Notes

Providing Students with the Protection They Deserve: Amending the Office of Civil Rights' Guidance or Title IX to Protect Students from Peer Sexual Harassment in Schools

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I. Introduction

A female was asked to describe oral sex, stabbed in the hand, called a "whore," hit, grabbed in the buttocks, and backed up against a wall where two males held her arms and started yanking off her shirt as a male, who stated that he was going to have sex with her, removed his pants.[1] Another male told this same female that he could touch her anywhere he wanted to and no one would do anything about it.[2] He touched her breasts and buttock, and when she complained, she was told by a person in authority to "be friendly."[3] Another female was "thrown to the ground; laid on top of . . . in 'a sexual manner'; had her buttocks, breast, and genitals fondled"; and was told that she was going to be raped.[4] When she made a written complaint to someone in authority, it was torn up before it was even read and she was told not to be a whistleblower.[5] A third female, who was developmentally disabled and severely physically impaired, was repeatedly removed from supervision

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1. These were some of the allegations in the complaint filed by Barbara Erfurth concerning her daughter, Alma. Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000).

2. *Id.*

3. *Id.*

4. These were some of the allegations in Haines v. Metro. Gov't, 32 F. Supp. 2d 991 (M.D. Tenn. 1998).

5. *Id.*

and taken to undisclosed locations by a male with a known history of sexual misconduct.[6] The male took her to secluded areas to sexually assault and rape her.[7] During one assault, the female bled and vomited on herself. When persons in authority discovered the assault, they told the female not to tell anyone about the attack and to forget it ever happened.[8]

As troubling as these assaults are, they become even more alarming when one realizes that these attacks were experienced by American school children. The knowledge that the females in these situations are girls as young as ten years old, and were assaulted on school grounds during school hours, further adds to the distress.[9] And in each of these situations, teachers and principals were aware of the attacks but did little, if anything, to stop them.[10]

Reports of peer sexual harassment in American schools are growing at a staggering rate.[11] One potential reason for the increase in peer sexual harassment stems from schools' confusion about their legal responsibility to respond to peer sexual harassment complaints. This confusion arises because schools must contend with two different legal standards: a constructive notice standard to protect themselves from losing federal funding, and an actual notice standard to protect themselves from private lawsuits. Under the constructive notice standard, a school can be found liable, and thus lose its federal funding, if the school *knew or should have known* about the peer sexual harassment. Under the actual notice standard, a school can only be found liable, and thus owe money damages, if the school *knew* about the peer sexual harassment. As a result of this continuing confusion, schools end up vacillating between under-protecting students from harassers and

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6. These were the allegations made in Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999).

7. *Id.*

8. *Id.*

9. The girl in the first description was in sixth grade (approximately 11-12 years old), while the girl in the second situation was 10 years old. The age was not reported for the third girl, and although the facts of the case state that she was in high school, she was functioning intellectually and developmentally on the level of a first-grader (approximately 6 - 7 years old).

10. In the first situation, the girl was forced to sit with her teacher and her attackers and tell the attackers what she thought they had done. Then the boys spoke with a youth advocate about the harassment. In the second situation, the teacher did nothing. When the girl's mother called the principal, the principal gave the boys a one day in school suspension, and the boys retaliated against the girl with additional assaults. In the third situation, the principal, upon becoming aware of the situation, suspended the victim, and no disciplinary action was taken against her attacker.

11. *See* American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools* (1993) (as cited in Tianna McClure, *Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of* Davis v. Monroe County Board of Education, 12 HASTINGS WOMEN'S L.J. 95, 102-03 (2001)).

over-punishing students for conduct that does not rise to the level of sexual harassment. Thus, schools and students would benefit greatly from the promulgation of one standard for peer sexual harassment and the subsequent clarification of the two issues that the circuit courts have been unable to agree on: (1) who in the school needs to be notified of a peer sexual harassment problem for the school to have "officially received notice" requiring action on its part; and (2) whether a school simply needs to attempt to address a peer sexual harassment problem, or whether the school is required to actually effectively remedy the peer sexual harassment problem.[12]

When school districts need to know what the federal laws require of them, they turn to the Department of Education.[13] If the school's questions concern sexual harassment, the school will be directed to the Department's Office of Civil Rights ("OCR") for assistance.[14] The OCR writes Regulations and Guidance to help schools understand their responsibility under Title IX of the Education Amendments of 1972

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12. *Compare* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1248 (10th Cir. 1999) (noting that "[w]here the victim is complaining about a fellow student's action during school hours and on school grounds, teachers may well possess the requisite control necessary to take corrective action to end the discrimination," thus allowing teachers to receive notice), *and* Rosa H. v. Swan Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997) (finding that "[w]hether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge"), *with* Floyd v. Waiters, 171 F.3d 1264, 1265 (11th Cir. 1999) (reaffirming their holding that the superintendent or a member of the school board must have notice). *Compare* Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 261 (6th Cir. 2000) (holding that "where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior"), *with* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (holding that as long as the school "did not 'turn a blind eye and do nothing,'" the school could not be considered deliberately indifferent), *and* Doe v. Dallas Sch. Dist., 153 F.3d 211, 215 (5th Cir. 1998) (holding that when the principal called a meeting of the alleged child-molesting teacher, parent of the victim, and the victim, even though the teacher was not reprimanded or removed from the victim's classroom, the school was not deliberately indifferent). *See also* Joan Schaffner, Davis v. Monroe Board of Education: *The Unresolved Questions*, 21 WOMEN'S RTS. L. REP. 79 (2000).

13. Many states also have sexual harassment statutes that schools should be aware of to protect themselves from state law claims. *See e.g.* MINN. STAT. ANN. § 363.01 (West 1991); CAL. EDUC. CODE § 212.6 (West 1994); WASH. REV. CODE § 28A.640.020(2)(a)-(f) (West 1994); FLA. STAT. ANN. § 230.23(6)(d)(8) (West Supp. 1998) (as cited in Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, note 56 (2000)).

14. The OCR may instruct the school to review the OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, *available at* http://www.ed.gov/offices/OCR.shguide/index.html, or the OCR guide that was written for non-lawyers but covers the principles of the guidance, Protecting Students from Harassment and Hate Crimes, *available at* http://www.ed.gov/pubs/Harassment/.

("Title IX").[15] Unfortunately, the current Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties ("Revised OCR Guidance") only addresses what schools are required to do to protect themselves from losing their federal funding through the administrative process, rather than what school should do to protect themselves from private lawsuits seeking money damages.

When school districts cannot find guidance from the Department of Education, they may turn to the text of Title IX to determine their responsibility. Unfortunately, Congress did not speak directly to the standards that should be employed in the enforcement of Title IX when it originally passed or when it was subsequently amended.[16] This Note argues that the proper remedy to address the lack of clear guidance that schools receive concerning their legal responsibility with regard to peer sexual harassment is an initiative that will create *one* standard for both administrative and private enforcement. Thus, an effective initiative would require that either the Department of Education's OCR create a single set of Guidance for private enforcement and administrative enforcement by changing the administrative enforcement standard to the actual notice standard, or, in the alternative, that Congress amend Title IX to create a single standard for private enforcement and administrative enforcement by allowing for money damages under the constructive notice standard. Implementation of either solution would result in one standard for all enforcement under Title IX and would aid in providing answers to the two questions that have created a split in the circuit courts.

