the Western Division of Missouri found that Title IX mandates that as soon as a school district becomes aware of sexual harassment, it must take prompt and reasonably designed reme-

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[129] *See id.* at 174-76.

[130] 890 F. Supp. 1452.

[131] *See id* at 1469. The case did not give any further guidance as to what constitutes adequate steps to deter or punish sexual harassment.

[132] *See id.* at 1457.

[133] *See id.*

[134] *Id.*

[135] *See id.* at 1457.

[136] *See id.* at 1469.

[137] 35 F.3d 1396, 1401 (9th Cir. 1994). The Ninth Circuit held that a school did not violate the Individuals With Disabilities Education Act when removing a student with Tourette's Syndrome from the classroom. *See id.* Noting that the student's sexually explicit remarks were directed at female students, the court stated, "public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools. . . . Moreover school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment." *Id.* at 1401-02.

[138] *See Oona R.-S.- by Kate,* 890 F. Supp. at 1469.

[139] *See id.* at 1473. This order was affirmed by the Ninth Circuit in *Oona R.-S.- by Kate*, 1998 WL 216944 at *4.

[140] 904 F. Supp. 1006.

[141] *See id.* at 1024 (alleging that various boys drew obscene pictures, brushed up against girls, and spread sexually explicit rumors).

dial measures to stop the harassment.[142]

These cases indicate that elementary schools may not be immune from the recent crusade to curb peer sexual harassment through private lawsuits under Title IX. Instead, many federal courts are willing to hold elementary schools to the same standards for hostile learning environments as high schools. Unfortunately, although establishing a duty, these cases provide little guidance as to how schools may fulfill this duty by preventing conduct from rising to the level of a hostile learning environment. These cases do not address the issue of day-to-day prevention; instead they only address extremely egregious student conduct and schools that did virtually nothing in response. Lacking guidelines and in order to avoid liability, many elementary schools may end up punishing *any* questionable conduct as sexual harassment rather than risking taking the time to consider an age-appropriate response. In addition, many educators argue that, rather than end student-to-student sexual harassment, litigation will only polarize students and require schools to use their limited resources to pay lawyers' fees and damages.[143]

III. THE DEPARTMENT OF EDUCATION'S OFFICE OF CIVIL RIGHTS GUIDELINES DO NOT PROVIDE ENOUGH GUIDANCE

The OCR investigates Title IX complaints.[144] Partly in response to the uproar surrounding the Jonathan Prevette kissing incident, the Department of Education issued new guidelines designed to help school officials determine what constitutes sexual harassment.[145] These new guidelines "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."[146] The Department stated that the "factors in the Guidance confirm that a kiss on the cheek by a first-grader does not constitute sexual harassment."[147] However, while the OCR guidelines tell officials to consider the alleged offender's age, they do not clearly address sexual

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[142] *See id.* at 1023. After the jury awarded the plaintiff a verdict of $5,000, the district court granted the defendant's motion for judgement as a matter of law. *See* Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 779 (8th Cir. 1998). On appeal, the Eighth Circuit affirmed because there was insufficient evidence to show that the school district intentionally responded differently and inadequately to the plaintiff's complaints because of her sex. *See id.* For purposes of the appeal, the Eighth Circuit assumed that such intent was necessary for a Title IX peer sexual harassment claim. *See id.*.

[143] *See* Lewin, *supra* note 4, at A22.

[144] *See* 34 C.F.R. § 106.1 *et seq.*, 100.7-100.8.

[145] *See* Greene, *supra* note 24, at A1.

[146] SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12034 (1997) ("SEXUAL HARASSMENT GUIDANCE").

[147] *Id.*

harassment at the elementary school level.[148]

Two main problems exist with the guidelines. First, the OCR relies on the proposition that Title IX creates a private right of action for sexual harassment of students by other students,[149] even as it recognizes that there is division among the U.S. Courts of Appeals regarding the issue.[150] The OCR simply concludes that courts that have reached the opposite conclusion have erred[151] and does not address what school districts should do if the Supreme Court were to hold that there is no cause of action under Title IX for peer sexual harassment.

