1998

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THE UNIVERSITY'S LIABILITY FOR PROFESSOR-STUDENT SEXUAL HARASSMENT UNDER TITLE IX

Henry Seiji Newman

In May, 1994, Darleen E. Pallett, an undergraduate at Iona College, received an “F” on a paper she had submitted in Professor Michael Palma’s British Poetry class. Pallett agreed to meet Professor Palma in his office on the Iona campus to discuss her grade. Upon her arrival, Palma closed the office door and sat in front of the door. Immediately, Palma embarked upon a sexually explicit discussion of his personal sexual history, fantasies, and opinions. Palma closed his eyes, licked his lips, and rubbed his hands together. Palma told Pallett that he envisioned her naked, stated that he was likely to have a sexual dream about Pallett, and inquired into Pallett’s personal sexual activity.

Only after stating that she had to go home did Palma address Pallett’s grade. Without looking at the paper, “Palma asked Pallett if she would be happy with a final grade of ‘C’ for the course. Palma said that she would.” Later, Pallett would learn that students and faculty had filed at least five other harassment complaints against Professor Palma.

In January, 1995, Pallett filed suit under Title IX of the Education Amendments of 1972 (“Title IX”) against Iona College. She claimed that Iona should be liable for Palma’s sexually discriminatory acts. The district court, although acknowledging that Palma’s behavior was sexual harassment, granted Iona’s motion for summary judgment based on its finding that the college took appropriate remedial action upon learning of the harassment. On appeal, the Second Circuit vacated the district court’s decision.

1. Kracunas v. Iona College, 119 F.3d 80, 83 (2d Cir. 1997).
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id. at 84.
8. 20 U.S.C. §§ 1681-1687 (1994). Title IX provides, in part: “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 . . . .” Id. § 1681(a).
10. Kracunas, 119 F.3d at 82.
12. Id. at 1025.
principles adopted from Title VII of the Civil Rights Act of 1964,\textsuperscript{14} the court of appeals remanded the case for further proceedings consistent with the court's decision that Iona may be liable for the actions of Professor Palma.\textsuperscript{15}

As the \textit{Iona} case demonstrates, applying a proper standard of Title IX institutional liability is an unsettled issue.\textsuperscript{16} Recognizing the limits of a university's moral incentives to end sexual harassment,\textsuperscript{17} courts and commentators view potential liability as an effective means of preventing sexual harassment \textit{before} it occurs\textsuperscript{18} and as an assurance that institutions will respond quickly and determinedly to their legal obligations.\textsuperscript{19} Yet, there is considerable debate—among scholars as well as within the courts—over the precise standard of liability to impose upon universities.\textsuperscript{20} The significance of this unresolved issue is


\textsuperscript{15} Kracunas, 119 F.3d at 91.

\textsuperscript{16} \textit{See} Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1420-21, 1426 (N.D. Cal. 1996) (rejecting a Fifth Circuit standard of institutional liability, which requires actual and affirmative intent to sexually harass, in favor of a "knows or should have known" standard); Robert J. Shoop, \textit{The Legal Context of Sexual Harassment on Campus, in Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students} 22, 23 (Bernice R. Sandler & Robert J. Shoop eds., 1997) [hereinafter Sexual Harassment on Campus] ("\textquotedblleft[Even when courts provide guidance, there is often sharp disagreement [over] \ldots questions of truth, sanctions, and university liability." (emphasis added)); \textit{see generally} Dawn A. Ellison, Comment: \textit{Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX}, 75 N.C. L. Rev. 2049, 2146-47 (1997) (analyzing the relevant case law and noting that there is confusion as to how a school can avoid liability).

\textsuperscript{17} \textit{Cf.} Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997) (mentioning "morality" as an unspoken reason why the court's decision, which makes it virtually impossible to hold a school liable for teacher-student sexual harassment, does not encourage schools to adopt a "heads in the sand" approach to dealing with sexual harassment).

\textsuperscript{18} \textit{See} Ronna Greff Schneider, \textit{Sexual Harassment and Higher Education}, 65 Tex. L. Rev. 525, 573-74 (1987) (arguing that litigation "may be the only effective way to force the institution to comply with its statutory and regulatory obligations," and that the "threat of institutional liability \ldots will make the institution more vigilant in deterring conduct violative of Title IX"). An analysis of Title IX, the federal legislation which protects students from sexual discrimination and harassment, demonstrates that Congress did not phrase the statute as a prohibition but rather as "an affirmative duty on the part of recipients of federal funds to insure a school environment free of discrimination." Brief for Petitioners, available in 1998 WL 19745, at *16, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (emphasis added).

\textsuperscript{19} \textit{See} American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (recognizing that by holding the company itself civilly liable, it is much more likely that violations by the company's agents "will not occur in the future").

\textsuperscript{20} For a sampling of the approaches to the appropriate standard of liability in the Title IX context, compare the following sources: \textit{Rosa H.}, 106 F.3d at 657 (requiring a plaintiff to show "actual, intentional discrimination on the part of the school district"); Kracunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997) (requiring demonstration of a supervisory relationship between professor and student of which the professor took advantage); Carrie N. Baker, Comment, \textit{Proposed Title IX Guidelines on Sex-Based Harassment of Students}, 43 Emory L.J. 271, 290 (1994) (supporting strict liability of
heightened by the recent increase in sexual harassment litigation across the country.\textsuperscript{21} Thus, it is imperative to clarify the Title IX institutional liability standard in order to help rectify the problem of sexual harassment on campus, and to promptly and equitably handle the increasing numbers of sexual harassment suits.

This Note analyzes the diverse standards of liability currently applied to universities in cases of professor-student sexual harassment under Title IX,\textsuperscript{22} and proposes a model standard of institutional liability. Part I discusses the growing problem of sexual harassment in universities and the effects of this problem. This part also explains the important differences between the university and elementary or secondary school environments, and it outlines the legal remedies that are presently available to student-victims of sexual harassment on campus. Part II focuses on Title IX, the federal statute intended to remedy the problem of sexual harassment within educational institutions. Title IX has created a great deal of debate, specifically because courts have applied widely differing standards of institutional liability. Thus, part II discusses where courts have turned for guidance in applying the statute, and how courts have ultimately attempted to discern the standard of liability specified by Title IX. In addition, part II considers the Title IX standard of liability advanced by the Office for Civil Rights in March, 1997.\textsuperscript{23}

\textsuperscript{21} Educator's Guide to Controlling Sexual Harassment, Dec., 1996, \textsuperscript{22} This Note focuses solely on sexual harassment between professor and student. Title IX also addresses student against student (peer) sexual harassment which is also a growing concern on university campuses. For an analysis of that issue, see Bernice Resnick Sandler, \textit{Student to Student Sexual Harassment, in Sexual Harassment on Campus}, supra note 16, at 50.

23. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997) [hereinafter OCR Guidance]. The OCR Guidance includes the Supplementary Infor-
Part III of this Note proposes a standard of liability that holds the university liable for the harassing behavior of its professors, but considers the preventative or corrective measures that the university may have taken, and the degree of notice that the university may have had. This Note introduces a liability standard—based on negligence—that is most likely to reduce the occurrence of professor-student sexual harassment. Further, the proposed standard should promote an institutional attitude of intolerance towards sexual harassment on campus.

I. SEXUAL HARASSMENT ON UNIVERSITY CAMPUSES

The problem of sexual harassment is of national concern. This part examines the magnitude of the problem and the devastating effects that sexual harassment has on education. In addition, this part highlights the need for a clear standard of institutional liability under Title IX, a standard that should be unique to the university setting. Lastly, this part will consider the remedial options that presently exist for the student-victims of sexual harassment.

A. The Problem of Sexual Harassment and Its Effects

Sexual harassment on college and university campuses is not a new problem. Nor is it a problem that has been ignored by legal and educational authors. This attention, unfortunately, is well-warranted. In a 1991 survey of undergraduate and graduate women stu-
dents, over thirty one percent of the women surveyed reported having been harassed because of their gender by at least one instructor in college.

Sexual harassment on campus has wide-ranging and destructive effects on the lives of those that it touches. First, the sexual harassment has an impact upon the student-victim's behavior, especially as it relates to her education: a student may avoid classes taught by certain professors; she may change her major or educational program; she may forsake research opportunities; or, she may change or forfeit educational and career plans. Sexual harassment on campus can also have emotional and physical consequences for student-victims, including: loss of self-esteem; anxiety attacks; weight fluctuation; sleep dep-


This Note will use female pronouns to identify the student-victims of sexual harassment and will use male pronouns to identify the perpetrators of sexual harassment because those designations comport with the most common scenarios of sexual harassment. Title IX, however, protects both genders from the effects of sexual harassment and prohibits sexual harassment by either gender. OCR Guidance, supra note 23, at 12,039.

28. Fitzgerald et al., supra note 27, at 181. The authors consider their figures to be conservative estimates. Id. They explain that "gender harassment and seductive behaviors . . . constitute what can be called condition of work (or education) harassment, and . . . create an offensive and often intimidating environment in which women must work or study." Id.; see The Lecherous Professor, supra note 25, at 15 (providing statistics which demonstrate that "20 to 30 percent of women students report they have been sexually harassed by male faculty during their college years"); Bernice R. Sandler & Robert J. Shoop, What Is Sexual Harassment?, in Sexual Harassment on Campus, supra note 16, at 1, 13 (citing the same figures); see also Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 657 (5th Cir. 1997) ("[I]t is increasingly evident from our docket that sexual harassment . . . of students by teachers is not uncommon and may be a widespread phenomenon.").

29. See Fitzgerald et al., supra note 27, at 164 ("The practical costs of harassment to the victim are quite dramatic and have been documented by both survey and qualitative research efforts."). For a thorough analysis of the effects of sexual harassment, see Mary P. Koss, Changed Lives: The Psychological Impact of Sexual Harassment, in Ivory Power: Sexual Harassment on Campus 73 (Michele A. Paludi ed., 1990).

Several commentators have recommended that students who were not themselves the direct targets of the harassment but were affected by it should also have standing to file sexual harassment claims. See, e.g., OCR Guidance, supra note 23, at 12,041 (explaining that a student can claim harassment based on behavior that was not directed specifically to that student); Roth, supra note 26, at 504 (same).

30. Ivory Power, supra note 26, at 3; see also Kracunas v. Iona College, 119 F.3d 80, 85 (2d Cir. 1997) (noting that after meeting with her parents and the dean, the plaintiff decided to complete a semester at home rather than at the college); Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 752-53 (E.D. Va. 1995) (noting that after the plaintiff was spanked by her biology professor, plaintiff explained that "she is [now] reluctant to enter the life sciences building, avoids classes taught by male professors and refrains from identifying herself in class"); Educator's Guide, supra note 21, ¶ 102, at 6; Koss, supra note 29, at 78.
rivation; or, in extreme cases, suicidal tendencies.\textsuperscript{31} Lastly, sexual harassment obstructs the socialization goals that universities strive to achieve.\textsuperscript{32} Students who suffer, witness, hear of, or participate in sexual harassment are more likely to identify sexual harassment as an acceptable form of social conduct.\textsuperscript{33} This misguided "education" will transfer to the student's life as worker, parent, spouse, and community member.\textsuperscript{34}

B. The Differences Between the University Environment and the Elementary-Secondary School Environment

While a great deal of case law and academic writings address sexual harassment in elementary and secondary schools, far less attention has been paid to the specific problem of sexual harassment on university and college campuses.\textsuperscript{35} This is despite reports and statistics that evidence a severe harassment problem within those institutions.\textsuperscript{36}

The significant differences between sexual harassment in a university and harassment in secondary and elementary schools underscore the need for independent consideration of the university setting.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{31} Educator's Guide, supra note 21, \S 102, at 7; see also Kracunas, 119 F.3d at 84 (stating that the plaintiff sought counseling with the director of Iona's Counseling Center after she was sexually harassed by Professor Palma).
\item \textsuperscript{32} See John Provost, Forewords to the Second Edition, in Ivory Power, supra note 26, at xxv, xxvii (explaining that "[t]he entire campus community ... [has] a moral and ethical responsibility to value one another. They are to protect and cherish each other's freedom for, bound as a community, they share a sense of obligation to one another"); see also Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1427 (N.D. Cal. 1996) ("The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students." (quotations omitted)).
\item \textsuperscript{33} Karen Maitland Schilling & Ann Fuehrer, The Organizational Context of Sexual Harassment, in Academic and Workplace Sexual Harassment, supra note 27, at 123, 123-24 (examining the manner in which "sexual harassment may be viewed as appropriate behavior for men within the context of typical patterns of socialization by members of institutions, particularly universities, in this society").
\item \textsuperscript{34} Id. at 123-25.
\item \textsuperscript{35} See, e.g., Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir.), cert. granted, 118 S. Ct. 595 (1997); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997) (describing an unlawful sexual relationship between a high school teacher and his fifteen year old student); Stacy, supra note 20, at 1340 n.11 ("This Note focuses on sexual harassment of students by teachers in the context of elementary through high school."). But see Schneider, supra note 18 (examining sexual harassment in higher education); Ivory Power, supra note 26 (same).
\item \textsuperscript{36} See supra note 28 and accompanying text; Sandler & Shoop, supra note 16, at 1 ("Although most ... faculty members ... do not harass, sexual harassment is a problem on every campus." (emphasis added)).
\item \textsuperscript{37} See Brief for Petitioners, available in 1998 WL 19745, at *20 n.11, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (recognizing that "[t]he context of higher education ... may raise somewhat different issues than are raised by this case"); Melsheimer et al., supra note 26, at 541-43. The authors discuss whether "schoolchildren and students of higher education should receive the same protections." Id. at 541. They state that there are two categories of students: "(1) schoolchildren, and (2) students of higher education,"
First, the age of the students is a major difference: school children are, with very few exceptions, minors, "as to whom the law universally recognizes a limited capacity for judgement"; in contrast, university students are, in nearly all situations, of legal majority age. When confronted with the sexual abuse of a second grade girl, the social reactions are, and the legal consequences should be, different from those that result from the sexual harassment of a college student.

Second, unlike elementary and high school students, university students are not legally required to attend post-secondary schools. The mandatory attendance requirements of elementary and secondary students, which remove children from the protection of their parents, arguably place a greater obligation upon schools to protect those children from physical and emotional harm, such as sexual harassment.

A third important distinction is the difference between the professor-student relationship and the school teacher-student relationship. The American Association of University Professors explains the pro-
fessor's significant ethical obligations to students: “Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors... They protect their academic freedom.”45 In stark contrast, the elementary or secondary school teacher often interacts with students on a level closely resembling that of a parent towards a child.46

Yet another factor distinguishing the university-student from the child-student is the relationship between a university and a professor as compared to a school's relationship with a teacher. The university creates a teaching environment in which the faculty is quite independent from the university.47 This same freedom does not exist in elementary and secondary schools.48 A final distinction between the university and the elementary or secondary school is society's dissimilar views of these institutions. The university is a model environment for growth, learning, and respect between faculty and students,49 whereas elementary and high schools are custodians of children and responsible for their safety.50 These many differences suggest that sexual harassment in the university be treated differently from sexual harassment in elementary and secondary schools.

C. The Current Redress Options—Other Than Title IX

Currently, students who suffer sexual harassment at the hands of a professor have limited options through which they may seek amends. Title IX, the predominant vehicle for educational sexual harassment claims, is discussed in part II. This section reviews some of the other available options.