Part II of this Note will explore the problem of peer sexual harassment in schools and describe the progression of the use of Title IX in addressing this problem. It will also describe the changes required in the OCR Guidelines or Title IX to create a single standard. Part III will then explain the utility of making these changes to the OCR Guidelines and to Title IX. Next, Part IV will identify the obstacles to realizing the needed changes to the OCR Guidelines and to Title IX. Finally, Part V will describe a strategy for achieving the desired changes to the OCR Guidelines and to Title IX, while addressing the identified obstacles.

II. The Reality of Peer Sexual Harassment in Schools

A relatively recent study by the American Association of University Women reports that eighty-five percent of high school girls and seventy-six percent of high school boys report that they have been

15. 20 U.S.C. § 1681 (2001).
16. *Id.*

the victims of sexual harassment at the hands of their peers.[17] As a result of this harassment, many students suffer a drop in grades, loss of appetite, nightmares, feelings of isolation from family and friends, and feelings of sadness, nervousness and anger.[18] Students have also reported insomnia, ulcers, headaches, weight loss or gain, respiratory problems, and eating disorders.[19] Students have even attempted suicide to escape the sexual harassment they have been forced to endure at school.[20] In addition to the negative physical effects, sexual harassment can interfere with the learning process for the victimized student.[21]

While schools are required to prohibit the severe sexual harassment that results in the symptoms described above, schools are not required to prohibit the teasing and horseplay that have been accepted as a normal part of childhood and do not rise to the level of sexual harassment.[22] Although childish horseplay occasionally makes the headlines of newspapers when schools punish students (i.e. the six-year-old from North Carolina who was suspended for kissing a classmate[23]), according to the Supreme Court, conduct does not rise the level of sexual harassment unless the conduct is "so severe, pervasive, and objectively offensive" that it interferes with the victim's education.[24] In addition to interfering with the victim's education, the conduct must be sexual in

17. *See* American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools*, 7-11 (1993) (students were responding to a question inquiring whether they had been subjected to "unwanted and unwelcome sexual behavior that interferes with their lives.") (as cited in Tianna McClure, *Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of* Davis v. Monroe County Board of Education, 12 HASTINGS WOMEN'S L.J. 95, 102-03 (2001)).

18. Susan Fineran & Larry Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 SOC. WORK. 55, 57-59 (1998); Susan Fineran & Larry Bennett, *Gender and Power Issues of Peer Sexual Harassment Among Teenagers*, 14 J. INTERPERSONAL VIOLENCE 626, 637 (1999) (as cited in Jill S. Vogel, *Between a (Schoolhouse) Rock and a Hard Place: Title IX Peer Harassment Liability After* Davis v. Monroe County Board of Education, 37 HOUS. L. REV. 1525 (2000)).

19. *See* Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student on Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 89 (1992) (as cited in Tianna McClure, *Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of* Davis v. Monroe County Board of Education, 12 HASTINGS WOMEN'S L.J. 95, 102-03 (2001)).

20. Christopher Bagley, *Sexual Assault in School, Mental Health and Suicidal Behaviors in Adolescent Women in Canada*, 32 ADOLESCENCE 361, 363 (1997) (as cited in Jill S. Vogel, *Between a (Schoolhouse) Rock and a Hard Place: Title IX Peer Harassment Liability After* Davis v. Monroe County Board of Education, 37 HOUS. L. REV. 1525 (2000)).

21. *See* Lilian Chaves, *Responding to Public School Peer Sexual Harassment in the Face of* Davis v. Monroe County Board of Education, 2000 B.Y.U. EDUC. & L. J. 287, 300 (2000).

22. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652 (1999).

23. George F. Will, *Six Year Old Harassers?*, NEWSWEEK, June 7, 1999, at 88.

24. *Davis*, 526 U.S. at 631.

nature.[25] While kissing on the school playground should not be encouraged, an isolated incident would neither rise to the level of severe and pervasive conduct, nor be considered sexual when the supposed perpetrator is six years old. Unfortunately, the confusion that has developed in the schools as to what they will be held liable for has created a situation in which some schools are so fearful of liability that they are over-punishing children for behavior that hardly suggests sexual harassment.

A. How Title IX Fits In

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational institutions receiving federal funds. Specifically, it provides that:

> No 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[26]

The utilization of Title IX for a private cause of action with money damages in peer sexual harassment cases has evolved from three specific Supreme Court holdings.[27] The Supreme Court first considered whether Title IX included a private right of action in 1979 when a female student claimed that she was denied admission to the University of Chicago Medical School based on her sex.[28] The Seventh Circuit dismissed the claim because it found that there was no private cause of action under Title IX,[29] but the Supreme Court reversed that decision and held that Title IX *does* allow for a private cause of action.[30] In inferring the existence of a private cause of action, the Court reviewed the legislative history of Title IX and found that Congress stated two purposes for

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25. *See* Oncale v. Sundower Offshore Servs. Inc., 523 U.S. 75, 82 (1998) (instructing courts to look at the circumstances to determine if the parties conduct would constitute harassment); Saxe v. State College Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001) (instructing courts to look at the ages of the harasser and victim and the number of students involved); Seamon v. Snow, 84 F.3d 1226 (Utah 1996) (finding that harassment of a football player by his teammates, including taping his genitals to a towel bar, is not sexual harassment because there was no showing that the harassment was based on sex).

26. 20 U.S.C. § 1681(a) (2002).

27. *See generally,* Gregory M. Petouvis, *Student-on-Student Sexual Harassment in Higher Education: The Effect of* Davis v. Monroe County Board of Education, 8 VA. J. SOC. POL'Y & L. 397, 401-04 (2001).

28. Cannon v. Univ. of Chicago, 441 U.S. 677, 680 (1979).

29. Cannon v. Univ. of Chicago, 559 F.2d 1063, 1073 (1976).

30. *Cannon*, 441 U.S. at 717.

passing Title IX: (1) to end the use of federal funds to programs that discriminate, and (2) to provide protection from discrimination.[31]

Litigants added money damages to their private rights of action thirteen years later, in *Franklin v. Gwinnett Public Schools*, when the Supreme Court allowed a student to recover money damages from her school because the school failed to protect her from sexual harassment at the hands of her teacher.[32] In this holding, the Court suggested that liability under Title IX in the school context should be as broad as liability under Title VII in the employment context.[33] In the employment context, an employer can be held liable for sexual harassment if the employer had "constructive notice" of the harassment (i.e. if the employer "should have known").[34]

The Supreme Court clarified its position on constructive notice when it decided *Gebser v. Lago Vista Independent School District*.[35] In this decision, the Court held that school officials must have "actual notice" of a teacher's sexual harassment instead of only constructive notice.[36] The Court also stated that its reference to Title VII in *Franklin* was only intended to signify its endorsement of the proposition that "sexual harassment can constitute discrimination on the basis of sex."[37]

In addition to clarifying its position regarding actual notice in *Gebser*, the Court introduced the concept of "deliberate indifference" into Title IX litigation.[38] Deliberate indifference is a legal standard that was derived from a series of cases brought under 42 U.S.C. Section 1983 involving a municipality's failure to prevent a deprivation of its citizens' federal rights by instituting poor hiring practices for police officers[39] and failing to train police officers,[40] as well as from cases brought under the Eighth Amendment involving inadequate medical attention in prison.[41] In defining the standard, the Supreme Court instructed that the deliberate indifference standard was "something more than mere negligence [but

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31. *Id.* at 704.

32. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992).

33. *Franklin*, 503 U.S. at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)) (as cited in Patricia Romano, Davis v. Monroe County Board of Education: *Title IX Recipients' "Head in the Sand" Approach to Peer Sexual Harassment May Incur Liability*, 30 J.L. & EDUC. 63, 67 (2001)).

34. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70-71 (1986).

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

36. *Id.* at 290.

37. *Id.* at 282-83.

38. *Id.* at 290.

39. *See* Bd. of County Com'rs v. Brown, 520 U.S. 397 (1997) (as cited in *Gebser*, 524 U.S. at 291).

40. City of Canton v. Harris, 489 U.S. 378 (1989); Collins v. City of Harker Heights, 503 U.S. 115 (1992) (as cited in *Gebser*, 524 U.S. at 291).

41. Estelle v. Gamble, 429 U.S. 97 (1976) (holding that inadequate medical care in prison may violate the Eighth Amendment).

was] ... something less than acts or omissions for the very purpose of causing harm."[42]

B. The Supreme Court's First Peer Sexual Harassment Case

The Supreme Court first examined a school's liability for *peer* sexual harassment in *Davis v. Monroe County Board of Education*.[43] In this case, fifth-grader LaShonda Davis was subjected to the attempts of G.F.,[44] another fifth-grader, to grab her breasts and genitals, as well as to his comments "I want to go bed with you" and "I want to feel your boobs."[45] LaShonda told her teacher and her mother, who called the school to ensure that the principal had been informed of this misconduct.[46] No disciplinary action was taken against G.F.[47] G.F.'s misconduct continued when he put a doorstop in his pants during class and acted in a sexually explicit way toward LaShonda.[48] LaShonda reported the incident to her teacher and to her mother, who again followed up with a phone call to the school.[49] At one point, LaShonda asked her teacher if she and the other targets of G.F.'s harassment could speak with the principal themselves about the harassment.[50] The teacher denied the request and told the girls that "If [the principal] wants you, he'll call you."[51] G.F.'s advances escalated when he cornered LaShonda in the hallway and rubbed his body against her in a "sexually suggestive manner."[52] LaShonda again reported the behavior to her teacher and her mother.[53] When LaShonda's mother called the principal and asked what would be done, the principal replied, "I guess I'll have to threaten him a little bit harder." Eventually, G.F. was charged with, and pled guilty to, sexual battery.[54]

Unfortunately, the five-month ordeal was almost more than LaShonda could endure.[55] LaShonda's grades, which had previously been high, dropped because she was unable to concentrate on her

42. Farmer v. Brennan, 511 U.S. 825, 836 (1994).
43. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).
44. In peer sexual harassment cases, the alleged harassers are identified by initials only so as to protect their identity because they are minors.
45. *Davis*, 526 U.S. at 634.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Davis*, 526 U.S. at 635.
51. *Id.*
52. *Id.* at 634.
53. *Id.*
54. *Id.*
55. *Davis*, 526 U.S. at 634.

schoolwork.[56] Additionally, LaShonda told her mother that she did not know how much longer she could take this abuse, and LaShonda's father found a suicide note that she had written.[57]

In deciding *Davis*, the Supreme Court extended the holding in *Gebser* to peer sexual harassment and found that, under Title IX, a student could recover money damages from a school for subjecting its students to peer sexual harassment when: (1) a school official was deliberately indifferent to the harassment, and (2) the harassment was so "severe, pervasive, and objectively offensive that it barred the victim's access to education."[58] In order to qualify as deliberately indifferent, a "school official" who can administer student discipline must have actual knowledge of the sexual harassment.[59] The salient point in the *Davis* analysis is that a school cannot be held liable for "subject[ing] its students to harassment," unless the school had control over the situation where the harassment occurred and could have intervened.[60]

In reaffirming the deliberate indifference standard in *Davis*, the Court left unanswered the two questions involving peer sexual harassment that have created a split in the circuits: (1) who within the school has enough "control" to officially receive notice of peer sexual harassment; and (2) whether the school merely has to take some form of action to address the harassment, or, alternatively, whether the school is required to effectively halt the harassment in order to escape liability under the deliberate indifference standard.[61]

With regard to the former question, the Supreme Court has found that, in the Section1983 context, control is vested only in the few persons who have the ability to set the municipality's policies.[62] Thus, the Eleventh Circuit held that only the school board has enough control to receive notice of peer sexual harassment.[63] But in *Gebser*, the Supreme

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56. *Id.*

57. *Id.*

58. *Id.* at 633.

59. *Id.*

60. *Davis*, 526 U.S. at 645.

61. *Compare* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1248 (10th Cir. 1999) (noting that "[w]here the victim is complaining about a fellow student's action during school hours and on school grounds, teachers may well possess the requisite control necessary to take corrective action to end the discrimination," thus allowing teachers to receive notice), *and* Rosa H. v. Swan Elizario Indep. Sch. Dist., 106 F.3d, 659 (5th Cir. 1997) (finding that "[w]hether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge"), *with* Floyd. v. Waiters, 171 F.3d 1264 (11th Cir. 1999) (reaffirming their holding that the supervisor with the authority to take corrective action must be high enough up the chain of command that his acts constitute an official decision by the school district itself).

62. *See* Monell v. New York City Dept. of Soc. Servs. 436 U.S. 658, 694 (1978) (explaining this control in the context of a government's liability).

63. Floyd v. Waiters, 171 F.3d 1264, 1265 (11th Cir. 1999).

Court seems to expand control to include persons who have disciplinary control over students by finding control in "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on a recipient's behalf."[64] Further, after deciding *Gebser*, the Supreme Court ordered the Eleventh Circuit to reconsider its previous holding. Although the Eleventh Circuit reaffirmed its prior decision, this order for re-examination from the Supreme Court suggests that they perhaps would not have come out the same way.[65] Additionally, the Fifth and Tenth Circuits have found that control is vested in a much larger number of school employees because several school employees can address peer sexual harassment and take steps to correct it.[66] While the school board may set the large-scale policy regarding discipline, individual principals and teachers are able to intervene and discipline students who sexually harass other students.