Secondly, the OCR's guidelines are extremely open-ended.[152] As a result, rather than preventing future lawsuits, the guidelines may in fact create a flood of lawsuits. Particularly distressing is the OCR's suggestion that school districts should be liable if they knew or *should have known* about a hostile environment in the school.[153] School officials may be put in a position of having to forego federal funding rather than risk lawsuits from alleged victims and alleged harassers when addressing the issue of peer sexual harassment.[154]

At the same time, however, the OCR guidelines recognize the impossibility of being able to provide an answer to every problem that may arise.[155] Instead, the "Guidance offers school personnel flexibility in how to respond to sexual harassment."[156] Thus, rather than incorporating each provision of the guidelines into their own statutes, individual states should use the general themes of the guidelines in their policy-making efforts. In particular, the Guidance explicitly stresses the need for age-appropriate policies, regulations and responses.[157]

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[148] *See id.*

[149] *See id.*

[150] *See id.* at 12036 (citing *Rowinsky*, 80 F.3d at 1006).

[151] *See id.* ("In OCR's view, the holding in *Rowinsky* was based on a mistaken belief that the legal principle underpinning this aspect of the Guidance makes a school responsible for the actions of a harassing student, rather than for the school's own discrimination in failing to respond once it knows that the harassment is happening.").

[152] *See id.* at 12039.

[153] *See id.* at 12042 (emphasis added).

[154] *See Davis*, 120 F.3d at 1402-06. In rejecting a Title IX private right of action for peer sexual harassment, the court found that such liability would create

> for school boards a Hobson's choice: On the one hand, if a student complains to a school official about sexual harassment, the official must suspend or expel the alleged harasser or the board will face potential liability to the victim. . . . On the other hand, if the public school official, presiding over a disciplinary hearing suspends or expels the alleged harasser, the school board may face a lawsuit alleging that the official acted out of bias—out of fear of suit.

Id. at 1402.

[155] *See* SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. at 12034.

[156] *Id.*

[157] *See id.* at 12038, 12042-44. The OCR notes that Title IX does not require a school to implement a sexual harassment policy if it has a nondiscrimination policy that forbids all forms of sex discrimination. *See id.* at 12038. But it has found that age-appropriate sexual harassment policies, by raising awareness can effectively lead to the prevention of

In deciding whether sexual harassment of a student by another student rises to the level of hostile environment sexual harassment, the OCR recommends that school officials consider all relevant circumstances, including the age of the alleged harasser and the subject or subjects of the harassment.[158] However, the OCR does not specify how much weight should be put on the age of the victim and/or harasser as compared to other listed factors, such as the size of the school, the location of the incidents, other incidents at the school, etc.[159] Additionally, once a school has notice of possible sexual harassment of students by other students, the guidelines recommend the school quickly investigate to determine what occurred and to take appropriate steps to resolve the problem.[160] The OCR suggests that the specific course of investigation will vary "depending upon the nature of the allegations, the source of the complaint, *the age of the student or students involved,* the size and administrative structure of the school, and other factors."[161] The OCR does not, however, specify the relative weight of each of those factors.

If a school determines that one student sexually harassed another, the OCR recommends that the school "take reasonable, timely, *age-appropriate,* and effective corrective action."[162] Some of the responses the OCR suggests include: separating the students by changing housing arrangements, directing the harasser to have no further contact with the harassed student, giving the harassed student the option of withdrawing from a class, and ordering the harasser to apologize.[163]

Additionally, the OCR suggests that the school take different measures to prevent any future harassment. Specifically, the OCR suggests that "training for administrators, teachers, and staff and *age-appropriate* classroom information for students can help to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond."[164] Unfortunately, the OCR does not give schools any specific guidance as to particularly addressing this problem at the elementary school level. Without such guidance, coupled with the possible threat of private lawsuits, many schools may feel pressured to apply a sexual harassment policy across the board to all grade levels — thus recreating the Jonathan Prevette problem of overreaction that the guidelines are supposed to help schools avoid.