45. American Association of University Professors, Statement on Professional Ethics, in AAUP Policy Documents & Reports 75, 76 (1990); see also Schneider, supra note 18, at 552 (describing the relationship that exists between professor and student as akin to a fiduciary-beneficiary relationship which requires the fiduciary “to act in scrupulous good faith” (quotations omitted)).

46. See Brief for the United States as Amicus Curiae Supporting Petitioners, available in 1998 WL 24199, at *19-20, Gebser (No. 96-1866).

47. See Schneider, supra note 18, at 569 (noting that because of the “strong tradition of academic freedom” granted professors, universities have limited control over them).

48. See Brief for Petitioners at *23, Gebser (No. 96-1866) (arguing that a school district has a “broad responsibility” for the conduct of teachers who care for the school’s “young students”).

49. See Dube v. State Univ. of New York, 900 F.2d 587, 597-98 (2d Cir. 1990) (pointing out that “[t]he essentiality of freedom in the community of American universities is almost self-evident.... [Professors] and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die” (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957))); Melsheimer et al., supra note 26, at 554 (describing the modern university as a “collective educational enterprise”).

50. See Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992) (stating that, “[s]eparated from his or her parents... the child’s safety and well-being are entrusted to school officials”).
1. State Claims

The student may have a state claim against the university under specific state laws which prohibit sexual harassment in educational institutions. In addition, student-victims of sexual harassment may file civil suits based on common law torts. Either infliction of emotional distress or negligent supervision, for instance, could provide the basis for a state law tort claim. The main flaw with these forms of redress, however, is the variance that exists from state to state in such laws. Thus, the protection provided students would depend on the locale of their school. In contrast, the application of one form of redress increases uniformity among different jurisdictions and provides schools with a greater understanding of their role in remedying sexual harassment.

2. Section 1983

Students may also bring suit for sexual harassment under 42 U.S.C.A. § 1983, which prohibits anyone acting under color of state law from depriving individuals of any right secured by the Constitution. These rights include being free from discrimination on the basis of race, color, religion, national origin, and sex. Section 1983,

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51. See National Advisory Council on Women's Educational Programs, The Report on Sexual Harassment on Campus, in The Lecherous Professor, supra note 25, at 192, 192-93 (listing state civil rights laws as a possible remedy to sexual harassment); Educator's Guide, supra note 21, ¶ 340, at 47.
53. See, e.g., Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1566 (N.D. Cal. 1993) (filing suit against school district for "intentional and negligent infliction of emotional distress" as a result of sexual harassment she suffered).
54. See, e.g., R.L.R. v. Prague Pub. Sch. Dist., 838 F. Supp. 1526, 1529 (W.D. Okla. 1993) (ruling on a sexual harassment claim in which plaintiff relied on Oklahoma state tort law to allege that defendant school "breach[ed] . . . their duties to use reasonable care in the hiring and retention of employees" (internal quotation omitted)). In addition, state claims may be based on assault and battery, see, e.g., Coleman v. Wirtz, No. 92314, 1993 U.S. App. LEXIS 920, at *1 (6th Cir. Jan. 13, 1993) (noting that the district court dismissed plaintiff's state claim of assault and battery against a high school principal), or invasion of privacy. See Educator's Guide, supra note 21, ¶ 360, at 65.
55. See Educator's Guide, supra note 21, ¶ 340, at 47; id. Appendix III (providing a state by state survey of the existing state statutes specifically prohibiting sexual harassment); The Report on Sexual Harassment on Campus, National Advisory Council on Women's Educational Programs, in The Lecherous Professor, supra note 25, at 192, 192-93.
57. 42 U.S.C.A. § 1983 (West Supp. 1998); see Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1459 (N.D. Cal. 1995) ("In order to state a claim under § 1983, a plaintiff must allege two elements: 1) the deprivation of a right secured by the Constitution or laws of the United States; and 2) that the alleged deprivation was committed by a person acting under the color of state law.").
however, applies only when the public entity's official policies are discriminatory.59 Thus, the student-plaintiff must demonstrate that the accused is the "final decision-maker . . . . It is not enough that an employee of the . . . entity . . . caused a violation of Section 1983. Such an action alone would not subject the educational institution . . . to liability."60

Moreover, the Eighth Circuit has stated that, "[t]o establish a claim against the school district, [appellant] must show . . . the existence of a continuing, widespread, persistent pattern of unconstitutional conduct, as well as deliberate indifference or tacit authorization and causation."61 The Educator's Guide to Controlling Sexual Harassment notes that the "deliberate indifference" standard is a major obstacle to recovery under § 1983.62 One court has further characterized § 1983 as "a statute that opens a narrow and limited window for recovery in cases where governmental entities or actors are involved in constitutional deprivations."63 Therefore, the requirements of a § 1983 claim prevent it from being a practical remedy for teacher-student sexual harassment in the educational setting.64

As the foregoing discussion demonstrates, state claims and § 1983 claims are both incapable of providing individual student-victims with effective protection and recovery from sexual harassment. Thus, student-victims, as well as courts, must look to Title IX, as Congress intended.

II. TITLE IX AND CURRENT LIABILITY STANDARDS OF EDUCATIONAL INSTITUTIONS

Title IX prohibits discrimination on the basis of sex by any educational institution that receives federal financial assistance, or by any

60. Id. at 100; see Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 144 (5th Cir. 1992) (asserting that supervisory officials will not be liable under § 1983 "on a respondeat superior theory" and "[o]nly their direct acts or omissions can form the basis for liability" (citations omitted)).
64. At least one court, however, has entertained a claim for sexual harassment based on § 1983 against supervisory school officials. Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1468 (N.D. Cal. 1995) (permitting plaintiff to enforce a § 1983 action against certain individual defendants for the sexual harassment she suffered and analyzing defendants' liability based on § 1983 rules). It is significant to note, however, that the plaintiff in Oona R.-S. relied on Title IX—as her right secured by the Constitution—to enforce § 1983. Id. at 1459-60. This creates the undesired situation of Title IX actions being converted into § 1983 actions. See Leija, 887 F. Supp. at 952 ("[T]here should be no requirement that the limitations of section 1983 be transferred to Title IX . . . . Otherwise, Title IX actions are transformed into section 1983 actions . . . . Certainly, the Congress did not intend to enact Title IX to duplicate section 1983.").
institution whose students receive federal financial aid. The following Part of this Note examines claims of Title IX sexual harassment and documents the courts' struggle to discern an appropriate standard of institutional liability. This Part considers where courts have looked for guidance in applying the statute, and how courts have ultimately attempted to formulate a coherent standard of liability.

A. History of Title IX: An Attempt to Prevent Sexual Harassment

Through the enactment of Title IX, "Congress sought to eliminate invidious discrimination on the basis of sex in educational institutions" and looked to provide the federal government with an instrument to achieve that goal. In Cannon v. University of Chicago, the Supreme Court probed the "genesis of Title IX," and noted that the statute was specifically established to respond to the problem of sexual discrimination within educational institutions. The Court also identified two primary objectives of Title IX: "[f]irst, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protections against those practices." Consistent with these objectives, the Court held that Title IX creates an implied private right of action for an individual's claim of sex discrimination in the educational context.

To establish a prima facie case of sexual discrimination under Title IX, "a plaintiff must show: (1) that he or she was excluded from par-

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The OCR has established certain procedures that recipients of Title IX funds are to implement and the actions that the OCR can take for violations of Title IX. 34 C.F.R. §§ 106.3-106.9 (1994). These include: conducting evaluations of the institution's policies and practices, id. § 106.3(c)(1); designating at least one employee to be responsible for Title IX issues within the institution, id. § 106.8(a); adopting and publishing grievance procedures for complaints of Title IX violations, id. § 106.8(b); and, notifying all relevant parties that the institution abides by the requirements of Title IX. Id. § 106.9.


67. Cannon, 441 U.S. at 704 n.36 ("[T]itle IX is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers" (quoting 118 Cong. Rec. 5805-5807 (1972) (comment of Sen. Bayh) (alteration in original))); see Russo et al., supra note 66, at 733.

68. 441 U.S. 677 (1979) (involving a plaintiff who claimed that the defendant, a medical school, denied her admission because of her gender).

69. Id. at 694 n.16.

70. Id. at 704.

71. Id. at 717. An implied private right of action allows private litigants, as well as the federal government, to file a cause of action to support their statutory rights even though the statute does not expressly provide a cause of action. See id.
participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the exclusion from the program was on the basis of sex."\(^72\)

In 1992, Title IX truly became a "viable legal tool for eliminating sexual harassment in education."\(^73\) That year, the Supreme Court decided Franklin v. Gwinnett County Public Schools.\(^74\) This decision, building upon the Cannon holding, made it possible for students who were victims of sexual discrimination to sue the school for monetary damages for failure to enforce Title IX.\(^75\) The Court discerned an intent by Congress to provide all appropriate remedies, including damages, for a suit brought under the statute.\(^76\) Further, the Court did not equivocate in its belief that sexual harassment is prohibited under Title IX, and, therefore, may be the basis for a damages claim:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.\(^77\)

The Franklin Court also made an important distinction between "unintentional" and "intentional" Title IX violations, particularly as the distinction relates to an educational institution's "notice that it will be liable for a monetary award."\(^78\) The Court acknowledged that, typ-

\(^72\) Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996) (quoting Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143-44 (W.D. Pa.), aff'd, 882 F.2d 74 (3d Cir. 1989)).

\(^73\) Roth, supra note 26, at 468.

\(^74\) 503 U.S. 60 (1992) (hearing a case in which Franklin, a high school student, claimed she was subjected to continual sexual harassment from a sports coach and teacher employed by the school district): see Ellison, supra note 16, at 2060 (stating that the Franklin decision "provided the most significant impetus" for the surge in Title IX sexual harassment claims).

\(^75\) Franklin, 503 U.S. at 66; see also Barbara Watts, Legal Issues, in Ivory Power, supra note 26, at 9, 18 ("Until Franklin v. Gwinnett County Public Schools, the relief available—the withdrawal of federal funds from the institutions—provided little satisfaction and no financial compensation to a student suffering the mental and emotional distress caused by sexual harassment."); Russo et al., supra note 66, at 739 ("No longer acceptable is the practice of simply dismissing a teacher who sexually harassed a student and then pretending the problem never existed.").

\(^76\) Franklin, 503 U.S. at 66 (holding that absent Congress's clear direction otherwise, federal courts have the power to "use any available remedy to make good the wrong done" in a cause of action brought pursuant to a federal statute (quoting Bell v. Hood, 327 U.S. 678, 684 (1946))).

\(^77\) Id. at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (alteration in original)). But see Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir. 1996) (construing this language as "pure dictum").

\(^78\) Franklin, 503 U.S. at 74.
ically, the remedies available for *unintentional* violations of a Spending Clause statute by the receiving entity are limited because the entity does not have notice that it will be monetarily liable for such violations. Title IX, however, differs from the normal rule. Because the statute established an affirmative duty on schools to not discriminate on the basis of sex, which includes acts of teacher-student sexual harassment, the Court reasoned that harassing behavior must be considered an *intentional* violation of Title IX. Thus, the receiving entity can be found monetarily liable for those violations. Accordingly, student victims of sexual harassment seeking money damages under Title IX are not constrained by the general rule prohibiting recovery for *unintentional* violations of Spending Clause statutes.

B. Confusion Over Institutional Liability Under Title IX

The *Franklin* decision leaves unanswered many important questions relating to the standard of institutional liability under Title IX. There has been continued confusion over an educational institution’s liability for Title IX claims of hostile environment sexual harassment. The Supreme Court has recognized this confusion and inconsistency, and in December, 1997, the Court granted certiorari in *Doe*

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79. Congress enacted Title IX through its Spending Clause powers. *Id.* at 74-75; see U.S. Const. art. I, § 8, cl. 1. The clause reads in part: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1.


81. *Franklin,* 503 U.S. at 75; see also Roth, supra note 26, at 471 (concluding that the Supreme Court based its entire decision in *Franklin* on the premise that teacher-student sexual harassment is an intentional violation of Title IX).

82. *Franklin,* 503 U.S. at 74-75; see also *Doe v. Petaluma City Sch. Dist.,* 949 F. Supp. 1415, 1422 (N.D. Cal. 1996) (concluding that hostile environment sexual harassment claims are, by definition, intentionally discriminatory).

83. For instance: the Court does not address the specific standard of liability to which a receiving entity will be held for intentional violations of Title IX; the Court does not address whether the entity may avoid liability if it demonstrates efforts to prevent the sexual harassment; nor does the Court address whether the receiving entity must have knowledge of the intentional violations in order to be held liable. See *Canutillo Indep. Sch. Dist. v. Leija,* 101 F.3d 393, 400 (5th Cir. 1996) (listing a number of issues that the sparse wording of Title IX fails to address and which *Franklin* had not resolved).

84. See *Kinman v. Omaha Pub. Sch. Dist.,* 94 F.3d 463, 468 (8th Cir. 1996) (noting that, “courts that have discussed the standard of liability for school districts under Title IX have failed to reach a consensus regarding the appropriate standard”); *Bolon v. Rolla Pub. Schs.,* 917 F. Supp. 1423, 1427 (E.D. Mo. 1996) (“The standard of a school district’s liability for sexual harassment by teachers against students under Title IX is not clear.”).
v. Lago Vista Independent School District.\textsuperscript{85} In Lago Vista, petitioners' question presented asks, "What is the proper standard of liability of a school district under Title IX . . . for a teacher's sexual harassment of a pupil?\textsuperscript{86}

Notwithstanding the Court's ultimate decision, however, Lago Vista, which considers the liability standard of a secondary school, should not resolve the particular problem that courts confront with university setting professor-student sexual harassment in Title IX cases such as Kracunas v. Iona College.\textsuperscript{87} Whomever looks to deviate from the standard that the Court may establish in Lago Vista should be able to forcefully argue that universities differ significantly from elementary and high schools,\textsuperscript{88} and that, as a result, the standard of institutional liability must consider the university's distinct "liability calculus."\textsuperscript{89}

C. The Courts Look for Answers

Because the standard of institutional liability under Title IX is so imprecise, courts have looked to Title VI\textsuperscript{90} and Title VII\textsuperscript{91} of the Civil Rights Act of 1964 for guidance.\textsuperscript{92} The following sections examine liability standards that courts have imported into Title IX.

\textsuperscript{85} 106 F.3d 1223 (5th Cir.), cert. granted, 118 S. Ct. 595 (1997) (No. 96-1866). In this case, petitioner is seeking damages from a school district for Title IX violations committed by a ninth grade teacher of petitioner. \textit{Id.} at 1224. Because of the many differences between universities and elementary and secondary schools, the Supreme Court's pending decision in Lago Vista should not be considered binding in cases of sexual harassment between university professor and student. See Brief for Petitioners, available in 1998 WL 19745, at *23-24, \textit{Gebser} (No. 96-1866) (arguing for institutional liability based on factors that are nearly entirely absent in colleges and universities: the psychological and physical immaturity of the minor students; the wide age differential between students and teachers; the compulsory attendance rules of elementary and secondary schools; and the tradition of the school's role, "in loco parentis"); see also supra Part I.B (discussing the differences between the higher education environment and the environment in elementary and secondary schools).

Because of the limited case law and literature pertaining to professor-student sexual harassment in post-secondary educational institutions, however, this Note will rely on courts' analysis of harassment that occurred in elementary and secondary schools. Important differences between the educational settings will be noted where necessary.

\textsuperscript{86} Brief for Petitioners at *1, \textit{Gebser} (No. 96-1866).