Second, there is a lack of clarity about how much action is required when a school has notice of peer sexual harassment. In the Section1983 context, deliberate indifference can only be found when there is a deliberate choice to do nothing.[67] Thus, the Eighth Circuit and the Fifth Circuit have held that as long as the school "did not 'turn a blind eye and do nothing,'" the school could not be considered deliberately indifferent.[68] But when the person with control recognizes that one child's harassment of another child is so severe, pervasive, and objectively offensive that it interferes with the child's ability to learn, it seems unreasonable to require the school to attempt to remedy the situation only once. Thus, the Sixth Circuit requires the school to take further reasonable action once it becomes aware that its initial actions were ineffective.[69]

Because the Court has not squarely been presented with these issues, schools are left guessing as to their responsibilities. Schools that turn to the Revised OCR Guidance or to Title IX for help will be

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64. *Gebser*, 524 U.S. at 284.

65. *Floyd*, 171 F.3d at 1265.

66. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1248 (10th Cir. 1999); Rosa H. v. Swan Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997).

67. *See* City of Canton v. Harris, 489 U.S. 378, 389 (1989).

68. Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000).

69. Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (holding that the school district did investigate the allegations of the student and "initiated termination proceedings"); Doe v. Dallas Sch. Dist., 153 F.3d 211, 217 (5th Cir. 1998) (holding that having a policy was sufficient to overcome deliberate indifference). For example, the school may initially try speaking to the harasser about his or her behavior. If that does not end the harassment, the school may try making the harasser move his desk to a different part of the classroom and ensure that the harasser and the victim are not assigned to small groups with one another. If this course of action is unsuccessful, the school may move the harasser to another classroom and ensure that the harasser and victim do not ride the bus or have recess or lunch together. In sum, the school could escalate its actions until the harassment ceased.

disappointed because neither effectively speaks to the issue of what schools need to do to avoid liability for private money damage actions. Therefore, this Note proposes that either the Revised OCR Guidance be amended to describe a single set of guidance for administrative relief and private actions or, in the alternative, that Title IX be amended to create a single standard for administrative relief and private actions.[70]

C. Amending the Department of Education's Revised OCR Guidance

The OCR issued the Revised OCR Guidance on January 19, 2001.[71] Both the revised and the original issuances of the Guidance were promulgated pursuant to the OCR's authority under Title IX and the Department's Title IX implementing regulations to eliminate discrimination based on sex in educational institutions that receive federal funding.[72] The Supreme Court reaffirmed this authority in *Gebser* by noting that the Department had the power "to promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate."[73]

The Revised OCR Guidance was published pursuant to a notice requesting comments[74] and was intended to revise the 1997 Guidance[75] by the same title, "in light of subsequent Supreme Court cases."[76] Instead of revising the Guidance to reflect the holdings of the Supreme Court in *Gebser* and *Davis*, however, the OCR distinguished *Gebser* and *Davis* as applying only to private actions and maintained the pre-*Gebser* legal standards for administrative relief.[77] The preamble to the Revised Guidance reads: "The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages . . ." In effect, the OCR created two different legal standards.

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70. There are actually two potential courses of action within an amendment to Title IX. Either Congress can amend Title IX and, in doing so, preemptively answer the questions regarding who can receive notice and whether the school has to be effective in ending the harassment, or Congress can just amend Title IX. If Congress simply amends Title IX, then the courts can defer to the Revised OCR Guidance.

71. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5,512 (2001).

72. *Id.* Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

73. *See Gebser*, 524 U.S. at 292.

74. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092 (Nov. 2, 2000).

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

76. *See supra* note 74.

1. *The Difference Between the Revised OCR Guidance and Supreme Court Precedent*

The most salient difference between current Supreme Court precedent and the Revised OCR Guidance concerns the issue of notice. While the Court requires that the school receive actual notice of incidents of peer sexual harassment to hold the school liable for damages,[78] the Revised OCR Guidance would allow a school to be held liable, and thus lose its federal funding, based on constructive notice of peer sexual harassment.[79] In explanation of its actions, the OCR distinguished *Gebser* and *Davis* and explained that the Court was concerned with ordering money damages against a school for peer harassment when the school did not know about the harassment.[80] Thus, the OCR maintained the constructive notice standard and presented the assumption that constructive notice is preferable to actual notice where Congress or the Court has not spoken. In addition, the OCR explained that the purpose of administrative enforcement is to "make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms."[81]

The OCR was only partially correct in its reading of *Gebser*. While the Court was concerned about schools being liable for money damages in peer sexual harassment actions where the school did not know about the harassment, that is not why the court required actual notice. Rather, the Court required actual notice because the Court found that Title IX was passed under the Spending Clause. A statute passed under Congress's spending power requires that the recipient be aware of the conditions placed on acceptance of the funds.[82] Thus, the Court's holding is based on the finding that Title IX requires that the schools have notice that they will be liable for subjecting students to sexual harassment, and is not solely based on the public policy rationale that the Court does not want the schools to be held liable when they did not know about the harassment.

The OCR presumably makes the assumption that keeping the constructive notice standard for administrative relief will provide students with greater protection. But the OCR's decision to create two standards in effect provides less protection for students because: (1)

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77. Revised OCR Guidance, *supra* note 14.

78. *See also Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 649-50 (holding that sexual harassment satisfies the notice requirement). .

79. Revised OCR Guidance, *supra* note 14, at 13 (stating that "[f]or the purpose of compliance with Title IX regulations, a school has a duty to respond to harassment about which it reasonably should have known, i.e. if it would have learned about the harassment if it had exercised reasonable care or made a 'reasonable diligent inquiry'.")

80. Revised OCR Guidance, *supra* note 14 .

81. *Id.*

82. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

contending with two separate legal standards for the same behavior may be confusing to schools; (2) schools have little reason to conform to the higher administrative standard, as no school has ever lost its federal funding for deliberate indifference to peer sexual harassment;[83] and (3) by segregating the legal standards, the OCR has deprived the Court of agency guidance to defer to when deciding the issues that have created a split in the circuits.[84] Furthermore, the OCR seems to assume that keeping the constructive notice standard will allow students greater protection because the OCR can intervene before the school would be required to under an actual notice standard. While this may initially appear logical, it seems difficult to argue that many parents or students would file a complaint with the Office of Civil Rights at the Department of Education before they attempted to apprise the school of the situation.[85] But even if the OCR does receive a complaint without the school's knowledge of a problem, when the OCR notifies the school of the complaint, it is providing the school with actual notice. Thus, utilizing a constructive notice standard for administrative relief under Title IX does not achieve the desired results of providing greater protections for students.