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sexual harassment. *See id.*

[158] *See id.* at 12042.

[159] *See id.*

[160] *See id.*

[161] *Id.* (emphasis added).

[162] *Id.* at 12043 (emphasis added).

[163] *See id.*

[164] *Id.* at 12044 (emphasis added).

IV. WHAT OTHER STATES CAN LEARN FROM: MINNESOTA, CALIFORNIA, WASHINGTON, AND FLORIDA

A. *Minnesota's Pioneering Efforts*

Although education is traditionally a concern of the states, only four states have passed legislation regarding school sexual harassment policies: Minnesota, California, Washington, and Florida.[165] Minnesota was the first state to address the issue of sexual harassment within schools,[166] amending its antidiscrimination statute to cover hostile environment sexual harassment in schools.[167] In 1989, Minnesota passed a law requiring all schools to institute sexual harassment policies that conform with the state's antidiscrimination statute, becoming the first state requiring school board policies prohibiting sexual harassment.[168] Specifically, school boards must adopt policies that apply to "pupils, teachers, administrators, and other school personnel,"[169] and that include "reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy."[170] The policy must be posted throughout the school and included in the school's student handbook. Furthermore, the school must develop a procedure to

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[165] *See* Jehan A. Abdel-Gawad, *Kiddie Sex Harassment: How Title IX Could Level the Playing Field Without Leveling the Playground,* 39 ARIZ. L. REV. 727, 744-45 (1997) (arguing that courts should recognize that under Title IX students have a right to sue for hostile environment sexual harassment and that such a remedy can best be enforced by imposing a Title VII standard of liability on school districts).

[166] *See* Sherer, *supra* note 50, at 2139.

[167] *See* MINN. STAT. ANN. § 363.01 (West 1991). The statute reads:

> "Sexual Harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when. . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Id.

[168] *See* MINN. STAT. ANN. § 127.46 (West 1994). The 1989 statute provides:

> Each school board shall adopt a written sexual, religious, and racial harassment and sexual, religious, and racial violence policy that conforms with sections 363.01 to 363.15. The policy shall apply to pupils, teachers, administrators, and other school personnel, include reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy. Disciplinary actions must conform with collective bargaining agreements and sections 127.27 to 127.39. The policy must be conspicuously posted throughout each school building . . . and included in each school's student handbook on school policies. Each school must develop a process for discussing the school's sexual, religious, and racial harassment and violence policy with students and school employees.

Id.

[169] *Id.*

[170] *Id.*

discuss the policy with students and school employees.[171] The statute, however, neither explicitly requires that the policy be developed at an age-appropriate level nor provides much guidance on developing a policy applicable to elementary schools.

Since 1988, state and private consultants have been training secondary school educators on sexual harassment, and the state has been providing a model sexual harassment curriculum for junior and senior high schools use.[172] In addition, the federal government gave the Minnesota Department of Education a grant to design a harassment prevention curriculum to be used in elementary schools.[173] Working with educators, parents, and students, the authors developed a curriculum, respectful of students' families and belief systems[174] and that emphasized lessons of respect and cooperation.[175] The curriculum, entitled "Girls and Boys Getting Along," was available to teachers through the state's Department of Education, but was not mandatory.[176] The curriculum was well-received by teachers and students throughout Minnesota and is now used in other states and several foreign countries.[177]

B. *Washington's Plan of Sample Policies*

Washington also passed legislation that requires schools to respond to student-to-student sexual harassment.[178] Similar to the Minnesota statute, Washington's

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[171] *See id.*

[172] *See* Berkson, *supra* note 7, at A27.

[173] *See id.*

[174] *See id.*

[175] *See School Curriculum on Sex Harassment Approved,* STAR TRIBUNE (MINN.), Oct. 13, 1993, at B8.