\textsuperscript{87} 119 F.3d 80 (2d Cir. 1997). Nonetheless, the Supreme Court's decision in Lago Vista will offer guidance to determine the appropriate standard of liability for university violations of Title IX.

\textsuperscript{88} See Melsheimer et al., supra note 26, at 543-44; supra Part I.B.

\textsuperscript{89} Brief for the United States as Amicus Curiae Supporting Petitioners, available in 1998 WL 24199, at *20 n.14, \textit{Gebser} (No. 96-1866).


\textsuperscript{92} See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (relying on Title VI for the limited purpose of supporting its decision to permit private rights of action in Title IX cases); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (relying on Title VII for resolution of issues in a Title IX case).
1. Title VI

Title VI prohibits discrimination based on race by recipients of federal funds. The Supreme Court has stated that Title IX was "patterned" after Title VI, and several courts have held accordingly. In Cannon, the Court explained how Title IX was originally designed as an amendment to Title VI, and noted that Title IX simply substitutes "sex" for Title VI's "race, color, or national origin." In addition, Congress enacted Title VI, like Title IX, under its Spending Clause power.

In Guardians Association v. Civil Service Commission of New York, a divided Supreme Court held that a plaintiff must demonstrate two elements to prove a Title VI violation: (1) discriminatory intent; and (2) discriminatory effect. One commentator has explained that institutional liability under Title VI requires the institution's "direct involvement, and even notice would not impute liability to the educational facility." When applied to sexual harassment cases then, notice of the sexual harassment, either constructive or actual, would not be sufficient to find liability "absent direct involvement by the school district."

The difficulty in proving actual discriminatory intent may provide one reason why few courts have addressed the issue of liability for federal fund recipients in violation of Title VI. This is in contrast to Title VII, under which the courts have more fully developed employer liability. Moreover, because Title VII specifically addresses gender

93. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).
94. Cannon, 441 U.S. at 694.
95. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012 n.14 (5th Cir. 1996); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1566 (N.D. Cal. 1993) (citing Cannon to support its similar interpretations of Title VI and Title IX).
97. See supra notes 79-80 for a discussion of Spending Clause statutes.
99. Id. at 607 n.27.
102. See Roth, supra note 26, at 475 ("[T]he issue of fund recipient liability for [Title VI] discrimination by individual employees has been infrequently litigated."). But see Springer v. Seamen, 821 F.2d 871, 881 (1st Cir. 1987) (remanding a summary judgement for the defendant, the United States Postal Service, based on plaintiff's Title VI claim that the Postal Service discriminated on the basis of race through the actions of its supervisors).
103. Katherine M. Franke, What's Wrong With Sexual Harassment?, 49 Stan. L. Rev. 691, 692 (1997) (examining the evolution of sexual harassment law under Title
discrimination, much of the case law relating to claims of sexual harassment has developed under this statute. Thus, courts have more frequently looked to Title VII when interpreting Title IX claims.

2. Title VII

Title VII makes it unlawful for an "employer . . . to discriminate against any individual . . . because of such individual's . . . sex." Students may seek the protection of Title VII only if they are also an employee of the school or university. The fundamental concepts of sexual harassment law evolved from Title VII. Under Title VII, there are two types of sexual harassment claims: (1) quid pro quo sexual harassment, which occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and (2) hostile environment sexual harassment, which exists "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'"}

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104. See infra note 107 and accompanying text for Title VII's relevant language.

105. Franke, supra note 103, at 692; see also Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (recognizing that there is much more case law involving sex discrimination claims under Title VII than under Title VI, and that in resolving these kinds of claims appellate courts have relied much more on Title VII).

106. See Patricia H., 830 F. Supp. at 1292 (relying on Title VII case law, specifically, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)). This Note will also rely on Title VII claims, rather than Title VI claims, as the primary source of comparison for the Title IX standards that the Note analyzes and ultimately proposes.


109. See Patricia H., 830 F. Supp. at 1290 ("The entire legal theory of sexual harassment has been developed in the context of Title VII.").


111. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)). In the Title IX context, the same two forms of sexual harassment have been recognized as actionable by the OCR. OCR Guidance, supra note 23, Fed. Reg. at 12,038. For purposes of this Note, discussion will focus almost entirely on claims of hostile environment sexual harassment. See id. (defining hostile environment sexual harassment as: "conduct . . . that is sufficiently severe, persistent, or pervasive to . . . create a hostile or abusive educational environment"). This is due, primarily, to two factors. First, courts and commentators are almost unanimous in finding that strict liability governs claims of quid pro quo sexual harassment. See id. at 12,039 ("[A] school will always be liable for even one instance of quid pro
There are five basic elements to a hostile environment sexual harassment claim under Title VII.112 First, the employee-victim must be a member of a protected group, which is satisfied by simply stipulating to plaintiff’s gender.113 Second, the plaintiff must have been subject to harassment, such as unwelcome sexual advances or remarks.114 Third, the alleged harassment was based on sex and would not have occurred but for plaintiff’s sex.115 Fourth, the harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment.116 Finally, the employee must establish a basis for the employer’s liability.117

Employer liability under Title VII is, in large part, determined by the employment position of the perpetrator in relation to both the victim and the employer. Thus, the Equal Employment Opportunity Commission (“EEOC”),118 through the use of agency principles, argues that the employer should be held strictly liable in all cases of quid pro quo sexual harassment.119 As the Second Circuit noted, this is “[b]ecause the quid pro quo harasser, by definition, wields the em-

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112. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1042 (2d Cir. 1993); 1 Alba Conte, Sexual Harassment in the Workplace: Law and Practice § 6.44, at 284-304 (2d ed. 1994); Baker, supra note 20, at 289. Title IX employs the same basic elements to claims of hostile environment sexual harassment in the education context. See Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467-68 (8th Cir. 1996). In Kinman, the Eighth Circuit stated that plaintiff must show:
1) that she belongs to a protected group; 2) that she was subject to unwel- come sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and 5) that some basis for institutional liability has been established.

113. See Cosgrove, 9 F.3d at 1042; Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).

114. Cosgrove, 9 F.3d at 1042; Roth, supra note 26, at 486.

115. Cosgrove, 9 F.3d at 1042; Roth, supra note 26, at 487.

116. Cosgrove, 9 F.3d at 1042; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must . . . ‘alter the conditions of [the victim’s] employment and create an abusive working environment.’” (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (alteration in original))).

117. Cosgrove, 9 F.3d at 1042; Roth, supra note 26, at 485.

118. The EEOC is the governing body that effectuates the policies of Title VII. 42 U.S.C. § 2000e-4 (1994).

119. See Meritor, 477 U.S. at 70-71. The Supreme Court, referring to the amicus brief submitted by the EEOC, explained, and seemed to support, the EEOC’s position on quid pro quo sexual harassment as: “where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are prop-
ployer's authority to alter the terms and conditions of employment—either actually or apparently” over the employee-victim.\textsuperscript{120}

For hostile environment sexual harassment claims, however, the employer's standard of liability is not so clear.\textsuperscript{121} As the EEOC explains, this is because with such claims "the usual basis for a finding of agency [between employer and harasser] will often disappear."\textsuperscript{122} The Supreme Court, therefore, in \textit{Meritor Savings Bank v. Vinson}\textsuperscript{123}—which established hostile environment sexual harassment as an actionable claim under Title VII\textsuperscript{124}—declined "to issue a definitive rule on employer liability."\textsuperscript{125} Nevertheless, the Court did state that employers will not be automatically liable for the hostile environment created by their supervisors.\textsuperscript{126} Conversely, it also held that an employer's lack of notice and the existence of a grievance procedure does not insulate an employer from liability.\textsuperscript{127} The Court ultimately found that Congress intended the "courts to look to agency principles for guidance in this area."\textsuperscript{128}

As a result of \textit{Meritor}'s directive to determine employer liability for hostile environment sexual harassment based on agency principles, courts have distinguished between harassment committed by supervisors and harassment perpetrated by coworkers.\textsuperscript{129} If the harasser is in a supervisory position in relation to the victim, then the employer is liable if the “supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the

\begin{itemize}
  \item \textsuperscript{120} Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994).
  \item \textsuperscript{121} Id. at 779 (“Unfortunately, the ‘specific basis’ of employer liability for a hostile work environment remains elusive.”).
  \item \textsuperscript{122} \textit{Meritor}, 477 U.S. at 71. The Court again refers to the EEOC to explain that hostile environment claims, unlike \textit{quid pro quo} claims, are not based on employment related threats or rewards made by a supervisor to an employee-victim. See \textit{id}. at 70-71. Thus, the direct link between supervisor and employer—whose delegation of supervisory authority made the threats or rewards possible—does not exist. \textit{Id}.
  \item \textsuperscript{123} 477 U.S. 57 (1986).
  \item \textsuperscript{124} \textit{id}. at 73.
  \item \textsuperscript{125} \textit{id}. at 72. In his concurring opinion, Justice Marshall emphatically opposed the creation of two distinct standards of liability: one for hostile environment sexual harassment, and one for \textit{quid pro quo} sexual harassment. \textit{id}. at 77 (Marshall, J., concurring). Justice Marshall declared that sexual harassment predicated on a supervisor's responsibility for “the work environment and with ensuring a safe, productive workplace,” should not result in liability any less severe than harassment predicated on a supervisor's abuse of his power to "hire, fire, and discipline." \textit{id}. at 76 (Marshall, J., concurring)
  \item \textsuperscript{126} \textit{id}. at 72.
  \item \textsuperscript{127} \textit{id}.
  \item \textsuperscript{128} \textit{id}.
  \item \textsuperscript{129} See, e.g., Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir. 1994) (“It will certainly be relevant to the analysis . . . that the alleged harasser is the plaintiff's supervisor rather than her co-worker.”).
\end{itemize}
harassment by the existence of the agency relationship.”¹³⁰ If the harassment is committed by a coworker, the employer will be liable only if “the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.”¹³¹ Because of the unique facts that comprise an employment-setting sexual harassment claim, the difficulty in transferring agency principles to that environment,¹³² and the fact that agency principles can support many different theories of liability,¹³³ courts have continued to struggle, however, with applying a uniform standard of employer liability, particularly in cases of supervisor-employee hostile environment sexual harassment cases.¹³⁴

¹³⁰ Id. at 780; see 29 C.F.R. § 1604.11(c) (1997); Restatement (Second) of Agency § 219 (1958) [hereinafter Restatement] which provides as follows:
(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
   (a) the master intended the conduct or the consequences, or
   (b) the master was negligent or reckless, or
   (c) the conduct violated a non-delegable duty of the master, or
   (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

¹³１ Id.
¹³³ Roth, supra note 26, at 490-95 (noting that agency principles can support both negligence, based on either actual or constructive notice, or strict liability).
¹³４ This lack of uniformity will be addressed by the Supreme Court in Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir.), cert. granted, 118 S. Ct. 438 (1997) (No. 97-282). Faragher, a Title VII claim which will be heard in the Spring Term, 1998, may establish a clear standard of employer liability for supervisor-employee hostile environment sexual harassment. Specifically, the Petitioner seeks answers to the following questions:
I. Is an employer, pursuant to common-law principles of agency, responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effectuate the harassment?
II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment:
   A. through actual notice to an intermediate supervisor, who reports it no further?
   B. from the same pervasive nature of the harassment that makes it actionable?
   C. by default through its failure to effectively disseminate any sexual harassment policy...?

Petitioner's Brief, available in 1997 WL 793076, at *i, Faragher (No. 97-282).
¹³⁴ See Faragher, 111 F.3d at 1535 (citing cases from a number of circuits that have each applied different tests for employer liability); Roth, supra note 26, at 490 (noting that, under Title VII, “courts have struggled with developing appropriate rules of liability and no one rule or approach has prevailed”).
One important characteristic of Title VII, which is particularly relevant to the issue of institutional liability, is the statutory cap limiting an employer's liability. This helps ensure that private actions against entities in violation of Title VII do not become excessive. The recovery cap does not, however, include Title IX. This may be because Congress passed the statute in 1991, a year prior to the Franklin decision which opened the door to monetary damages for Title IX claims. One consequence of not having a cap on Title IX liability damages is that courts must strongly consider the potential "for Title IX suits to bankrupt school districts."  

3. The Transfer of Title VII to Title IX  

Despite the unsettled Title VII standards for employer liability, courts often apply Title VII principles when confronted with Title IX claims of hostile environment sexual harassment. This may be due to the similar hierarchical nature of the employment environment and the educational environment. As one commentator has noted, both environments are the "locus of relationships of unequal power." In addition, there is a large amount of Title VII case law which can fill the void left by the relatively few Title IX cases that have been litigated. Lastly, courts have looked to Title VII because they have interpreted the Supreme Court's decision in Franklin—which turned to Meritor, a Title VII case—as directing them to hold educational institutions to the same standard of liability as employers are held in Title VII cases.  

137. Id. at 657 n.4.  
138. See supra note 81 and accompanying text.  
139. Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 955 (W.D. Tex. 1995). This court found for the plaintiff and limited damages to expenses for medical and mental health treatment, and to special education. Id. at 956; see also infra note 315 (discussing the need for a Title IX cap); cf. Rosa H., 106 F.3d at 657 n.4 (arguing that the absence of a cap may suggest that "Congress did not view Title IX as the kind of legislation that could generate expansive liability").  
140. See, e.g., Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir. 1997) (deciding not to deviate from the liability standard established in Title VII cases, although the court recognized several distinctions between Title VII and Title IX claims); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996) (extending the application of "Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student").  
141. See Roth, supra note 26, at 500.  
142. Id.  
143. See supra notes 103-06 and accompanying text.  
144. See, e.g., Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-49 (2d Cir. 1995) (noting Franklin's citation of Meritor in support of its decision to apply Title VII liability standards to Title IX) (citations omitted). But see Rosa H., 106 F.3d at 656 (deciding that one reference to Meritor cannot be interpreted as a directive by the Supreme Court to fully adopt Title VII liability standards into Title IX cases).
The application of Title VII to Title IX, however, creates confusion and varying liability standards as courts ruling on Title IX violations try to find a Title VII hostile environment liability standard that fits Title IX. Moreover, there are significant differences between the sexual harassment actionable under Title VII and that which is actionable under Title IX. First, “students, unlike employees, are by nature transient.” This may dissuade students from seeking remedial action against the university, and it may cause them to sense that the university has a greater commitment to its professors than to the students. Second, the benefits that students receive—such as, recommendations, future employment opportunities, intellectual and emotional growth—are not as readily obvious as the benefits received by employees. This creates a problem in which a student may feel that a professor is implicitly threatening or forcing her to accept the sexual harassing conduct based on the intangible benefits over which a professor has power. Another factor that distinguishes a Title VII case from a Title IX case is the deference that courts have traditionally shown to the activities of colleges and universities, a deference the courts have not typically shown non-educational institutions.

A final factor that differentiates claims brought under the two statutes is their statutory language. In outlining the coverage of the statute, Title VII, unlike Title IX, expressly defines “employer” to include agents of the employer. Thus, at least one court has argued that this implies that “Title IX does not instruct courts to impose liability based on anything other than the acts of the recipients of federal funds.” Yet, Title IX regulations, unlike Title VII’s, do require educational institutions to adopt specific procedures in order to affirmatively handle issues of sexual harassment. This difference may suggest that “Congress perceived a need for broader protection

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145. See supra notes 133-34 and accompanying text (discussing the absence of a uniform standard of Title VII liability). Compare Kinman, 94 F.3d at 469 (applying, in a hostile environment sexual harassment case, a Title VII standard that is interpreted as a negligence or “knew or should have known” standard), with Krakunas, 119 F.3d at 87 (applying, in a hostile environment sexual harassment case, a Title VII standard that is based on agency principles which disregards the knowledge of the institution).