2. *Addressing the Split Among the Circuits*

In *Gebser*, the Supreme Court suggested that any school personnel who could stop the harassment and enact disciplinary measures against the harasser could receive notice.[86] Some courts, including the Tenth Circuit, have held that notice to a teacher who has authority over classroom discipline qualifies as actual notice.[87] Other courts have disagreed and argued that, because only the school board has the authority to institute disciplinary policy, the school board would be the only entity that could institute corrective measures and should be the only entity qualified to receive the actual notice.[88] The Revised OCR Guidance adopts the position of the Tenth Circuit and allows a wide

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83. Interview with Doreen Dennis, Attorney for the Office of Civil Rights at the Department of Education, in Washington, D.C. (June 14, 2002). *See also* Tamar Lewin, *A Touching Issue: Schools Run Scared As Sex Suits Increase*, COURIER-JOURNAL LOUISVILLE (KY), June 28, 1995, at 1A.

84. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 841-42 (1984) (holding that when Congress gives a federal agency power to implement regulations and the agency promulgates reasonable regulations on point, the courts should defer to the agency's regulation when encountering an ambiguity in the law.).

85. *See* Interview with Doreen Dennis, supra note 83 (indicating that when questioned on this point specifically, Ms. Dennis did not know how often this happened).

86. *Gebser*, 524 U.S. at 290.

87. *See Murrell*, 186 F.3d at 1247 (10th Cir. 1999).

88. *See* Floyd v. Waiters, 133 F.3d 786, at 789-90 (11th Cir. 1998), *aff'd on remand*, 171 F.3d 1264 (1999).

range of persons to receive the actual notice, including: the Title IX coordinator, the principal, campus security, any bus driver, any teacher, any affirmative action officer, or the staff in the office of student affairs.[89] Thus, according to the Revised OCR Guidance, any school employee who can effectuate student discipline can receive actual notice of peer sexual harassment and, if deliberately indifferent to that notice, can subject the school to liability under Title IX.[90]

The second unsettled issue in peer sexual harassment cases concerns whether a school's response to peer sexual harassment has to effectively remedy the harassment for a school to escape liability under the deliberate indifference standard.[91] In the Section 1983 context, from which the deliberate indifference standard was derived, it seems as though deliberate indifference required only that that actor did not consciously decide to "do nothing."[92] Some courts have followed that rationale and applied liability to schools only when the school has virtually ignored all complaints of harassment.[93] Other courts have required that when a school knows that its first attempt to stop the sexual harassment has failed, it is required to try different solutions until it finds one that is effective in stopping the peer sexual harassment.[94] The Revised OCR Guidance takes the latter approach and requires that if a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action.[95] If the school's first approach does not work, then a series of escalating consequences may be necessary.[96] Thus, the school is required to continue its efforts to stop the sexual harassment until those efforts are effective. This requirement is logical because if a school knows that sexual harassment is occurring, and knows that its steps have been ineffective to halt the harassment, then the school is knowingly

89. Revised OCR Guidance, *supra* note 14, at 13.

90. Revised OCR Guidance, *supra* note 14, at 12.

91. *See Murrell*, 186 F.3d at 1248 (holding that "complete refusal to investigate known claims . . . amounts to deliberate indifference"); *Rosa H.*, 106 F.3d at 650 (holding that "an employee who has been invested by the school board with supervisory power. . . actually knew of the abuse" and failed to end the abuse.); *Vance*, 231 F.3d at 261 ("the school district must respond and must do so reasonably in light of known circumstances").

92. *See* City of Canton v. Harris, 489 U.S. 378, 390 (1989).

93. *See* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (holding that the school district did investigate the allegations of the student and "initiated termination proceedings"); Doe v. Dallas Sch. Dist., 153 F.3d 211, 217 (5th Cir. 1998) (holding that having a policy was sufficient to overcome deliberate indifference).

94. *See* Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000).

95. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512, iii (2001).

96. Intlekofer v. Turnage, 973 F.2d 773, 779-80 (9th Cir. 1992) (holding that escalation is required in a Title VII case).

subjecting its students to sexual harassment. This is precisely what Title IX was intended to prevent.

D. Amending Title IX

Congress has the power to amend Title IX on its own volition. Congress might do this in instances where it believes that the Supreme Court has misinterpreted legislative intent or when Congress wants to expand or limit the reach of a statute.

1. *The Difference Between Title IX and Supreme Court Precedent*

In the absence of clear congressional intent, the Court "fills in" what it believes Congress intended when it enacted a particular statute. However, Congress can effectively overrule a Supreme Court holding by passing a new statute or amending the old statute if it believes that the Court was wrong in its interpretation of congressional intent. This gives Congress the option to clarify its intent, or sometimes to reiterate its intent, when Congress's intent is not clear to the Court.[97] Under Title IX, the Court has effectively "filled in" congressional intent by determining that there is a private cause of action,[98] and that in order for an individual to receive money damages for that private right of action, the school must have actual notice of the sexual harassment.[99] Thus, if Congress decided that the Court misinterpreted its intent when the Court established a remedy provision requiring actual notice, Congress could pass an amendment to Title IX that would replace the actual notice standard with the constructive notice standard, in effect overruling the Supreme Court.

One may argue that it is unlikely that Congress will expand the reach of Title IX to cover more private actions because it never intended to have a private action for money damages under Title IX in the first place. Rather, it may be argued that Title IX was modeled after Title VI to demonstrate that Congress's intent was only to prohibit federal funds from supporting discrimination, not to provide a vehicle for private lawsuits. If prohibiting federal funds from supporting discrimination was Congress's only intent, then it would be unlikely that Congress would amend Title IX to increase the opportunity for private damages even if it would provide greater protection for students.

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97. *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687; 29 U.S.C. § 794; 42 U.S.C. §§ 2000d-4a (responding to the Supreme Court decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), requiring a school to execute a program-specific assurance of compliance in order to continue receiving federal financial aid).

98. Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979).

99. *Gebser*, 524 U.S at 285.

While these arguments are not without merit, Congress could amend Title IX based on a change in philosophy. From a public policy perspective, it seems troubling that current civil rights laws provide less protection for children than they do for adult employees. Moreover, children do not have the same flexibility to leave or change schools that adults have to leave or change jobs if they are being subjected to sexual harassment.[100] In addition, children who have been sexually harassed have a higher propensity to suffer from greater negative effects for a longer period of time than adult victims.[101] The negative impact sexual harassment has on children was considered by Title IX's drafter, Senator Birch Bayh. In introducing Title IX to Congress, Senator Bayh noted that "because education provides access to jobs and financial security, discrimination here is doubly destructive."[102]

Further, Congress will not be thwarted by a Spending Clause issue as long as it amends Title IX to state that, from this date forward, any school that accepts federal funding must assent to the fact that it can be held liable for discriminating against students on the basis of sex, including sexual harassment by teachers or peers when the school knew or should have known about the harassment. Thus, any school that accepts the federal funding will be fully aware of the conditions placed upon the money, and Congress will have escaped the problems noted by the Court in *Gebser* when it refused to apply a constructive notice standard.[103]

2. *Addressing the Split Among the Circuits*

While remaining silent on who needs to receive notice of peer sexual harassment, Congress mentioned the effectiveness of remedies when it last expanded Title IX with the Civil Rights Restoration Act of 1987. In that amendment to Title IX, Congress not only indicated awareness that Title IX was being used to prohibit sexual harassment, but also noted that one of the purposes of the Restoration Act was to assist in resolving sexual harassment cases.[104] While prohibiting sexual

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100. *See* Julie Fay, Note, Gebser v. Lago Vista Independent School District: *A Look at School Districts' Liability for Teacher-to-Student Sexual Harassment*?, 31 CONN. L. REV. 1485, 1506 (1999).