[176] *See id.*

[177] *See* Karin Winegar, *Harassment Curriculum Review Sets off Dispute,* STAR TRIBUNE (MINN.), Dec. 6, 1994, at B1. After being in use for one year, the Minnesota Department of Education put the distribution of the program temporarily on hold for further review. *See id.* This decision sparked controversy since it came just two days after a local attorney and member of an ultraconservative Minneapolis think tank criticized the need for such a program in a *Star Tribune* editorial. *See id.* In support of the need for the program, a spokesperson for the attorney general's office said that more than 2,000 incidents of sexual harassment in elementary schools were reported in a 1993 survey. *See id.* Co-authors of the program considered the review an opportunity to respond to teachers' feedback and make the curriculum stronger. *See id.* According to a co-author, "Kids and teachers really enjoy it. But just like anything else, you write it, try it, and then fine-tune it. I think it's that time." *Id.* During the review, schools that already had implemented the curriculum continued to use it. *See id.* The curriculum is currently available through the Equal Educational Opportunities (EEO) Office of the Minnesota Department of Education. *See Girls and Boys Getting Along; Sexual Harassment Prevention in the Elementary Grades,* MINNESOTA DEP'T OF EDUC., 1993. [Equal Educational Opportunities, 550 Cedar Street. St. Paul, Minnesota 55101].

[178] *See* WASH. REV. CODE § 28A.640.020(2)(a)-(f) (West 1994). The statute provides in relevant part:

legislation applies across the board to all grade levels and requires that every school board develop sexual harassment policies with grievance procedures, remedies, and disciplinary actions, and to disseminate the policy throughout the school community.[179] The Washington statute contains the same problem as the Minnesota scheme — it does not explicitly require that school boards implement age-appropriate policies.[180] The statute, however, does provide for additional guidance by requiring that the superintendent of public instruction provide sample policies to requesting school districts.[181]

(a) By December 31, 1994, the superintendent of public instruction shall develop criteria for use by school districts in developing sexual harassment policies as required under (b) of this subsection. The criteria shall address the subjects of grievance procedures, remedies to victims of sexual harassment, disciplinary actions against violators of the policy, and other subjects at the discretion of the superintendent of public instruction. Disciplinary actions must conform with collective bargaining agreements and state and federal laws. The superintendent of public instruction also shall supply sample policies to school districts upon request.

(b) By June 30, 1995, every school district shall adopt and implement a written policy concerning sexual harassment. The policy shall apply to all school district employees, volunteers, parents, and students, including, but not limited to, conduct between students.

(c) School district policies on sexual harassment shall be reviewed by the superintendent of public instruction considering the criteria established under (a) of this subsection as part of the monitoring process established in RCW 28A.640.030.

(d) The school district's sexual harassment policy shall be conspicuously posted throughout each school building, and provided to each employee. A copy of the policy shall appear in any publication of the school or school district setting forth the rules, regulations, procedures, and standards of conduct for the school or school district.

(e) Each school shall develop a process for discussing the district's sexual harassment policy. The process shall ensure the discussion addresses the definition of sexual harassment and issues covered in the sexual harassment policy.

(f) "Sexual Harassment" as used in this section means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

(i) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment.

(ii) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(iii) That conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

Id.

[179] *See id.*

[180] *See id.*

[181] *See id.*

C. *California's Punishment Scheme*

California also passed legislation requiring schools to establish written sexual harassment policies.[182] Additionally, the California legislature passed a statute that allows schools to suspend or recommend for expulsion any student that sexually harasses another student.[183] With respect to punishment for sexual harass-

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[182] *See* CAL. EDUC. CODE § 212.6 (West 1994). The statute reads:

(a) It is the policy of the State of California, pursuant to Section 200, that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state. The purpose of this section is to provide notification of the prohibition against sexual harassment as a form of sexual discrimination and to provide notification of available remedies.