146. Schneider, supra note 18, at 527. This factor seems particularly relevant in higher education where students are usually at a school for four years or less, whereas a younger student can remain in a specific school district from first through twelfth grades—twelve years.

147. Id. at 527-28.

148. Id. at 528.

149. See Roth, supra note 26, at 502-03.

150. Schneider, supra note 18, at 528 & n.14 (citing to several Supreme Court cases in which the Court refused to override a university’s decision relating to an internal matter).


153. 34 C.F.R. §§ 106.3-106.9 (1997); Schneider, supra note 18, at 544-45; see supra note 65 (noting the regulatory language).
against discriminatory behavior in the academic context than in the employment context."154 As a result of these differences, the Fifth Circuit has retreated from incorporating Title VII into IX,155 and a federal court in Missouri has completely rejected applying Title VII in Title IX cases.156

D. Ways That A University May Be Found Liable Under Title IX

Whether a court employs a Title VI analysis, a Title VII analysis, or an independent Title IX analysis, courts will essentially select from two main theories of liability: (1) strict liability, which has been applied in Title IX cases and Title VII quid pro quo cases;157 or (2) negligence, based on actual or constructive notice, which courts have again applied in Title IX and Title VII cases.158 Thus, courts must first determine whether they will require plaintiffs to prove that the institution had knowledge—actual or constructive—of the harassment in order to impute liability: if a court does not require a school to have knowledge of the harassment, it would apply a strict liability standard; if a court does require a school to have knowledge, it would apply a negligence standard.

Neither the language of Title IX nor of Title VII establishes a particular standard of institutional liability for violation of their directives. Thus, the remainder of Part II examines courts’ decisions and commentators’ opinions regarding the knowledge requirement, and how courts have applied the strict liability and the negligence theories in cases of hostile environment sexual harassment arising under Title IX.

154. Schneider, supra note 18, at 545.
155. See Rosa H., 106 F.3d at 656.
156. Bolon v. Rolla Pub. Schs., 917 F. Supp 1423, 1429 (E.D. Mo. 1996) (deciding, in a Title IX case, that the Title VII standard of institutional liability for hostile environment sexual harassment, interpreted as a “knew or should have known” standard, is inapplicable). See infra notes 219-20 and accompanying text for the Bolon court’s specific reasons why it rejected the “knew or should have known” standard.

It is also significant to note that the Supreme Court has granted certiorari, for the same Term, to a Title VII case and a Title IX case, which both focus on the issue of institutional liability. The Court’s intent is not clear. It may look to take Title IX cases off of the Title VII track that lower courts have relied on since Franklin v. Gwinnett. Alternatively, the court may look to confirm Title IX’s reliance on Title VII.

157. See Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185-86 (6th Cir. 1992) (Title VII); Bolon, 917 F. Supp. at 1428 (Title IX).
1. No Institutional Knowledge Necessary for Liability: Imposing Strict Liability

Strict liability imposes liability upon any federally funded educational institution for the sexual harassment of a student by a teacher, regardless of whether the school “knew or should have known” about the harassment.159 Thus, if a student-victim successfully establishes “that the harassment was severe or pervasive enough to interfere with her educational opportunities and create a hostile, offensive or intimidating learning environment” then the school shall be automatically liable.160

The use of agency principles, specifically Restatement of Agency § 219(2)(d), reaches a similar result to strict liability by directly imputing liability upon the school for the actions of its agent, the teacher.161 Because courts and commentators often rely on agency principles as an authoritative source for their Title IX institutional liability standard,162 it is necessary to first analyze the specific arguments that support and oppose the use of agency principles, and then to examine the appropriateness of strict institutional liability under Title IX.

a. Looking to Agency Principles: Support for Institutional Liability

The focus of agency principles is on the actual or apparent authority that a teacher wields over his students as a result of his relationship

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160. Roth, supra note 26, at 505.

161. See supra note 130 for the language of the Restatement of Agency § 219(2)(d). There is often a great deal of overlap between agency principles and strict liability. See Stacy, supra note 20, at 1380 (recognizing that a standard premised on agency principles will raise similar arguments as strict liability). One author, in discussing institutional liability, writes of a standard of “strict vicarious liability.” Schneider, supra note 18, at 568.

162. See Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir. 1997); Rosa H. v. San Elizario Indep. Sch. Dist., 887 F. Supp. 140, 142 (W.D. Tex. 1995), rev’d, 106 F.3d 648 (5th Cir. 1997); OCR Guidance, supra note 23, Fed. Reg. at 12,039. Typically, courts and commentators employ either Restatement of Agency § 219(2)(b) or § 219(2)(d) as a basis of support for a particular standard of liability. See Kracunas, 119 F.3d at 87 (applying Restatement § 219(2)(d)); Rosa H., 887 F. Supp. at 143 (applying Restatement § 219(2)(b)); Brief for Petitioners, available in 1998 WL 19745, at *36, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (applying § 219(2)(d)); Stacy, supra note 20, at 1342 (same). Application of § 219(2)(b) is akin to a negligence standard, Rosa H., 887 F. Supp. at 143 (employing § 219(2)(b) and requiring a negligence finding upon the school to create liability), while application of § 219(2)(d) is analogous to a standard of strict liability. See infra note 205 and accompanying text (noting the Fifth Circuit’s concern over § 219(2)(d)); Stacy, supra note 20, at 1379 (recognizing that use of § 219(2)(d) is “tantamount to strict liability”). The arguments for and against the use of agency principles—either § 219(2)(b) or § 219(2)(d)—as a source to support a particular institutional liability standard, however, are essentially the same.
Thus, for a school to be held liable for teacher-student hostile environment sexual harassment based on agency principles, a plaintiff must establish that the teacher was acting in a supervisory manner, or that he was aided in the harassment by his relationship with the school.

i. Arguments for the Use of Agency Principles

The courts and commentators that advance the use of agency principles to determine institutional liability under Title IX for hostile environment sexual harassment offer several specific arguments to

163. See OCR Guidance, supra note 23, Fed. Reg. at 12,039 (defining agency principles as, "principles governing the delegation of authority to or authorization of another person to act on one's behalf"). Although the Second Circuit neither refers nor cites to agency principles in Kracunas, it uses language that mimics the Restatement of Agency. See Kracunas, 119 F.3d at 88; supra note 130 (reciting the language of the Restatement). The court ultimately applies a liability standard, stating that: "If a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct." Kracunas, 119 F.3d at 88.

164. See supra note 162 and accompanying text. In addition, the OCR unambiguously asserts that an educational institution's liability for sexual harassment committed by its employees "is determined by application of agency principles." OCR Guidance, supra note 23, Fed. Reg. at 12,039. The agency principles that the OCR endorses derive entirely from Restatement § 219(2)(d). Id. at 12,039, 12,048 n.22-23.

There are conflicting views as to the OCR's authority. Courts have stated that they will "accord the OCR's interpretations appreciable deference." Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 n.20 (5th Cir. 1996) (citing Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993)). The OCR itself advocates that courts should "defer to the expertise of an agency" that has the authority to interpret and enforce Title IX. OCR Guidance, supra note 23, Fed. Reg. at 12,036. In Meritor Savings Bank v. Vinson, the Supreme Court specifically addressed the effect of the EEOC Guidelines on the Court's interpretation of Title VII, stating that the Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance." 477 U.S. 57, 65 (1986) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (citation omitted)); see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (stating that "considerable weight" should be given to the interpretation of the statute's administrative agency, but qualifying its support to situations in which "the meaning or reach of a statute... depends upon more than ordinary knowledge respecting the matters subjected to agency regulations" (quoting United States v. Shimer, 367 U.S. 374, 382 (1961) (emphasis added))).

In two recent cases, however, neither the Second nor the Fifth Circuits made reference to the OCR Guidance or to the OCR's request for comments, released in Fall of 1996, Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52,172 (1996), in formulating a standard of institutional liability. See Kracunas, 119 F.3d 80; Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997). In Rosa H. v. San Elizario Independent School District, the Fifth Circuit acknowledged the OCR Guidance and recognized that its own analysis of Title IX institutional liability conflicted with the OCR Guidance's analysis, but refused to apply the OCR Guidance retroactively. 106 F.3d 648, 658 (5th Cir. 1997) (noting that the school received its federal funding before the issuance of the OCR Guidance and explaining that to apply the Guidance retroactively—to funds already
support this theory. The first argument is that the structure of the university setting makes application of agency principles straightforward and logical. 166 The university empowers a professor to exercise a great deal of authority over students. 167 Professors are in positions to further the university's goals of attracting and retaining students, 168 and they are the "agents" who carry out the educational institution's goal of educating its students. 169 Within universities in particular, educators are given wide latitude for their "academic freedom" as it pertains to their teaching duties, relations with students, and conduct generally. 170 Thus, because a professor is "most certainly acting as [a university]'s agent in his role of college professor . . . . [his] blatant abuse of that authority, if proven, is sufficient under agency principles to impute liability to [the university]." 171

Another argument for the use of agency principles to support a standard of institutional liability under Title IX is that students should receive at least the same protection from sexual harassment as em-

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166. See Kracunas, 119 F.3d at 87 (determining that there is no question that Professor Palma was acting as an agent of Iona College).
167. Id. at 87-88; see Roth, supra note 26, 512-13.
168. Kracunas, 119 F.3d at 87.
169. Roth, supra note 26, at 512-13. The district court in Pallett v. Palma, however, argues that "[u]nder agency principles, Professor Palma obviously did not have actual authority of the college to act as he allegedly did [by committing sexual harassment]. . . . [I]t is clear that Professor Palma was acting adversely to the institution itself . . . ." 914 F. Supp. 1018, 1024 (S.D.N.Y. 1996), vacated sub nom. Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997) (emphasis added).
170. Roth, supra note 26, at 514; see Sue Rosenberg Zalk, Men in the Academy: A Psychological Profile of Harassers, in Ivory Power, supra note 26, at 81, 84 (explaining that one repercussion of this autonomy includes a professor's "exaggerated sense of self-importance" which "contributes to an aura that shrouds the professor in the eyes of many").
171. Kracunas, 119 F.3d at 87-88.
employees would receive under Title VII. As noted above, agency principles are easily transferrable to the structure of the education environment. Thus, the same protection provided for employees under Title VII should extend to students. The Second Circuit, in Kracunas, stated: "In the employment context, similar conduct by a supervisor undoubtedly would visit liability on the employer. College students should not receive less protection from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace."

The Supreme Court's decision in Franklin v. Gwinnett County Public Schools has also been used to support the application of agency principles to determine institutional liability in Title IX cases of teacher-student sexual harassment. Courts have used the decision in two ways. First, courts note that Franklin cites Meritor Savings Bank v. Vinson, a decision in which the Supreme Court directed lower courts to employ agency principles to resolve Title VII liability issues. Therefore, courts, such as the Second Circuit, have held that Franklin directs them, by analogy, to look to agency principles in Title IX cases as well. In Murray v. New York University College of Dentistry, for example, the Second Circuit argued that use of agency principles is precisely what the Supreme Court desired in Franklin when it cited to the Title VII case Meritor.

Second, instead of linking Title IX with Title VII, several commentators and at least one court have used the Franklin decision to distin-

172. See id. at 88 (supporting the application of agency principles to determine Iona's liability); Stacy, supra note 20, at 1365-66.
173. In at least one circuit, however, an employer will be liable for supervisor-employee sexual harassment, but a school will not be liable for teacher-student harassment. See Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655-56 (5th Cir. 1997) (acknowledging that the Fifth Circuit has a constructive notice basis of liability for Title VII claims—based on pervasiveness of the conduct—but refusing to extend it to Title IX claims).
176. 477 U.S. 57 (1986); see Franklin, 503 U.S. at 75 (citing Meritor, 477 U.S. at 64).
177. Meritor, 477 U.S. at 72.
178. See, e.g., Doe v. Claiborne County, 103 F.3d 495, 514 (6th Cir. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995). But see infra note 199 and accompanying text (discussing arguments against Franklin's support of agency principles).
179. 57 F.3d 243 (2d Cir. 1995).
180. Id. at 249 ("The Court's citation of Meritor ... , a Title VII case, ... indicates that, in a Title IX suit ... an educational institution may be held liable under standards similar to those applied in cases under Title VII." (citation omitted)). The OCR Guidance also relies on the Franklin decision and its citation to Meritor as support for the use of agency principles. OCR Guidance, supra note 23, Fed. Reg. at 12,047 n.18 ("The Supreme Court has ruled that agency principles apply in determining an employer's liability under Title VII ... . These same principles should govern the liability of educational institutions under Title IX ... .").
guish the statutes.\textsuperscript{181} In \textit{Doe v. Petaluma City School District}, the court noted that the Supreme Court "made no reference to \textit{Meritor's} (or any other Title VII case's) discussion of when an employer will be held liable for . . . sexual harassment" when it considered the liability of an educational institution.\textsuperscript{182} The Petaluma court continued by stating that the Supreme Court did not intend to imply that Title IX is "co-extensive" with Title VII,\textsuperscript{183} but, rather, that \textit{Franklin} made Title IX damages available against an institution for the intentionally discriminatory acts of its agents based on the agency theory of respondent superior.\textsuperscript{184}

In \textit{Rosa H. v. San Elizario Independent School District},\textsuperscript{185} the district court relied on agency principles to develop an institutional liability standard because of the Fifth Circuit's reliance on Title VI—which requires a showing of institutional discriminatory intent to create liability—in analyzing Title IX.\textsuperscript{186} To hold the school itself liable for the acts of its teacher, the court had to determine "[h]ow . . . the wrongful, discriminatory conduct of [the teacher could] be imputed to the school district."

\textsuperscript{187} The court determined that application of agency principles would allow the court to impute the teacher's discriminatory intent upon the school.\textsuperscript{188}

\textbf{ii. Arguments Against Agency Principles}

There are several arguments, however, that courts have offered to oppose the use of agency principles to develop a proper standard of institutional liability. When the district court's \textit{Rosa H.} decision reached the Fifth Circuit, the court of appeals rejected the application of agency principles under Title IX.\textsuperscript{189} The court provided several ba-


\textsuperscript{182} \textit{Petaluma}, 830 F. Supp. at 1575.

\textsuperscript{183} Id.

\textsuperscript{184} \textit{Id.}; see also Brief for Petitioners at \textsuperscript{*}34 n.22, \textit{Gebser} (No. 96-1866) (interpreting \textit{Franklin} as suggesting that a school should be "directly accountable for intentional discrimination by teachers").


\textsuperscript{186} Id. at 142.

\textsuperscript{187} Id.

\textsuperscript{188} Id. at 142-43. The court applied Restatement § 219(2)(b), and held that use of this section required plaintiff to demonstrate, in addition to the intentional violations of the teacher, a separate tort committed by the school. \textit{Id.} at 143.