101. *See* Andrea Giampetro-Meyer, *Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN'S L.J. 301, 305 (1997).

102. Martha McCarthy, *Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond*, 12 HASTINGS WOMEN'S L.J. 177, 212 (2001)(statement of Senator Bayh, citing 118 CONG. REC. 5804-15(1972)).

103. *Gebser*, 524 U.S. at 287-88.

104. *See* Revised Sexual Harassment of Students by School Employees, Other Students or Third Parties, 66 Fed. Reg. 5512, n.20 (2001) (citing S. REP. NO. 64, 100th Cong., 1st Sess. at 12 (1987)).

harassment, Congress indicated that if discrimination occurred, schools would need to implement effective remedies.[105] Thus, while silent on the issue of notice, it seems that given the opportunity to amend Title IX again, Congress might require schools to continue attempting new approaches until they are effective in eliminating peer sexual harassment.

III. The Utility of the Solution

Although convincing Congress to amend Title IX may be more difficult than convincing the OCR to amend the Revised OCR Guidance, amending Title IX could provide immediate answers to the questions on which the circuit courts have disagreed. Amending the OCR Guidance, however, may not be effective unless the Supreme Court defers to it to answer the questions that have created the split in the circuits.[106] Regardless, either solution will succeed in creating one standard for both administrative and private enforcement.

Because schools generally do not fear losing their federal funding, most schools are more concerned with ensuring that their actions will not make them liable for money damages under current Supreme Court precedent.[107] Aligning the Revised OCR Guidance with Supreme Court precedent would increase the likelihood that when the Court is squarely presented with the questions that divide the circuits, the Court will defer to the Revised OCR Guidance. In situations where (1) Congress is silent, (2) Congress has delegated power to the federal agency to implement regulations, and (3) the agency has promulgated reasonable regulations, the Court should defer to the agency's regulations.[108] The Supreme Court has already noted that Congress was silent on the remedy provisions under Title IX.[109] Congress delegated power to the Department of Education to implement regulations under Title IX.[110] Thus, it can be inferred that the Court did not defer to the OCR's Guidance in *Gebser* because the Guidance at that time promulgated a

105. *Id.* (citing S. REP. NO. 64, 100th cong., 1st Sess. at 5 (1987)).

106. *Supra* note 12.

107. Interview with Jon Bailey, Partner, Bose McKinney & Evans, Indianapolis, Ind. (Apr. 27, 2002).

108. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-845 (1984).

109. *Gebser*, 524 U.S at 285, citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. at 71(1992) (Scalia, J., concurring in judgment) ("Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies.").

110. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 ("The Secretary shall prepare and publish, not later than 30 days after the date of the enactment of this Act, proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 20 U.S.C. §§ 1681 et seq. relating to the prohibition of sex discrimination in federally assisted education programs. . . ").

constructive notice standard for both administrative and private damage actions. The Court in *Gebser* held that constructive notice was unreasonable because schools, in accepting their federal funding under the Spending Clause, did not know that they were accepting potential liability under a constructive notice standard.[111] Thus, it seems that if the OCR Guidance were in place with the actual notice standard, then the Court would be required to defer to the OCR Guidance in deciding the questions that have created a split in the circuits.

In the alternative, Congress could amend Title IX to answer the questions that have created a split in the circuits in two different ways. In either circumstance, it is Congress that would need to take action. In the first instance, Congress can preemptively answer the questions on which the circuits have split by clearly stating that anyone who has control over student discipline (i.e. school board, superintendent, principals, teachers, bus drivers, teacher's aid) can receive constructive notice, and by clearly stating that the school must escalate its intervention until the sexual harassment is alleviated. Thus, Congress would foreclose this debate in the courts and provide greater protection for students. In the second instance, Congress can decide to amend Title IX by merely inserting a provision which states that if a school accepts federal funding, it is consenting to the possibility of liability for sexual harassment under a constructive notice standard. If Congress only changes the standard and does not answer the questions that have created a split in the circuits, then the OCR would need to step in and revise the Revised OCR Guidance to reiterate the pre-*Gebser* Guidance, covering both administrative relief and private damages with a constructive notice standard. Because this would be asking the OCR to return to a position that it only changed on the direction of the Supreme Court, it seems likely that if Congress returned the standard to constructive notice, then the OCR would be amenable to returning to its prior position. Following the same argument as above, the Court would be more likely to defer to the Revised OCR Guidance when the questions that have created a split in the circuits are raised.

IV. Obstacles to Implementation

Either solution creates a set of obstacles for a third party organization interested in providing students with an educational environment free from peer sexual harassment. However, for both of these solutions, getting the issue of peer sexual harassment into the minds and hearts of the Office for Civil Rights, Congress, and the

111. *Gebser*, 524 U.S. at 287 ("If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior*, it will likewise be the case that the recipient of funds was unaware of the discrimination.").

American public during this time of war on terrorism and decreased public support for civil rights may be difficult.[112] In addition, to the extent that civil rights advocates could be used to build and strengthen a coalition, their resources may be diverted to attend to the current discrimination against certain religious and racial groups.[113] For the purpose of the next two sections, a hypothetical group, Law Students for Harassment Free Schools ("LSFHFS"), will be used. It is composed of law students and law professors from across the country who are interested in assisting primary and secondary schools in creating an educational environment free from sexual harassment. The group is based out of Washington, D.C., but also has chapters in various law schools around the country.

A. Revising the Revised OCR Guidance

The first major obstacle in revising the Revised OCR Guidance is convincing the Department of Education that revisions are needed in the first place. Because the last revision was published a little more than two years ago, in January 2001, and there have not been any Supreme Court cases that would affect the OCR Guidance since *Davis* in 1999, it seems unlikely that the OCR would propose changes and request comments on its own volition in the relatively near future. If the OCR could be convinced to propose changes and request comments, the next obstacle would be convincing the OCR to change its position regarding the notice standard. Barring an amendment to Title IX or new Supreme Court precedent, it seems unlikely that the OCR will change its position to create a single set of Revised OCR Guidance using the actual notice standard. This reluctance to change is again due to the fact that little has changed since the OCR decided to segregate private causes of action involving money damage remedies from the Revised OCR Guidance addressing cases involving administrative remedies. In addition to the OCR, civil rights advocates may initially oppose this change in

112. George M. Kraw, *First, Do No Harm: Lawyers and the Terrorist Threat*, THE RECORDER, Oct. 3, 2001 ("Choices made in response to the terrorist acts most affect the nation's defenders, not its lawyers or civil libertarians. The bar's first task should be to do no harm to those who protect us. Police and military must not be forced to take unnecessary risks because misguided, myopic and self-absorbed special interest groups have successfully denied them the tools they need to do their job.").