(b) Each educational institution in the State of California shall have a written policy on sexual harassment. It is the intent of the Legislature that each educational institution in this state include this policy in its regular policy statement rather than distribute an additional written document.

(c) The educational institution's written policy on sexual harassment shall include information on where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies.

(d) A copy of the educational institution's written policy on sexual harassment shall be displayed in a prominent location in the main administrative building or other area of campus or school site. "Prominent location" means that location, or those locations, in the main administrative building or other area where notices regarding the institution's rules, regulations, procedures, and standards of conduct are posted.

(e) A copy of the educational institution's written policy on sexual harassment, as it pertains to students, shall be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session, as applicable.

(f) A copy of the educational institution's written policy on sexual harassment shall be provided for each faculty member, all members of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year, or at the time that there is a new employee hired.

(g) A copy of the educational institution's written policy on sexual harassment shall appear in any publication of the institution that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the institution.

Id.

[183] *See* CAL. EDUC. CODE § 48900.2 (West 1993). The statute reads in relevant part:

[A] pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5.

For the purposes of this chapter, the conduct described in Section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive.

Id. Section 212.5 provides in relevant part that:

"sexual harassment" means unwelcome sexual advances, requests for sexual favors,

ment, however, the California legislation does not apply to children in kindergarten and grades one through three.[184] Additionally, the California statute does not require that schools discuss the sexual harassment policy with students.[185]

By limiting the statute's application to the fourth grade and above, the California legislature may prevent a school official from overreacting to the conduct of elementary school children. However, the statute may also provide a disincentive for school officials to address egregious conduct of elementary school children. The California legislation also ignores the very strong argument that by addressing sexual harassment at an early age, school districts can prevent the attitudes that cause students to sexually harass each other in the future.[186] Additionally, by focusing on punishment rather than curriculum, the California legislation does not provide teachers, staff, or students the means to develop an understanding of what constitutes sexual harassment and how to prevent conduct from rising to that level.[187]

D. *Florida's Understandable Codes of Student Conduct*

Florida is the most recent state to require schools to adopt sexual harassment policies.[188] The Florida statute requires that elementary and secondary school

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and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions: the conduct has the purpose or effect of having a negative impact under the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

CAL EDUC. CODE § 212.5 (West 1994).

[184] *See* CAL. EDUC. CODE § 212.5. Note that, in defining sexual harassment for purposes of punishing students, the California legislation requires that the conduct must be "considered by a reasonable person of the same gender as the victim," but it does not require any consideration of the victim's age. *Id.*

[185] *See id.*

[186] *See* Verzemnieks, *supra* note 18, at D5. For further discussion of this issue *see infra* Part IA.

[187] *See* Abdel-Gawad, *supra* note 165, at 745 (citing Peggy Orenstein Schoolgirls (1994)).

[188] *See* FLA. STAT. ANN. § 230.23 (6)(d)(8) (West Supp. 1998). The statute requires school boards to:

adopt a code of student conduct for elementary and secondary schools and distribute the appropriate code to all teachers, school personnel, students, and parents or guardian, at the beginning of every school year. Each code shall be organized and written in language which is understandable to students and parents and shall be discussed at the beginning of every school year in student classes, school advisory councils, and parent and teacher associations. Each code shall be based on the rules governing student conduct and discipline adopted by the school board and be made available in the student handbook or similar publication. Each code shall include, but not be limited to. . . notice that violation of the school board's sexual harassment policy by a student is grounds for in-school suspension, out-of-school suspension, expulsion, or imposition of other disciplinary action by the school and may also result in criminal

boards adopt and distribute a code of student conduct that includes notice that violation of the school board's sexual harassment policy is grounds for disciplinary action, such as suspension, expulsion and possible criminal penalties.[189] Like the California statute, Florida's legislation is solely punitive and does not require schools to introduce sexual harassment into the curriculum.[190] Unlike the California statute, Florida's punishment scheme applies to all grade levels.[191] Additionally, unlike the other three states, Florida does require that the code of student conduct be "organized and written in language which is understandable to students and parents."[192] Thus, although the statute does not give specific guidance as to how Florida elementary school boards should develop sexual harassment policies, the Florida legislation does specify that boards must organize such policies in an age-appropriate manner.[193]