\textsuperscript{189} \textit{Rosa H. v. San Elizario Indep. Sch. Dist.}, 106 F.3d 648, 655 (5th Cir. 1997) ("We conclude that Title IX does not contemplate a theory of recovery based purely on agency law."); see also \textit{Smith v. Metropolitan Sch. Dist.}, 128 F.3d 1014, 1024 (7th Cir. 1997) ("[N]o basis exists . . . to hold [Title IX] grant recipients liable based on agency principles.").
ses for its holding. First, the Fifth Circuit relied on the argument that Title IX is a Spending Clause statute.\textsuperscript{190} The court acknowledged the Supreme Court’s directive in \textit{Franklin} that a school has notice that it will be held monetarily liable only for intentional violations of Title IX.\textsuperscript{191} The Fifth Circuit argued, however, that the school did not have notice that it would be held liable for the actions of its teachers based on the application of agency principles.\textsuperscript{192} Making a subtle distinction, the court stated that because the recipient of Title IX funds agrees “not to discriminate on the basis of sex,”\textsuperscript{193} that does not mean that the recipient “agreed to suffer liability whenever its employees discriminate on the basis of sex.”\textsuperscript{194}

Another argument against reliance on agency principles for Title IX liability focuses on the textual differences of Titles VII and IX. Courts have noted that Title VII makes “explicit reference to the \textit{agents} of employers.”\textsuperscript{195} Thus, because there was a specific legislative intent to apply agency principles in Title VII cases, an employer’s Title VII violations inherently include those of its supervisors.\textsuperscript{196} Title IX, however, does not contain similar language broadening liability to violations committed by a school’s teachers.\textsuperscript{197} Thus, as opposed to Title VII, “Title IX does not instruct courts to impose liability based on anything other than the acts of the recipients of federal funds.”\textsuperscript{198} In addition, several courts have rejected the argument that \textit{Franklin} directed courts to apply agency principles.\textsuperscript{199} The Fifth Circuit, without detailed explanation, stated that, “[w]e are not convinced that \textit{Franklin} instructs us to find school districts vicariously liable whenever an employee intentionally harasses a student because of sex and satisfies the agency rules of § 219 of the \textit{Restatement}.”\textsuperscript{200}

Lastly, there is the argument that the use of agency principles to determine institutional liability supports the imposition of strict liabil-

\textsuperscript{190} \textit{Rosa H.}, 106 F.3d at 654; see \textit{supra} notes 79-80 and accompanying text (discussing Spending Clause statutes).
\textsuperscript{191} \textit{Rosa H.}, 106 F.3d at 654; see \textit{supra} notes 78-82 and accompanying text (discussing the \textit{Franklin} decision).
\textsuperscript{192} \textit{Rosa H.}, 106 F.3d at 654 (“As a statute enacted under the Spending Clause, Title IX should not generate liability unless the recipient of federal funds agreed to assume the liability.”).
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} (emphasis added).
\textsuperscript{195} \textit{Id.} (emphasis added); see \textit{Smith v. Metropolitan Sch. Dist.}, 128 F.3d 1014, 1023 (7th Cir. 1997) (explaining that Title VII’s language goes further than Title IX’s in prohibiting sexual harassment).
\textsuperscript{196} See \textit{Schneider, supra} note 18, at 568.
\textsuperscript{197} See 20 U.S.C. § 1681(c) (1994) (providing a definition for “Educational institution”); \textit{Rosa H.}, 106 F.3d at 654; \textit{Schneider, supra} note 18, at 568.
\textsuperscript{198} \textit{Rosa H.}, 106 F.3d at 654.
\textsuperscript{199} \textit{Id.}; \textit{Smith}, 128 F.3d at 1023.
\textsuperscript{200} \textit{Rosa H.}, 106 F.3d at 654.
ity on the schools. The Fifth Circuit viewed the district court’s application of agency principles in *Rosa H.* as an attempt to “evade Title IX’s intent requirement.” The court of appeals, therefore, made expressly clear that “agency law can [not] substitute imputed discriminatory intent for actual discriminatory intent in Title IX cases.” The Fifth Circuit’s contention that relying on agency principles, specifically Restatement § 219(2)(d), would “create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student” is based on the court’s belief that a “teacher’s status as a teacher often enables the teacher to abuse the student.” Moreover, “[a teacher]’s chances of initiating a sexual relationship...[are] enhanced when the school district hire[s] him.” Thus, the court did not dispute either the teacher’s “apparent authority” over the student, or the teacher being “aided in” accomplishing the harassment. The court concluded, however, that simply because this section of the Restatement’s factors were so easily satisfied, “is not a sufficient reason to think that the school district discriminated on the basis of sex.” If the court had ruled otherwise, it would have accepted a standard tantamount to strict liability—a standard that the Fifth Circuit had previously rejected.

b. **Strict Liability**

Notwithstanding the arguments against the use of agency principles to determine standards of institutional liability, courts and commentators continue to employ agency principles as a source of support for standards that are analogous to strict liability. In addition, several courts have employed strict liability without relying on agency princi-

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201. *Id.* at 655; *Smith*, 128 F.3d at 1029-30; *see infra* Part II.D.1.b.ii. (discussing the arguments opposing the imposition of strict liability against educational institutions under Title IX).

202. *Rosa H.*, 106 F.3d at 652-53 (explaining that the required discriminatory intent may not be imputed upon the school because the school must have actual intent to discriminate for a court to award of damages); *see supra* note 186 and accompanying text (discussing the district court’s recognition of the actual discriminatory intent requirement and its effort to evade it).


204. The section reads in pertinent part:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2)(d) (1958).

205. *Rosa H.*, 106 F.3d at 655 (emphasis added).

206. *Id.*

207. *Id.*; *see Roth, supra* note 26, at 515-16.

208. See Restatement (Second) of Agency § 219(2)(d) (1958).


210. *See infra* note 237 and accompanying text (noting that the court’s decision in *Canutillo* rejected strict liability in Title IX cases).
Thus, the following section will examine the specific arguments that support and oppose the strict liability standard.

i. The Arguments For Strict Liability

In *Leija v. Canutillo Independent School District*, the district court imposed strict liability against an educational institution for a Title IX teacher-student hostile environment sexual harassment claim. A central justification for this standard of institutional liability is that "the risk of harm [from sexual harassment] is better placed on a school district than on a young student." Institutional liability without knowledge imposes the risk of harassment on the school and encourages schools' heightened vigilance. The *Leija* court asserted that the "student, vulnerable in every way, should not be the only effective line of defense or the policing authority." In addition, to further support the implementation of this standard, the court, as well as commentators, stressed several other factors.

First, the district court focused on the difficulty students would have in satisfying a liability standard with a knowledge requirement since most sexual abuse "occurs or at least is attempted under cover of secrecy." Thus, the court reasoned, a "knew or should have known" requirement for the institution would be ineffective in cases of sexual harassment. Further, a no-knowledge standard avoids the possibility of "administrators and others closing their eyes to the problem" of sexual harassment.

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211. 887 F. Supp. 947 (W.D. Tex. 1995) (deciding a case in which a physical education teacher was accused of sexually molestering a second grade student throughout the 1989-90 school year).

212. Id. at 954.

213. Id. at 955; see also Bolon v. Rolla Pub. Schs., 917 F. Supp. 1423, 1428 (E.D. Mo. 1996) (quoting and supporting the *Leija* court's language); Brief for Petitioners, available in 1998 WL 7475, at *35, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (arguing that a no-knowledge standard—based on agency principles—is preferred over a constructive notice "knew or should have known" standard, because, "[a]s between the school district that put the teacher in the position of extracting sexual gratification through abuse of his authority and the student who is thus abused, the school district should bear the cost of this abuse"); Baker, supra note 20, at 305-06 ("[T]he expense should not fall on students who are protected under Title IX, but on the schools who have the duty to prevent harassment under Title IX.").

214. *Leija*, 887 F. Supp. at 955; Schneider, supra note 18, at 567-68; see Baker, supra note 20, at 305.


216. See, e.g., Schneider, supra note 18, at 569-70 (discussing the advantages of imposing institutional liability regardless of any institutional knowledge of the sexual harassment); Baker, supra note 20, at 303 (proposing a strict liability standard against educational institutions for teacher-student sexual harassment).

217. *Leija*, 887 F. Supp. at 953; see also Schneider, supra note 18, at 568 (recognizing that "sexual harassment, by its very nature, often occurs in private, beyond the purview of the employer or institution's administration").

sexual harassment. The potential for "closed eyes" exists with a "knew or should have known" standard because a school would not want to "know" of the sexual harassment and would not likely be in a position where it "should have known" of the harassment due to its secretive nature.

Another factor supporting liability without knowledge is that "unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative." Teachers are essentially the only parties that can commit intentional acts of sexual harassment in school. Thus, because Title IX is intended to provide monetary awards to student-victims of sexual harassment, acts of teachers must be imputed to schools "in a meaningful way, so that the intent of Congress... is not thwarted." The court, seeking to hold the defendant school liable under Title IX, noted that application of Title VII agency principles would not alleviate this statutory frustration problem. The court explained that "[n]o teacher who sexually abuses a student acts in the scope of his authority. No school district anywhere... could ever be found to condone, much less authorize, the sexual abuse of a child as a part of its teachers' duties." Whether authorized or not, strict liability allowed the court to impute the acts of the teacher to the school.

219. Id. at 953; see also Bolon, 917 F. Supp. at 1429 (stating the same concern of school officials “clos[ing] their eyes to the problem”).
220. Leija, 887 F. Supp. at 953; see also Bolon, 917 F. Supp. at 1429 (mentioning the secrecy of sexual harassment as one factor that renders a knowledge requirement unworkable).
221. Leija, 887 F. Supp. at 953; see also supra notes 151-52 and accompanying text (explaining why this problem is less of an issue in Title VII cases because the statute's prohibitions against an employer specifically include its supervisors).
222. Leija, 887 F. Supp. at 953 ("In teacher-student sexual abuse cases, intentional discrimination can occur only through the intentional acts of a school district's employees."
223. Id. (citing Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75 (1992) (White, J.), and Doe v. Taylor Independent School District, 15 F.3d 443, 477 (5th Cir. 1994) (en banc) (Jones, J., dissenting), in support of this interpretation of Title IX).
224. Id. (emphasis added); see also Brief of National Women's Law Center, American Association of University Women, California Women's Law Center, et al. As Amici Curiae in Support of Petitioners, available in 1998 WL 47598, at *17 (arguing that Title IX surely includes the acts of teachers, the "agents" of the school), Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.); cf. supra note 77 and accompanying text (discussing the Supreme Court's interpretation of Congress' Title IX intentions).
226. Id. The court seems to be looking to §§ 219(1), (2)(d) of the Restatement of Agency. See supra note 130 for the Restatement's full language. But see Kracunas v. Iona College, 119 F.3d 80, 87-88 (2d Cir. 1997) (arguing that Professor Palma was acting in the scope of his authority and abusing the duties delegated to him by the college when he sexually harassed plaintiff).
227. Leija, 887 F. Supp. at 953; see Baker, supra note 20, at 303 (proposing a liability standard that disregards "whether the specific acts complained of were authorized or even forbidden by the institution").
The Eastern District of Missouri also discussed the issue of statutory frustration in Bolon v. Rolla Public Schools. There, adopting a strict liability standard, the court noted that unless a school board decided to take a drastic, and an improbable, measure—such as forbidding females from attending school—the school could avoid liability because the board itself did not discriminate. Furthermore, if a teacher chose to forbid female students from attending his class, the school could simply claim that it lacked knowledge of the Title IX violations and, thus, would be free from liability. Consequently, under this interpretation of the statute, Title IX would have minimal effect in halting a fundamental form of sexual harassment in educational institutions—teacher-student sexual harassment.

Another factor supporting the strict liability standard is the belief that educational institutions and their teachers owe a higher duty of care to students than employers owe to employees. Unlike employees who receive direct economic compensation for their relationship with an employer, a student's main benefits are derived from grades, degrees, and other educational advancement. These benefits are primarily under the control of the teacher, are protected from deprivation on the basis of sex by Title IX, and are dependent on the physical and psychological environment within which the student learns. Thus, automatically imputing a teacher's harassing behavior to the school supports the institution's "important interest in ensuring that a faculty member carries out his special fiduciary-type responsibilities."

ii. The Arguments Against Strict Liability

There are several courts, however, that view the no-knowledge standard of institutional liability as misplaced and inappropriate for Title

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228. 917 F. Supp. 1423 (E.D. Mo. 1996) (involving a Title IX claim against the school district for the sexual relationship that a teacher had with plaintiff).
229. Id. at 1429.
230. Id.
231. Schneider, supra note 18, at 569 (examining the differences in applying strict liability in a university environment as opposed to an employment setting and stating, "[a]n educational institution has an important obligation to guard against the abuse of the power relationship between faculty and students"); see Bolon, 917 F. Supp. at 1428 (elevating the responsibility of schools over employers as a justification for the imputing of teachers' actions onto the school); see also Baker, supra note 20, at 305 (noting that a school's superior duty of care is particularly true when the students are minors).
233. See Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir. 1997) (arguing that the professor had great influence and control over the student-victim's academic and career success because of his position).
234. Schneider, supra note 18, at 551-53 (arguing that "[a] sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program").
235. Id. at 569.
IX claims of sexual harassment.\textsuperscript{236} Subsequent to an interlocutory appeal filed by the Canutillo Independent School District, the Fifth Circuit rejected the district court's application of the strict liability standard against the school district for teacher-student hostile environment sexual harassment.\textsuperscript{237} One reason for the renunciation of a no knowledge standard is the interpretation of Title IX as a Spending Clause statute.\textsuperscript{238} Pointing to the similarities between Title IX and Title VI, particularly their similarity as Spending Clause statutes, one court stated that "Congress must be clear and 'unambiguous[ ]' about any conditions or obligations it is imposing on the recipient of such funds."\textsuperscript{239} Thus, because there is no "whisper of strict liability" within Title IX, and because nothing in the statute "places a school district on notice that it will be strictly liable for its teachers' criminal acts," courts have held that they will not apply a strict liability standard.\textsuperscript{240}

Courts have also highlighted the lack of sound policy for applying a strict liability standard.\textsuperscript{241} The Fifth and Seventh Circuits analogized the school to a manufacturer, and students to products.\textsuperscript{242} They noted that the costs of imputing strict liability to a manufacturer is accepted because a manufacturer is able to spread the enhanced regulations costs to consumers by increasing the price of its products.\textsuperscript{243} Because a school's products are its students, however, a school would only be able to defray such added costs by increasing the "price" paid through federal, state and community funds, a measure which the court explicitly rejects.\textsuperscript{244} Thus, the potential for "million-dollar verdicts" against the school and the risk of financial ruin are too high under a strict liability regime.\textsuperscript{245}

\textsuperscript{236} See, e.g., Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1030 (7th Cir. 1997) (stating that the imposition of strict liability under Title IX is inappropriate); Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398 (5th Cir. 1996) (holding school district did not have the requisite actual or constructive notice).
\textsuperscript{237} Canutillo, 101 F.3d at 398.
\textsuperscript{238} Id.; see supra notes 79-80 and accompanying text (discussing Spending Clause statutes).
\textsuperscript{239} Canutillo, 101 F.3d at 398 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (alteration in original)). But see supra notes 78-82 and accompanying text (describing the Supreme Court's response to this issue).
\textsuperscript{240} Canutillo, 101 F.3d at 398-99; see Smith, 128 F.3d at 1030-31. The Fifth Circuit more readily accepts employer liability for an employee's violations in Title VII cases, however, because of the statute's explicit inclusion of "agents of employers." Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997).
\textsuperscript{241} Smith, 128 F.3d at 1030-31; Canutillo, 101 F.3d at 399.
\textsuperscript{242} Smith, 128 F.3d at 1030-31; Canutillo, 101 F.3d at 399.
\textsuperscript{243} Smith, 128 F.3d at 1030-31; Canutillo, 101 F.3d at 399.
\textsuperscript{244} Canutillo, 101 F.3d at 399 ("As horrible a crime as child abuse is, we do not live in a risk-free society; it contorts 'public policy' to suggest that communities should be held financially responsible in this manner (strict liability) for such criminal acts of teachers.").
\textsuperscript{245} Id. at 399-400; see Smith, 128 F.3d at 1032 (discussing the financial repercussions of strict liability on educational institutions).
In addition, unlike manufacturers, there is a limit to the regulating and screening that a school can do to prevent teacher-student sexual harassment. These limits decrease the school’s ability to control both its teachers and its students. This lack of control argument may be even stronger within the university context due to the “strong tradition of academic freedom [which] dictates a degree of faculty independence” and simply because “institutional control over faculty may be impossible or undesirable.”