113. Jason Hoppin, *Civil Rights Lawyers Sound Alarm: For No, Focus is on Enlisting Help for Victims of Hate*, N.J. L.J., Sept. 24, 2001 ("[C]ivil rights lawyers say they are focused on ending a wave of violence against Arab-Americans following last week's terrorist attacks. . . . The lawyers also warned of impending legislation being proposed by the Department of Justice that would expand wiretap authority and allow deportations of immigrants without evidence. They said they would fight the proposals through politics or, if need be, the court system.").

standards, assuming that students would have less protection if the constructive notice standard for administrative liability were removed.[114]

If the rationale for creating one set of Revised OCR Guidance was accepted by the OCR and civil rights advocates, and the Revised OCR Guidance was amended, the next obstacle would be to create an opportunity for the Court to defer to the Re-Revised OCR Guidance and convincing the Court that it should defer to the Re-Revised OCR Guidance. To create an opportunity for deference, LSFHFS would have to get the "right" case in front of the Court while the Court has the "right" composition to hear the case. LSFHFS would need to find a case with egregious facts in which a school employee who is allowed to discipline students (i.e. a classroom teacher), had actual knowledge of the peer sexual harassment and the school's attempt to stop the harassment previously was ineffective (i.e. the harasser was given detention but the harassment continued). Although it would be ideal to have both issues decided in one case, there is a chance that the Court would decide only the actual notice question and, finding liability, would not need to decide the effectiveness issue. However, even if such a case is found, it may be difficult to convince a parent to allow his or her child's case to continue through the legal system as opposed to settling out of court.[115]

After finding a case with appropriate facts, it should be brought in one of the district courts in a circuit that has been unfriendly to peer sexual harassment claims. For example, the Eleventh Circuit has consistently been against expanding liability for peer sexual harassment in school.[116] Then, when the case is lost in the circuit court, the plaintiffs can emphasize the split in the circuits to try to convince the Supreme Court to grant certiorari. Although the Supreme Court may be the ultimate goal, the coalition needs to be careful of the timing of this case because the composition of the Court may change. With several Justices nearing retirement and a conservative President in office, a shift to a more conservative Court in the next few years is likely. Not only would a conservative Court that disfavors federal government intervention into traditional state issues not go along with a plan that could increase school liability, it could also end up overturning *Davis* and not recognizing school liability for peer sexual harassment at all. Even if LSFHFS could convince the Supreme Court to take the case, it would still have to convince the Court that the Re-Revised OCR Guidance is reasonable.

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114. *See* Revised OCR Guidance, *supra* note 14, at iv (commentators agree on using the constructive notice standard).

115. Interview with Jon Bailey, Partner, Bose McKinney & Evans, Indianapolis, Ind. (Apr. 27, 2002).

116. *See* Floyd v. Waiters, 171 F.3d 1264, 1265 (11th Cir. 1999) (stressing that the school must be on notice to be liable).

B. Amending Title IX

In addition to the normal obstacles to the legislative process, which include finding a sponsor for the amendment in the House, getting the amendment out of the House Committee, achieving bipartisan support for the amendment in the House, getting the amendment out of committee in the Senate, achieving bipartisan support for the amendment in the Senate, and falling under the radar for a presidential veto, an attempt to pass an amendment to Title IX might face other barriers. The public may not initially be supportive of an amendment that appears to make it easier for an individual student to sue his or her school and deplete the school district's already limited funds.[117] The public may also oppose the constructive notice standard because it would be possible for the school to be found liable to a student for money damages without actually being aware of the sexual harassment. Additionally, advocates for school districts may also oppose this amendment because it would increase a school's potential liability. In light of overcrowded classrooms and increased pressure on teachers to prepare students for a changing world, these advocates may argue that a teacher cannot be held responsible for each student's behavior at all times.

V. Strategies for Implementation

Because of the limited financial resources of LSFHFS, forming a coalition with other groups would be imperative to the success of either initiative. The national chapter of LSFHFS should seek to form a coalition with other groups who traditionally advocate for the protection of children. Although these other groups will undoubtedly be busy pursuing their own agendas, some form of an exchange could be arranged where those group members support either the Revised OCR Guidance Revision or the Title IX amendments in exchange for LSFHFS's legal assistance with one of their initiatives.

This can be accomplished, as can propelling the issue of peer sexual harassment into the minds and hearts of the American public, through a media campaign. LSFHFS chapters in the Eleventh Circuit or other circuits that show signs of being unfriendly to peer sexual harassment claims should begin by identifying egregious cases of peer sexual harassment to take to the local and national media. Once these cases are found, the LSFHFS chapters can work with the families to secure their permission to take these cases to the media. Because these

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117. Interview with Jon Bailey, Partner, Bose, McKinney & Evans, Indianapolis, Ind. (Apr. 27, 2002) (stating that, although most schools have insurance for peer sexual harassment claims, when a particular school has regular claims against that policy, the premium is likely to increase).

are children who have been through traumatic events, the families' wishes for privacy should be respected and the children's identities protected at all costs. Identifying cases in certain geographic areas serves two purposes. First, if the local LSFHFS chapters can find factually egregious cases where a school employee with control over student discipline had actual awareness of the peer sexual harassment, or where the school took a single ineffective action to stifle the harassment, then it allows the national LSFHFS to begin identifying cases that have the potential to go to the Supreme Court. Second, the LSFHFS can use the media attention to build a coalition of parents and students who would be interested in taking up this "local" cause. Thus, while the national chapter is focusing on building coalitions with other groups that protect children, taking egregious cases to the national media, and organizing demonstrations, the local chapters and all of their "local" supporters can begin working on telephone and letter-writing campaigns to members of Congress and the President.

The public pressure created by the media attention, the demonstrations, and the telephone and letter-writing campaigns should be utilized to compel the President to take an active role in ending peer sexual harassment through the Department of Education. In the alternative, public pressure should be used to persuade individual members of Congress to overcome partisanship to solve this issue. If the amendment to Title IX were pursued, local chapters across the country could be utilized to find cases, to create media attention, and to use local citizens to write letters and visit their elected representatives.