V. CONCLUSION: PROPOSED STATUTE

Because of the inadequacy of federal caselaw on the subject and because sexual harassment is prevalent in our nation's elementary schools, each state should enact legislation addressing an elementary school's responsibility for sexual harassment. The following model statute considers the peculiar difficulties of addressing conduct in elementary schools and incorporates the general themes of Title IX caselaw and the Department of Education guidelines and the examples of the Minnesota, California, Florida, and Washington Statutes.

Sexual Harassment In Schools Prevention Act

(1) Each school board shall form a committee of educators, parents, and students to adopt a written age-appropriate sexual harassment policy to apply to all school personnel and students.

(A) For purposes of this statute, sexual harassment shall be defined as unwelcome sexual advances, requests for sexual favors, or other sexually explicit communication that interferes with a student's learning environment. Such conduct or communication shall include, but not be limited to, conduct or communication between students. Such conduct or communication must be considered "unwelcome" by a reasonable person of the same age and gender of the victim. In defining what conduct constitutes sexual harassment, school officials must consider the age of the alleged harasser and any additional factors the committee deems appropriate;

(B) Said policy shall require that school officials respond to violations of said policy in an age-appropriate manner;

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penalties being imposed.

Id.

[189] *See id.*

[190] *See* Abdel-Gawad, *supra* note 165, at 745.

[191] *See* FLA. STAT. ANN. § 230.23(6)(d)(8) (West Supp. 1998).

[192] *Id.*

[193] *See id.*

(C) Said policy shall set forth age-appropriate examples of conduct or communication that constitutes sexual harassment and examples of age-appropriate disciplinary responses;
(2) Said committee of educators, parents, and students, shall review and revise as necessary the school's sexual harassment policy each year;
(3) Said committee shall also establish a process for discussing, in an age-appropriate manner, the school's sexual harassment policy with students;
(4) The State's Department of Education shall develop and provide to schools upon request at least one model policy and a model curriculum that apply to elementary schools and one model policy and model curriculum that apply to junior high schools and one model policy and model curriculum that apply to high schools.

In general, each elementary school should be required to develop with students and parents a clear and age-appropriate sexual harassment policy distinct from any policies to be used by junior high or high schools in the same district. This requirement would apply to all grade levels beginning at the kindergarten level. Second, to assure that the policy is age-appropriate, each policy should require the school official to consider the ages of the alleged harasser and the alleged victim when defining what conduct constitutes sexual harassment and should provide age-appropriate examples of sexual harassment and responses to such conduct. Third, because child development experts agree that sexual harassment is something children should learn about, each elementary school should be required to implement its own procedure for introducing sexual harassment into the elementary school curriculum at an age-appropriate level. Each elementary school should be given wide discretion on how to handle student-to-student sexual harassment taking into account the needs and concerns of the individual students involved and the community. The elementary school must ensure that the method is reasonably related to addressing conduct that rises to the level of sexual harassment, and to preventing the development of attitudes that lead to future acts of sexual harassment. For example, an elementary school may require that students learn about being sensitive to other students feelings or having healthy relationships with other students. On an individual basis, teachers should not be required to use the phrase, "sexual harassment," but in an age-appropriate manner should communicate to children that their behavior is unacceptable. At the same time, given the complexities of this issue, states should develop and provide model policies and curriculums to any school upon request. Finally, for further assurance of effectiveness, states should require that the committee periodically review and update their sexual harassment policies and curricula, particularly taking into consideration feedback from teachers, students, and parents. By implementing the model statute, states will be providing clear guidance for school officials to follow. Thus, states will not only prevent ridiculous results such as the kissing cases of the fall of 1996, but will also contribute to the elimination of the attitudes that cause and perpetuate sexual harassment in the future.

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