Lastly, the Canutillo court noted the potential conflicts that would arise if a school were both educator and insurer. In such a situation, “it is most arguable that [the school’s] role as educator—needed now more than ever—will suffer, and suffer most greatly.” Despite this grave warning, the court did not elaborate on its concerns nor on the actual repercussions of the school’s dual role.

Imputing liability upon a school for sexual harassment of which it has no knowledge interprets Title IX in its broadest form and places a significant degree of accountability upon educational institutions for any violations that occur. Liability without knowledge provides plaintiffs with an improved potential for damages recovery from the school. In turn, this creates a significant hurdle for educational institutions in their defense of Title IX violations. As the Seventh

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246. Canutillo, 101 F.3d at 399 (arguing that humans are unpredictable and cannot be monitored for ‘defects’ the way that products can, and also that there are Constitutional limits to a school’s ability to conduct exhaustive background checks).

247. Id.

248. Schneider, supra note 18, at 569. But see Kracunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997) (explaining that “academic freedom” is placed in no jeopardy because liability is imputed to a university for the actions of its professors).

249. Canutillo, 101 F.3d at 400.

250. Id.

251. Id. The court may have worried that a school would wrongly shift its resources from educating its students to acquiring some form of liability insurance. The court may also have had concerns that a school would take such extreme measures to avoid liability that the basic quality and nature of the education would suffer. See Roth, supra note 26, at 520 (noting the concern that the prospect of Title IX liability may cause schools to “overreact and take extreme measures without consideration for due process and the careers of faculty and students”).

252. See Bolon v. Rolla Pub. Schs., 917 F. Supp. 1423, 1428 (E.D. Mo. 1996) (supporting the imposition of liability without knowledge by citing the Supreme Court’s directive to provide Title IX “a sweep as broad as its language” (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982))).

253. See Baker, supra note 20, at 307 (endorsing institutional liability without knowledge and stating that “Title IX was intended to require institutions to provide an educational environment free of sex discrimination, including sex-based harassment. When they fail to live up to this duty, the cost of this failure should fall on them, not on the victim of sex-based harassment.”).

254. See Schneider, supra note 18, at 568 (discussing the difficulties educational institutions would confront from a liability standard that does not require knowledge, including: that genuine efforts to eradicate the problem would not absolve schools from liability; and that the covertsness of sexual harassment makes it difficult to prevent its occurrence despite “careful vigilance by the [school]”).
Circuit noted, liability without knowledge "would create liability for the [s]chool . . . even if [it] acted without notice of the alleged harassment; even if [it] had no reason to know of the harassment; and even if [it] acted entirely reasonably."255

2. Institutional Knowledge—Based on a Negligence Theory—Necessary for Liability

The Eighth Circuit, in Kinman v. Omaha Public School District,256 applied a negligence theory to Title IX and held that an educational institution should be liable only if it has "engaged in some degree of culpable behavior."257 The court explained that institutional liability should be based on a "knew or should have known" standard.258 Elaborating the Eighth Circuit's standard, one commentator has defined the negligence standard of institutional liability as requiring "the plaintiff [to] establish that the school knew or should have known of the actions that created the hostile environment and failed to take appropriate action to remedy the situation."259

Many courts that apply a negligence or "knew or should have known" standard for Title IX cases point to Title VII case law for their authority.260 The precedent for Title IX's reliance on Title VII's application of negligence derives, as it does with Title IX's reliance on Title VII's agency principles,261 from Franklin, in which the Supreme Court cited to Meritor—a Title VII case.262

255. Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1030 (7th Cir. 1997) (rejecting strict liability and agency principles as bases for institutional liability in a Title IX case).
256. 94 F.3d 463 (8th Cir. 1996).
257. Id. at 469.
258. Id.; see also Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (adopting a Title VII standard, which is interpreted as a "knew or should have known" standard). The Court of Appeals for the Fifth Circuit asserts that "the constructive-notice standard is essentially grounded in negligence." Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 656 (5th Cir. 1997). For purposes of this discussion, negligence is interchangeable with a knowledge requirement. Smith, 128 F.3d at 1022 (stating that "the 'knew or should have known' standard is really just a negligence theory").
259. Ellison, supra note 16, at 2120; see Roth, supra note 26, at 517.
260. See Kracunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997) (holding that actual and constructive notice apply to cases arising under Title IX, as they do under Title VII); Kinman, 94 F.3d at 469 (extending Title VII's "knew or should have known" standard of liability to Title IX cases of teacher-student sexual harassment); Petaluma, 949 F. Supp. at 1426 (stating that the Title VII standard of liability, "which imposes liability where the entity knows or should have known of the hostile environment . . ., is the appropriate standard" to apply to Title IX cases).
261. See supra notes 178, 180 and accompanying text (noting the reliance on Franklin's citation of Meritor to justify use of agency principles).
262. See supra note 77 and accompanying quote for the Court's citation.
The negligence standard also has some basis in agency principles, particularly Restatement (Second) of Agency § 219(2)(b), which states that a “master” will be liable for the torts of a servant if “the master was negligent or reckless.” The district court in Rosa H. employed this section of the Restatement and proposed that the section required two torts to find institutional liability: “[t]he intentional tort of the school employee and the negligence tort on the part of the school district.” The court further explained that a plaintiff must show that the school had “notice, either actual or constructive, of the sexual harassment,” and that the school “failed to take prompt, effective, remedial measures.”

As stated earlier, the Fifth Circuit argued that requiring a school to have knowledge of the teacher-student sexual harassment as a condition to a recovery of damages “will result in much quicker and greater protection.” In contrast to a liability standard with a knowledge requirement, a no-knowledge standard fosters a school’s inability to act promptly. Because sexual harassment often occurs in secret, it is difficult for a school to detect, stop, and remove the harassing teacher without knowledge provided by the student-victim. One commentator further notes that liability without knowledge may influence a university not to “vigorously prosecut[e] the grievance internally, [because it] would establish [a] case that could be used against it in subsequent litigation initiated by the student.”

A knowledge requirement may also provide the school with an opportunity to remedy the sexual harassment and escape liability. The school is given time in which it can “act on behalf of the student, that is, terminate the discriminatory conduct, before being subject to liability.” Institutional liability based on negligence also permits no

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263. See supra Part II.D.1.a. for a discussion of whether relying on agency principles to support a standard of institutional liability is proper.
264. Restatement (Second) of Agency § 219(2)(b) (1958); see Roth, supra note 26, at 490.
266. Id.
267. Id.
269. See Canutillo, 101 F.3d at 399.
270. See id.
271. Schneider, supra note 18, at 570.
272. Id.; see also Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (stating that “even if a hostile environment exists, and the entity has actual or constructive notice of it, the entity is not liable if it takes prompt, appropriate remedial action”). The OCR also emphasizes that a school may avoid Title IX liability in these circumstances “if it takes immediate and appropriate action upon notice of the harassment.” OCR Guidance, supra note 23, Fed. Reg. at 12,039.
liability in a situation where there is no opportunity for the school to remedy the hostile environment sexual harassment because of its concealed nature.274

Moreover, a negligence standard is better suited to address sexual harassment in educational institutions because the school "is in the best position to be on the lookout" for Title IX violations.275 Such a position demands that a school oversee its teachers and students, or, in the alternative, be subject to liability.276 The Rosa H. district court believed that a "knew or should have known" standard "prevents a situation where the [school] . . . turns a blind eye toward" sexual harassment.277 The protection provided by this standard will, arguably, aid the harassed student, as well as protect other students from being harassed in the future.278 One commentator also notes that students may be more likely to report incidents of sexual harassment to the school if knowledge were a prerequisite to the institution's liability.279

As noted by the Eighth Circuit, the negligence standard imputes liability upon the school if it "knew or should have known" of the sexual harassment.280 The remainder of this section will separately consider the "knew" standard, or the actual knowledge of the school, and the "should have known" standard, or the constructive knowledge of the school.

a. Actual Knowledge

A principal issue that must be resolved with the "actual knowledge" standard, is to determine "whose knowledge is sufficient to hold the school district liable."281 If courts follow Title VII on this issue,282 then the person with the actual knowledge must be in a "manage-
ment-level" position. This person must have "some authority over employees, including, perhaps, the power to hire, fire, or discipline." Transferring the standard to Title IX, "the school district does not have actual knowledge of hostile environment sexual harassment until someone with authority to take remedial action is notified. . . . [I]t may well be that that someone must be a member of the school board." Under such a requirement, therefore, notifying a professor does not meet that standard.

Conversely, one commentator argues that an educational institution is deemed to have actual notice, for liability purposes, if a student tells a teacher of the sexual harassment. The OCR agrees, stating that a school receives actual notice of sexual harassment "as long as an agent or responsible employee of the school received notice." Instead, the Guidance provides examples of

283. Id. at 401; see also Roth, supra note 26, at 490-91 (noting that, under Title VII, "[a]ctual knowledge has been found where there is firsthand knowledge of the harassment, either because the harasser himself is an officer of the employer's company, or because a high level employee has personally witnessed the harassment" (citations omitted)).

284. Canutillo, 101 F.3d at 401.

285. Id. at 402 (emphasis added); see also Rosa H., 106 F.3d at 660 (elaborating upon its decision in Canutillo by stating that a school district will be liable only if the school official with the actual knowledge had a specific duty to supervise the harassing employee, had the power to take actions that would end such abuse, and failed to do so).

286. See Rosa H., 106 F.3d at 660; Canutillo, 101 F.3d at 402.

287. Roth, supra note 26, at 518. This standard of notice, however, is argued primarily with elementary and secondary schools in mind. See id. (arguing that this notice standard makes "particular sense in elementary and secondary schools" because of the preexisting legal duty that school officials have to report incidents of sexual abuse).

288. In addition to liability founded on agency principles, see supra note 165, the OCR also imputes institutional liability under Title IX "if the school 'has notice' of a sexually hostile environment and fails to take immediate and appropriate corrective action." OCR Guidance, supra note 23, Fed. Reg. at 12,042. The OCR explains that "notice" can be actual or constructive. Id. This standard is primarily applicable to sexual harassment perpetrated by a non-school employee, such as another student. Id. at 12,039 (discussing the "knew or should have known" standard in its section, "Liability of a School for Peer or Third Party Harassment"). Notice, however, is only required for this 'negligence' standard. There is no notice requirement for harassment—either quid pro quo or hostile environment—committed by a school employee that satisfies the criteria of § 219(2)(d) of the Restatement. Id. at 12,042 n.63. For the exact Restatement language see supra note 130.

Although this Note does not address the issue of peer harassment, it analyzes the OCR's application of the negligence standard to compare it to the negligence standards proposed by courts and commentators.


290. Id. The OCR states that "[a]n exhaustive list of employees would be inappropriate, however, because whether an employee is an agent or responsible school employee, or whether it would be reasonable for a student to believe the employee is an agent or responsible employee, even if the employee is not, will vary." Id. at 12,037. It is not clear from the language of the Guidance whether an ultimate list of school
the appropriate parties, including students, parents, or teachers contacting principals, teachers, campus security, bus drivers, or student affairs officers. The OCR disagrees with the contention that a school has notice only through managerial or designated employees.

b. Constructive Knowledge: The “Should Have Known” Standard

As an alternative to “actual knowledge,” a plaintiff may argue that the pervasiveness or severity of the hostile environment sexual harassment justifies an inference that a school had “constructive knowledge” of the harassment. In considering this constructive notice standard, some courts have reasoned that it is a means of ensuring that schools will not simply be held to a strict liability standard or found liable based solely on the teacher's use of his position of authority to further the harassment. Employing a constructive notice standard may also avoid a head-in-the-sand problem by encouraging schools to monitor, seek out, and eliminate sexually harassing behavior that it should have known about.

In cases of constructive notice, the OCR states that a school “should have known” of the sexual harassment if a “reasonably diligent inquiry” would have revealed it. An example of this would be if the pervasiveness of the harassment was such that it should have prompted the school to act. The OCR argues that the constructive notice standard is appropriate because of the school’s “obligation to respond,” and because the standard is simply punishing schools that “ignore[] or fail[] to recognize overt or obvious problems of sexual harassment.”

The Fifth Circuit rejected the use of a constructive notice standard in determining institutional liability. The court argued that the “should have known” standard “treats the . . . [school] as if it had

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291. Id. at 12,042. The Guidance, in a footnote, states that the ultimate determination of whether a school has actual notice through an agent or responsible employee “depend[s] on factors such as the authority actually given to the employee and the age of the student.” Id. at 12,042 n.65.

292. Id. at 12,037.


294. See Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655-56 (5th Cir. 1997) (rejecting a constructive notice standard, although the court acknowledges that this standard would not be liability based on agency principles); Petaluma, 949 F. Supp. at 1426 (rebutting arguments that this is a strict liability standard).

295. See Petaluma, 949 F. Supp. at 1426; Roth, supra note 26, at 518.


297. Id.

298. Id. at 12,037.

299. Rosa H., 106 F.3d at 656.
actual notice of the harassment," while conceding that a constructive notice standard is more protective of a school than agency principles, the court continued to guard against any threat to the school's financial security. Moreover, to counter the argument that Franklin endorsed the use of a Title VII-adopted constructive notice standard, the Fifth Circuit insisted that a single citation in Franklin—for the sole purpose of deeming sexual harassment actionable under Title IX—"does not by itself justify the importation of other aspects of Title VII law into the Title IX context."

As this analysis indicates, there is little consensus over the appropriate standard of institutional liability for Title IX violations. The standards of liability that courts have applied vary in strictness, knowledge and evidentiary requirements, and the manner in which they interpret similar bases of support, whether Supreme Court decisions or the language of Title IX itself. Thus, it is evident that courts, as well as the parties affected by Title IX, require guidance in formulating a structured and uniform standard of institutional liability.

III. TOWARD A MODEL STANDARD OF LIABILITY

A university jeopardizes and impairs a student's growth and educational experience when professors sexually harass students. For Title IX to have any significant effect in eradicating sexual harassment in universities, the prohibitions of the statute must include the discriminatory acts committed by a school's professors.