A. The Strategy for Changing the OCR

Before the media campaign begins, the national LSFHFS chapter should attempt to gain the support of civil rights advocates. Civil rights advocates may initially be opposed to changing the notice requirement for the administrative remedy from constructive notice to actual notice, but the national LSFHFS chapter should attempt to convince civil rights advocates that having a constructive notice standard in the administrative process, in reality, provides no extra protection for children who are sexually harassed by a peer. As stated earlier, since Title IX's enactment, no school has lost federal funding because of peer sexual harassment through the administrative process.[118] Requiring different standards in the administrative process and in the judicial process has confused schools and has created a situation where schools, fearing liability, are over-punishing students for acts that do not qualify as sexual harassment. Persuading civil rights advocates to support the actual

118. Interview with Doreen Dennis, Attorney for the Office of Civil Rights at the Department of Education, Washington, D.C. (June 14, 2002).

notice standard, a standard that they have strongly advocated against in the past, might encourage the OCR to take this request more seriously. If the civil rights advocates could be convinced to support this initiative, or at least not to oppose it, the aforementioned media plan should be initiated. As part of the media strategy, all chapters of the LSFHFS should educate the public about the prevalence of peer sexual harassment and circulate an explanation of how this initiative will provide greater protection for students. Thus, with the pressure on the President created by the media campaign and the support of the civil rights advocates, hopefully, the OCR will reevaluate its Revised OCR Guidance and change the administrative enforcement standard from constructive notice to actual notice.

After the Re-Revised OCR Guidance has been released for public comment, it is important that all LSFHFS chapters, civil rights advocates, and the coalitions of groups who advocate for the protection of children submit comments supporting the change in the administrative relief standard. By receiving a deluge of comments from the entire community, the OCR will be more likely to adopt the change.

If the OCR does indeed amend the Revised OCR Guidance, then the national LSFHFS should return its focus to the cases discovered by the local LSFHFS chapters. By utilizing egregious cases in which a school employee who can discipline students had actual notice, and the school's singular attempt to resolve the harassment is ineffective, the district courts would be required to decide the issues that have divided the circuits. If the case is not decided favorably by deference to the Re-Revised OCR Guidance, then the cases can be appealed to the circuits. If the circuit courts defer to the Re-Revised OCR Guidance, then a victory is attained because students receive greater protection. If the circuit courts do not defer to the Re-Revised OCR Guidance, then the case can be appealed to the Supreme Court.

On the other hand, if the OCR does not amend the Revised OCR Guidance, then the coalition would need to increase its media campaign by finding more cases, holding more demonstrations, and writing more letters. This strategy of using the media to call attention to the problem, using this attention to pressure the President, and then using the President to compel the OCR to release a new policy for comment, should be repeated until it is successful.

B. Legislative Strategy

Similar to the coalition that should be formed for revising the Revised OCR Guidance, a coalition would be needed for the legislative strategy. The civil rights advocates would be the strongest supporters of this amendment to Title IX and their help should be utilized to its fullest potential. Many of these advocates will have experience in lobbying and

will also have a good number of contacts in congressional offices. Advocates for school districts, on the other hand, will be more difficult to convince. The national LSFHFS chapter should ask for a meeting with the advocates for school districts to discuss the proposed amendment to Title IX. At this meeting, LSFHFS should remind the advocates for school districts that Congress has already spoken about its intent to protect students from sexual harassment in schools[119] and that when Title IX was last amended, Congress specifically increased protection for students.[120] In addition, LSFHFS should highlight the fact that schools and students will be better off if they have one standard and definitive answers to the two questions that have created a split in the circuits.

As the media is alerting the American public to the problem of peer sexual harassment and the public is becoming upset by what little protection American schoolchildren have, the national LSFHFS chapter should be meeting with men and women in Congress who have a strong record in education reform or those members who are relatively new to Congress and want to champion an issue with significant national media coverage. Once the national LSFHFS chapter has found a sponsor who will dedicate resources to shepherding this amendment through Congress, all the local LSFHFS chapters will need to increase their letter-writing campaigns, place telephone calls to their representatives' offices encouraging passage of the amendment, organize demonstrations to increase awareness, and attempt to meet with their local members of Congress in Washington or in his or her home district.

If this amendment to Title IX ultimately fails in Congress, the coalition may attempt to pass similar legislation through state legislatures. Currently, Minnesota,[121] California,[122] Washington,[123] and Florida[124] have state statutes that prohibit sexual harassment in schools. States could pass statutes that speak to the questions of who needs to have notice and whether a school's actions have to be effective in halting

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119. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979); 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).

120. *See Gebser*, 524 U.S. at 287, *and* S. REP. NO. 64, 100th Cong., 1st Sess. at 12 (1987).

121. *See* Minn. Stat. Ann. §363.01 (West 1991) (as cited in Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, note 56 (2000)).

122. *See* Cal. Educ. Code §212.6 (West 1994) (as cited in Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, note 56 (2000)).

123. *See* Wash. Rev. Code §28A.640.020(2)(a)-(f) (West 1994) (as cited in Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, note 56 (2000)).

124. *See* Fla. Stat. Ann. §230.23(6)(d)(8) (West Supp. 1998) (as cited in Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, n.56 (2000)).

peer sexual harassment. Also, the coalition could look at assisting states to strengthen their state tort law of negligent supervision.[125] Since the states have routinely been used as laboratories for experimentation before a plan is rolled out on a national basis, a successful program in a few states might be the strongest factor available to push this legislation forward on a national level.[126]

VI. Conclusion

This Note has argued that an initiative creating one standard for both administrative and private enforcement is the proper remedy to address the problems created by the lack of clear guidance that schools receive with regard to peer sexual harassment. Such an initiative would require that the OCR amend the Revised OCR Guidance, changing the administrative relief to the actual notice standard, or, in the alternative, that Congress amend Title IX to allow for money damages under the constructive notice standard. Either initiative will produce one standard for all Title IX enforcement and will provide answers to the two questions that have created a split in the circuits.[127]

Although the OCR's decision to create two separate standards for administrative and private relief was presumably intended to provide greater protection for students, it actually provides less protection. By aligning the Revised OCR Guidance with Supreme Court precedent, the OCR would increase the likelihood that when the Court is squarely presented with questions that have divided the circuits, the Court will defer to the Revised OCR Guidance. In the alternative, Congress can amend Title IX to require that in order to obtain future funding, schools assent to the constructive notice standard. In this amendment, Congress might also directly answer the two questions the have created a split in the circuits or may, by amending the notice standard, allow the OCR to return to the pre-*Gebser* OCR Guidance and increase the chances for deference by the courts when squarely presented with these questions.

While both strategies will face obstacles, by utilizing an effective media strategy, assembling a coalition, and finding egregious cases to

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125. *See* Martha McCarthy, *Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond*, 12 HASTINGS WOMEN'S L.J. 177, 204 (2001).

126. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.").

127. *See Murrell*, 186 F.3d at 1248 (holding that "complete refusal to investigate known claims . . . amounts to deliberate indifference"); *Rosa H.*, 106 F.3d at 650 (describing how "an employee who has been invested by the school board with supervisory power . . . actually knew of the abuse" and failed to end the abuse); *Vance*, 231 F.3d at 261 ("the school district must respond and must do so reasonably in light of known circumstances").

bring in circuits that have reputations for being unfriendly to peer sexual harassment claims, either strategy has a greater chance of answering the questions that have created a split in the circuits, thus ending confusion for schools and finally providing students with the protection from peer sexual harassment that they deserve.