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300. Id.
301. Id. (emphasis added).
302. Id.; see supra note 245 and accompanying text.
303. See supra notes 260-62 and accompanying text.
304. Rosa H., 106 F.3d at 656.
305. See Schneider, supra note 18, at 534-35.
306. See Brief for the United States as Amicus Curiae Supporting Petitioners, available in 1998 WL 24199, at *17, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (stating that teachers are the persons "through whom a school district generally acts in day-to-day relations with its students, not the school principal or school board members"). Given professors' tremendous autonomy, they should face greater Title IX liability than elementary school teachers. Thus, to ensure that the professor and the university share in the liability, courts should interpret Title IX as making clear that universities and the individual professors fall within the definition of the "educational institutions" prohibited from sexual discrimination. Compare 20 U.S.C. § 1681(c) (1994), with 42 U.S.C. § 2000e(b) (1994) (defining "employer" as a "person engaged in an industry affecting commerce . . . and any agent of such a person," (emphasis added)). In the alternative, Congress could amend Title IX to specifically provide for this. When a student-victim seeks recovery for sexual harassment, she should be able to apply the Title IX protections against the individual violator of the statute, as well as against the institutional violator. This issue is distinct to universities. Teachers in grade schools, like supervisors in the workplace, do not have the same level of autonomy granted to them. See supra notes 47-48 and accompanying text; see also Schneider, supra note 18,
and a model standard of liability should have this goal in mind.\textsuperscript{307}

At least one commentator has recognized the need to have Title IX extend to professor misconduct. In February, 1987, Ronna Greff Schneider published \textit{Sexual Harassment and Higher Education}.\textsuperscript{308} In the article, she advanced three situations in which schools should be liable for teacher-student sexual harassment: (1) if the school did not establish an anti-discrimination policy and grievance procedure; (2) if the school has actual or constructive knowledge of the harassment and did not respond appropriately; and (3) as an exception to requiring knowledge, if the sexual harassment was \textit{quid pro quo} harassment.\textsuperscript{309} At the time Schneider wrote her article, there had been only two reported federal claims of Title IX sexual harassment.\textsuperscript{310}

Although Professor Schneider's article is useful as a starting point, the law of Title IX sexual harassment has evolved in the subsequent eleven years. There have been several significant legal developments concerning Title IX that have changed the landscape of sexual harassment law. The most notable development is the 1992 Supreme Court decision in \textit{Franklin v. Gwinnett County Public Schools}.\textsuperscript{311} The Court's decision, making monetary damages available for Title IX claims, required the lower courts to develop their own Title IX institutional liability standards and to address the evidentiary issues in applying those standards. In addition, as a result of the surge in sexual harassment litigation since \textit{Franklin}, courts must now be sensitive to the financial impact that their decisions will have on schools and universities. In 1987, the possibility of $1.4 million jury verdicts for Title IX sexual harassment claims would have been remote.\textsuperscript{312} Moreover, \textit{Franklin}'s citation to Title VII case law has made the development of

\textsuperscript{307} See supra notes 221-24 and accompanying text.

\textsuperscript{308} Schneider, supra note 18.

\textsuperscript{309} \textit{Id.} at 572.

\textsuperscript{310} \textit{Id.} at 527 n.8 (citing Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980), and Moire v. Temple Univ. Sch. Of Med., 800 F.2d 1136 (3d Cir. 1986)).

\textsuperscript{311} 503 U.S. 60 (1992).

\textsuperscript{312} See Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 396 (5th Cir. 1996) (noting the jury's verdict for $1.4 million in compensatory damages and reversing on other grounds).
a uniform standard of institutional liability more difficult, as courts have varied greatly in the weight they give this citation. Lastly, Professor Schneider's standard of liability improperly conflates actual and constructive knowledge of sexual harassment into one basis of liability by not appropriately differentiating between the two. Such a standard would impute liability in nearly all occurrences of sexual harassment. All of these factors indicate that a reappraisal of Title IX's liability objectives, as well as any proposed standard itself, is essential.

Before discussing this Note's recommended standard of institutional liability for Title IX claims of professor-student hostile environment sexual harassment, it is necessary to outline the goals of this standard and why a uniform standard is essential. Elucidating the goals of institutional liability guides the choice of such a standard. As such, this part will first discuss the importance and purposes of this Note's Title IX liability standard and then will propose a model standard.

Any standard of liability must be able to adjust to the unique circumstances of a case. It is essential, however, that courts consistently apply one standard of institutional liability for the benefit of and fairness to student-victims, universities, and professors. By heightening a university's internal efforts to address professor-student sexual harassment, the consistent application of a liability standard can provide positive results that far outweigh any possible negative effects of institutional liability.

The primary objective of establishing a standard of institutional liability is to compel universities and professors to prevent professor-student sexual harassment on campus. For both the victims of sexual harassment and other individuals touched by its occurrence, the effects of sexual harassment may extend far beyond what may be remedied by a financial award. This Note argues, therefore, that the

313. See infra note 327 and accompanying text.
314. Cf. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468-69 (8th Cir. 1996) (explaining that "the divergence of views" on institutional liability "stems in part from the factual disparity in the cases").
315. In addition, the financial solvency of universities and how financial liability would affect the educational environment must be considered. See Pallett v. Palma, 914 F. Supp. 1018, 1024 (S.D.N.Y. 1996) (emphasizing that the money that would potentially go to student-victims of sexual harassment "could be used better for the instruction of other students"), vacated sub nom. Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997); supra notes 244-45 and accompanying text (discussing the impact that "million dollar verdicts" could have on educational institutions). Congress should, therefore, include Title IX in 42 U.S.C. § 1981a's coverage. Section 1981a is a statutorily created cap on damages that applies to claims arising under Title VII. 42 U.S.C. § 1981a(b)(3) (1994); see supra notes 135-37 and accompanying text. There is also an argument that universities should only be liable for granting equitable relief to the plaintiff, such as: transcript adjustments, course changes, or tuition reimbursement. See Schneider, supra note 18, at 573.
316. See supra notes 29-34 and accompanying text (discussing the diverse effects of sexual harassment).
force of an effective standard of institutional liability lies in its ability to affect the behavior of the university and professors before sexual harassment occurs. Thus, the goal of an institutional liability standard should be the eradication of sexual harassment on campus, and not compensation for the individual student-victim. In addition, this Note’s model standard of liability addresses the issues that the Franklin decision raised, and it revises Schneider’s bases of institutional liability, specifically her “actual or constructive notice standard,” to conform to the current landscape of Title IX law.

A. University Liability through an Adapted Negligence Theory, and Its Application

The model liability standard offered in this Note is similar, although with some modifications, to the negligence standard that several courts have applied to Title IX cases. The institutional liability determination should focus on whether the university itself has “engaged in some degree of culpable behavior.” The university should, therefore, be liable for Title IX violations of professor-student hostile environment sexual harassment in three situations:

1. if the university had constructive knowledge of egregious or rampant harassment and did not act to remedy the situation;
2. if the university had actual knowledge of severe or pervasive harassment and, again, did not act to remedy the situation; or
3. if the university had actual knowledge of severe or pervasive harassment and, again, did not act to remedy the situation; or

317. The OCR has stated, “the best way for a school to deal with sexual harassment is to prevent it from occurring.” U.S. Department of Education, Office for Civil Rights, Sexual Harassment: It’s Not Academic (visited May 22, 1997) <http://www.ed.gov/offices/OCR/ocrshpam.html> [hereinafter It’s Not Academic]; see also Brief of the National Education Association as Amicus Curiae in Support of Petitioners, available in 1998 WL 19697, at *3, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (“[T]he most effective means for reaching Title IX’s goal are pro-active school district efforts to promote equal treatment of all students and to prevent discrimination.” (emphasis added)).

318. See supra note 83 and accompanying text (discussing several issues created and left unresolved by the Franklin decision).

319. See supra Part II.D.2.


321. See Roth, supra note 26, at 518 (explaining that a court can make an “inference of constructive knowledge” depending on the severity of the sexual harassment); see also Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (applying a liability standard which holds a school liable if it “should have known” of the sexual harassment).

322. See Kinman, 94 F.3d at 469 (applying a liability standard that holds a school liable if it “knew” of the harassment); Petaluma, 949 F. Supp. at 1426 (explaining that a plaintiff must prove that the harassment was “severe or pervasive” to satisfy the actual knowledge standard); OCR Guidance, supra note 23, at Fed. Reg. 12,041-12,042 (stating that a school violates Title IX if it “actually knew” of “severe or pervasive” harassment and failed to take appropriate action).
(3) if the university did not have effective and accessible sexual harassment procedures established at the time of the sexual harassment.\textsuperscript{323}

Institutional liability against a university should exist if the university has constructive knowledge of egregious or rampant professor-student sexual harassment—if the university “should have known” about the harassment. For a university to have constructive knowledge of a Title IX violation, the sexual harassment must be \textit{egregious or rampant}, a more exacting harassment standard than the “severe or pervasive” level.\textsuperscript{324} In other words, because Title IX hostile environment sexual harassment claims require a minimum finding of “severe or pervasive” conduct,\textsuperscript{325} constructive knowledge is only appropriate in a subset of all such cases.\textsuperscript{326} If all “severe or pervasive” hostile

\textsuperscript{323} See Brief of National Women’s Law Center, American Association of University Women, California Women’s Law Center, et al. as Amici Curiae in Support of Petitioners, \textit{available in} 1998 WL 47598, at *23, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), \textit{granting cert. to} 106 F.3d 1223 (5th Cir.) (stating that schools should be “liable under Title IX for their own wrongful actions”); Brief for the United States as Amicus Curiae Supporting Petitioners, \textit{available in} 1998 WL 24199, at *17, Gebser (No. 96-1866) (discussing the negative repercussions of neither having nor disseminating sexual harassment policies throughout the school community).

\textsuperscript{324} See supra note 112 (explaining that a showing of “severe or pervasive” harassment is one of the elements of an actionable Title IX hostile environment sexual harassment claim). For Title VII and Title IX cases, there is no set list of factors that courts employ to measure a harasser’s conduct. Most courts and commentators rely on two separate analyses: (1) an objective analysis of whether a “reasonable woman” would perceive the conduct as “severe or pervasive”; see Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997); OCR Guidance, supra note 23, Fed. Reg. at 12,041; and (2) a subjective analysis of whether the victim perceived the conduct as “severe or pervasive.” See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); OCR Guidance, supra note 23, at 12,041. The OCR outlines several factors that the analyses should consider, including: “[t]he degree to which the conduct affected one or more students’ education;” any “tangible or obvious injuries”—although harassment can occur without tangible injury; the nature and frequency of the conduct; the number of individuals involved; and, the location of the conduct. OCR Guidance, supra note 23, Fed. Reg. at 12,041-12,042 (emphasis removed). Courts can apply these factors to find egregious or rampant harassment, although the degree to which the factors existed must be greater than for the “severe or pervasive” standard. As explained above, “egregious or rampant” sexual harassment is an extreme level of “severe or pervasive” harassment. See infra notes 358-59 for scenarios in which a court may find that conduct is “severe or pervasive” but not “egregious or rampant” enough to infer constructive knowledge.

\textsuperscript{325} Torres, 116 F.3d at 630-31 (ruling that its analysis of Title VII is transferable to Title IX).

\textsuperscript{326} This is akin to the assessment that courts must make to satisfy the “pervasive or severe” requirement. The Second Circuit explained that hostile environment sexual harassment exists if the conduct is “severe or pervasive,” but conduct “that is ‘merely offensive’ and ‘not severe or pervasive enough to create a[ ] . . . hostile or abusive work environment’” does not trigger Title IX. \textit{Id.} (quoting Harris, 510 U.S. at 21). Similarly, under the model standard, if a court finds that conduct is “severe or pervasive” but does not reach the level of “egregious or rampant” then liability based on a university’s constructive knowledge is not available under Title IX.
environment sexual harassment claims could substantiate a claim of constructive knowledge, a university would be liable in every case of sexual harassment.³²⁷ Requiring a plaintiff to demonstrate that the sexual harassment was "egregious or rampant," however, targets the most serious cases of harassment and ensures that a constructive knowledge standard will not simply be "open ended negligence" akin to a strict liability standard.³²⁸ In her article, Professor Schneider failed to make this distinction between actual knowledge and constructive knowledge.³²⁹ The implication of the oversight is potentially open-ended liability.³³⁰

If a student-plaintiff demonstrates that the university had constructive knowledge of particularly egregious harassment and did nothing to remedy the situation, then that is negligent behavior and should render the university liable based on its failure to provide an environment free from such sexual harassment.³³¹ Moreover, this will help prevent sexual harassment before it occurs by encouraging universities to implement monitoring procedures that will seek out and elimi-

³²⁷ For example, under the OCR Guidance, in order to hold a school liable for actual or constructive knowledge of a hostile environment Title IX claim, a plaintiff must demonstrate "severe or pervasive" harassment. OCR Guidance, supra note 23, Fed. Reg. at 12,041-12,042. For constructive knowledge, the OCR does not raise the degree of the harassment that plaintiff must demonstrate and, thus, a school will seemingly be liable, based on its constructive knowledge, in every actionable claim of sexual harassment whether it has received actual notice or not. Id. at 12,042; see also Roth, supra note 26, at 492 ("In general, where a plaintiff has already established that the harassment was sufficiently severe or pervasive to render it actionable as hostile environment harassment, it seems likely that there will also be a sufficient basis for constructive notice to the employer."). Moreover, quid pro quo sexual harassment is, by definition, severe, such that liability automatically attaches to it. See supra notes 119-20 and accompanying text.

³²⁸ See supra note 301 and accompanying text.

³²⁹ Schneider, supra note 18, at 572.

³³⁰ See supra note 312; see also Kajja Clark, Note, School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers, 66 Geo. Wash. L. Rev. 353, 377-78 (1998) (noting the need for the prevention of "unbound remedies" awarded to Title IX plaintiffs).

³³¹ See supra note 18 and accompanying text (discussing Title IX recipients' "affirmative duty" to protect students from sexual harassment). Title IX states: "No person in the United States shall, on the basis of sex, be excluded . . ., be denied the benefits of, or be subjected to discrimination under any education program . . . receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (1994).

For both constructive and actual knowledge liability, the satisfaction of the university's requirement to remedy the situation is a factual question. See Krausnas v. Iona College, 119 F.3d 80, 90-91 (2d Cir. 1997). The university should, at a minimum, take the following steps in a manner that is prompt, thorough and impartial: investigate the accuracy of the complaints; confront the accused; and enforce some degree of discipline upon the accused if the university confirms the accuracy of the complaint—this may take the form of warnings, mandatory counseling, or dismissal. See OCR Guidance, supra note 23, Fed. Reg. at 12,042-12,043.
nate sexually harassing behavior as this will often relieve them of liability.\footnote{332}{See Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 399-400 (5th Cir. 1996) (explaining that knowledge as a prerequisite to damages increases the likelihood of students reporting incidents of harassment, thus more quickly protecting themselves and potential future victims); Rosa H. v. San Elizario Indep. Sch. Dist., 887 F. Supp. 140, 143 (W.D. Tex. 1995) (arguing that a knowledge requirement prevents schools from "turn[ing] a blind eye" towards the problem of sexual harassment), rev'd, 106 F.3d 648 (5th Cir. 1997); cf. Melsheimer et al., supra note 26, at 553 (noting that detailed sexual harassment policies, which include effective monitoring, are strong tools in "recogniz[ing] and eradicat[ing] this continuing problem").}

For hostile environment sexual harassment claims in which the alleged conduct is not egregious or rampant, institutional liability against a university should exist where the university has actual knowledge of severe or pervasive sexual harassment. The university should establish a specified list of university personnel whose knowledge of the sexual harassment of a student would render a university as having "actual knowledge."\footnote{333}{Title IX does require educational institutions to "designate at least one employee to coordinate [the school's] efforts to comply with and carry out its responsibilities." 34 C.F.R. § 106.8(a) (1994).} Unlike elementary and secondary school students, college students can more readily understand and utilize the "channels of authority" that exist within a university to address claims of sexual harassment.\footnote{334}{See Brief for the United States as Amicus Curiae Supporting Petitioners, available in 1998 WL 24199, at *17, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.). It appears that there is resistance in establishing a specific list of elementary or secondary school personnel because of the concern that those schools may be able to avoid liability by claiming that the 'right' person did not have knowledge. Cf. supra note 290 (noting the OCR's reluctance in providing a specified list).} In addition, because the university must disseminate this information throughout the campus,\footnote{335}{If a university did not inform its students of the designated personnel, then the university could be found liable for having failed to implement effective sexual harassment procedures. See infra notes 343-49 and accompanying text; see also Schneider, supra note 18, at 571 (explaining how a university must publicize its sexual harassment policies, or else be subject to liability).} this attention will heighten the overall awareness to and discussion of the problem of sexual harassment.\footnote{336}{This list of personnel is offered as an example. Each university should establish its own particular list of "knowledgeable personnel" based on the authority that the university delegates to its employees. See supra note 291. The OCR, the federal agency charged with implementing Title IX, should have the ultimate authority to approve the list for use by the university.}

The list of persons whose "actual knowledge" can be imputed to the university should include: professors, deans, health personnel, student and academic affairs officers, and university officials.\footnote{337}{Title IX does require educational institutions to "designate at least one employee to coordinate [the school's] efforts to comply with and carry out its responsibilities." 34 C.F.R. § 106.8(a) (1994).} Professors are particularly important to include because students often develop ties with certain professors with whom they feel comfortable in shar-
ing difficult and emotional experiences. Because the university must attempt to remedy a sexual harassment situation or incur liability once a designated person has "actual knowledge," it is essential that the apprehension of subjecting the university to this liability not dissuade professors from having a student share a situation of harassment with them. Nor should the threat of liability drive universities to curb a professor's accessibility to students or to discourage professors from developing connections with students. Accordingly, professors, in addition to other designated personnel, should be required to ask the student whether she wants to exercise the university's reporting and grievance procedures. If the student only wishes to share the incident in confidence and does not want the issue to proceed further, then the university should be absolved from liability based on its knowledge. In such a situation, the university should not be found to have committed any "culpable behavior."

The third instance in which a university should be held liable under Title IX for professor-student sexual harassment is if the institution did not have effective and accessible sexual harassment procedures established at the time of the harassment. Because this Note advo-

338. See supra notes 44-45 and accompanying text.
339. See Schneider, supra note 18, at 534 ("If sexual harassment is to be eradicated, a credible legal definition of sexual harassment must allow effective prosecution of complaints without chilling all professionally appropriate faculty-student relationships.").
340. See Pallett v. Palma, 914 F. Supp. 1018, 1022 (S.D.N.Y. 1996) (noting that when one of the plaintiff-victims reported the sexual harassment to the Iona College dean, the dean "provided her with copies of the relevant college policies and offered to assist her in filing a formal complaint"), vacated sub nom. Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997).
341. Id. at 1023 ("A college official would seem to be morally bound to accept such a direction on the part of a student that confidentiality be maintained."). While this does not necessarily protect the interests of future potential victims, a student-victim, particularly one of majority age, should not be forced to pursue redress measures that she is not ready or willing to take. See id.
342. See supra note 257 and accompanying text.
343. See Brief of the National Education Association as Amicus Curiae in Support of Petitioners, available in 1998 WL 19697, at *18-19, Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 595 (1997) (No. 96-1866), granting cert. to 106 F.3d 1223 (5th Cir.) (stating that "[e]ducational efforts effectively increased female undergraduate awareness of the university's sexual harassment policy and grievance procedure and also raised their awareness of the illegality of sexual harassment"); OCR Guidance, supra note 23, Fed. Reg. at 12,038 (stating that grievance procedures "provide schools with an excellent mechanism to be used in their efforts to prevent sexual harassment before it occurs"); Effective Sexual Harassment Training of College Faculty: Conference Attendees Highlight Challenges, Offer Suggestions, in Educator's Guide, supra note 21, Monthly Bulletin 3, January 1997 ("Adequate faculty training is one of the most crucial issues an educational institution faces—along with establishment of grievance procedures and proper investigation of complaints—in ensuring its students are protected from harassment and it is protected from liability."); Elizabeth A. Williams et al., The Impact of a University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 60-61 (1992) (finding that effective sexual harassment policies reduce sexual harassment and increase awareness).
icates for a standard of liability that emphasizes the prevention of sexual harassment on campus before it occurs, it is necessary that universities develop, implement, and enforce measures that aim to achieve this goal.\textsuperscript{344} As suggested by the National Education Association, the measures should include: a clear and unambiguous sexual harassment policy,\textsuperscript{345} grievance procedures that encourage students to report sexually harassing conduct,\textsuperscript{346} and, a prevention program encompassing sexual harassment training and education for professors and students\textsuperscript{347} as well as sexual harassment monitoring by the university before the school receives a complaint and after the school receives any suggestions of harassment.\textsuperscript{348} Although the obligation that Title IX creates, and for which this Note advocates, does not support a strict liability standard, the absence of these measures should automatically impute liability upon the university for failing to meet its

\textsuperscript{344} See It's Not Academic, supra note 317, at 4 ("Adoption of strong preventive measures is often the best way to confront the serious problem of sexual harassment.").

\textsuperscript{345} Brief of the National Education Association as Amicus Curiae in support of Petitioners at *16, Gebser (No. 96-1866); see It's Not Academic, supra note 317, at 3 (stating that an effective sexual harassment policy "clearly states sexual harassment will not be tolerated and . . . explains what types of conduct will be considered sexual harassment"); cf. Brief for the United States as Amicus Curiae Supporting Petitioners, available in 1998 WL 24199, at *17, Gebser (No. 96-1866) (discussing the negative repercussions of either not having or not disseminating sexual harassment policies throughout the school community).

\textsuperscript{346} Brief of the National Education Association as Amicus Curiae in support of Petitioners at *18-20, Gebser (No. 96-1866); see Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (noting that grievance procedures should be "calculated to encourage victims of harassment to come forward"); OCR Guidance, supra note 23, Fed. Reg. at 12,044 (listing six elements of "prompt and equitable" grievance procedures: (1) notice of the procedures to all students and school employees; (2) application of the procedure to complaints of harassment; (3) effective investigation of complaints, including the opportunity to offer witnesses and other evidence; (4) establishing time frames for the complaint process; (5) notice to all parties of the complaint's outcome; (6) if appropriate, to assure that the institution will take steps to prevent recurrence of the harassment). The procedures must indicate the "actual knowledge" personnel of the university. See supra note 335 and accompanying text. In addition, the procedures should explain the disciplinary options that a university shall take if it finds that a professor did sexually harass a student.

\textsuperscript{347} Brief of the National Education Association as Amicus Curiae in support of Petitioners at *18-20, Gebser (No. 96-1866); see OCR Guidance, supra note 23, Fed. Reg. at 12,044 (stating 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").

\textsuperscript{348} See Brief of the National Education Association as Amicus Curiae in support of Petitioners at *19-20, Gebser (No. 96-1866). The National Education Association ("NEA") argues that schools must "monitor[ ] teacher compliance" with the institution's sexual harassment policy and with the "lessons of its training and education instruction." Id. at *20. The NEA describes effective monitoring as "following up on any information suggesting instances of teacher sexual harassment and by taking prompt and effective action to correct any deviation from those norms." Id.
legal obligation, and for failing to undertake efforts to prevent sexual harassment.\(^\text{349}\) Conversely, however, if the university shows these procedures existed and were properly utilized during the time of the sexual harassment claim at issue, that should be an affirmative defense to liability under Title IX.\(^\text{350}\) The university, in such a scenario, would have met its affirmative obligation under Title IX to not discriminate on the basis of sex.\(^\text{351}\) In addition, if the university had actual or constructive knowledge of the harassment, the utilization of these measures would demonstrate that the school acted appropriately to remedy the situation.

\[\text{B. Applying the Model Standard}\]

The remainder of this section will apply the model standard's three theories of liability to the facts presented in \textit{Kracunas v. Iona College}.\(^\text{352}\) The \textit{Iona} case provides fertile ground for exploring how this Note's model standard is well suited to the new developments in the case law. First, Iona may be liable if plaintiffs can demonstrate that the college had constructive knowledge of Pallett's harassment and did not act to remedy the situation.\(^\text{353}\) Specifically, plaintiffs must prove that the sexual harassment was egregious or rampant in order to infer that Iona "should have known" about the harassment. Plaintiffs could achieve this if they could show that Iona had indeed received the five previous complaints from other students concerning Professor Palma.\(^\text{354}\) A fact-finder should consider knowledge of five prior complaints concerning the same individual as egregious or rampant.\(^\text{355}\)

\(^{349}\) See Brief for the United States as Amicus Curiae Supporting Petitioners at *18, \textit{Gebser} (No. 96-1866) (explaining that the lack of effective sexual harassment procedures may: (1) contribute to a perception that the school was granting a teacher the authority to harass students; or (2) prevent a school from learning of harassment about which it should have known); Schneider, \textit{supra} note 18, at 583 (noting that universities that do not have effective sexual harassment policies in place "leave themselves open to charges of impermissibly discriminating against women by not facing the problem of sexual harassment and by failing to comply with their legal duty").

\(^{350}\) See Brief of the National Education Association as Amicus Curiae in support of Petitioners at *3, \textit{Gebser} (No. 96-1866); see also Barbara Watts, \textit{Legal Issues, in Ivory Power}, \textit{supra} note 26, at 20 ("[T]he institutions should be able to avoid liability by showing that, as soon as it learned of the harassment, it investigated and punished the offending individual.").

\(^{351}\) See \textit{supra} note 18 and accompanying text (discussing the university's affirmative obligation under Title IX).

\(^{352}\) 119 F.3d 80 (2d Cir. 1997); see \textit{supra} notes 1-14 and the accompanying text for a discussion of the \textit{Kracunas} case and the decisions rendered by the district and appellate courts.

\(^{353}\) See \textit{supra} note 321 and accompanying text.

\(^{354}\) See \textit{Kracunas}, 119 F.3d at 84.

\(^{355}\) See \textit{supra} note 324 (noting that one factor that courts may consider in determining whether conduct is egregious or rampant is the conduct's frequency). There also may be an argument that this is "actual knowledge" of the harassment.
Thus, this could permit a charge that Iona should have known about
the harassment and should have conducted an inquiry into the accu-
racity of the complaints. Iona’s failure to do so is negligent behavior for
which it should be liable. 356

If, however, there were no prior complaints and Pallett was the only
victim of Palma’s harassment, Iona’s knowledge of that incident
should not be inferred, and a fact-finder should not consider Palma’s
conduct egregious or rampant. Factors in forming this conclusion in-
clude: the harassment occurred behind closed doors in Palma’s of-
fice; 357 the harassment occurred once, not on numerous occasions
over a period of time; 358 Pallett did not require immediate medical or
counseling assistance; and, finally, the nature of the closed-door meet-
ing—such as its length or noise level—did not cause other students or
university employees to become aware of the harassment occurring
inside. 359 Thus, without proof of the five previous complaints, a fact-
finder should not conclude that the sexual harassment against Pallett
was egregious or rampant so that Iona should have known of it.

The second theory of liability under which Iona may be found liable
is if the college had actual knowledge of the sexual harassment and
did not act to remedy the situation. 360 Under this theory, because the
fact-finder does not have to justify an inference of Iona’s constructive

356. See supra notes 296-98 and accompanying text (discussing the OCR’s support
for a constructive notice standard based on a school’s “obligation to respond”).

357. Kracunas, 119 F.3d at 83; see also Pallett v. Palma, 914 F. Supp. 1018, 1024
(S.D.N.Y. 1996) (arguing that a professor who “clandestinely” violates school policies
should not cause the institution to confront liability), vacated sub nom. Kracunas, 119
F.3d at 80.

358. See Roth, supra note 26, at 518 (noting that “[h]arassers generally conduct a
pattern of harassment, thus making it more likely that they will be detected if a school
is reasonably alert”). To infer Iona’s constructive knowledge due to the rampant na-
ture of the sexual harassment, scenarios such as the following must have occurred:
Professor Palma had consistently sought private meetings with Pallett that were
known to the university community; Pallett had made previous complaints regarding
Palma’s conduct; or, there is proof of the five prior sexual harassment complaints filed
against Palma by other students.

359. See supra note 324 and accompanying text (noting the factors that should be
considered in an “egregious or rampant” analysis); see also Roth, supra note 26, at 518
(noting, as a factor in determining whether a school “should have known” of harass-
ment, that the “degree to which other students know about sexual harassment of
other students should be highly relevant”). To infer Iona’s constructive knowledge
due to the egregiousness of the sexual harassment, scenarios such as the following
must have occurred: Pallett was seen emotionally distraught by a university employee
subsequent to her meeting with Palma; or, the meeting was violent, noisy or ex-
tremely long. As is the case with “severe or pervasive” sexual harassment, plaintiffs
may not have to satisfy both the “egregious” and the “rampant” levels of harassment
in order to be able to infer the university’s knowledge. See OCR Guidance, supra
note 23, Fed. Reg. at 12,041 (explaining that “conduct that is sufficiently severe, but
not . . . pervasive, can result in hostile environment sexual harassment”).

360. See supra note 322 and accompanying text.
knowledge, plaintiffs are only required to demonstrate that "severe or pervasive" sexual harassment occurred and that a designated individual was aware of the harassment. Applied to the Kracunas case, Iona received actual knowledge of the harassment when Pallett discussed Professor Palma's conduct with the Dean of Students. The actual knowledge of a university official whose responsibilities included the handling of complaints filed against university employees should be imputed to Iona. Whether Iona's response to its actual knowledge of the sexual harassment constituted an appropriate remedy to the situation is a factual question for the jury. One factual issue to resolve is whether Pallett requested that the dean keep her complaint confidential. As the Second Circuit noted, there are disputed facts regarding this request. If the fact-finder determines that the plaintiffs requested that the dean maintain confidentiality regarding their complaints, then Iona should not face liability based on its actual knowledge.

Lastly, to assess Iona's liability, there must be a factual determination as to whether Iona had effective and accessible sexual harassment procedures at the time of Pallett's harassment. Regardless of whether the harassment is "severe or pervasive," or reaches the level of "egregious or rampant," a lack of appropriate procedures should render Iona liable. The Second Circuit's decision did not, however, con-

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361. See Roth, supra note 26, at 518 (insisting that a court must be able to "justify [the] inference of constructive knowledge"); cf. OCR Guidance, supra note 23, Fed. Reg. at 12,038 (defining hostile environment sexual harassment as conduct that is "sufficiently severe, persistent, or pervasive to ... create a hostile or abusive educational environment").

362. See supra note 343 and accompanying text; see also supra note 324 (discussing factors to consider for a "severe or pervasive" analysis).

363. Kracunas, 119 F.3d at 84.

364. The Dean of Students should be included in Iona's list of "knowledgeable personnel." Id. at 90 (discussing the Dean of Students' authority and power within the university and his relationship to Iona's students).

365. Kracunas, 119 F.3d at 89. But see Pallett v. Palma, 914 F. Supp. 1018, 1025 (S.D.N.Y. 1996) (relying primarily on two factors to rule as a matter of law that Iona's response was appropriate: (1) that plaintiffs asked the dean to keep the complaints confidential; and (2) the plaintiffs chose not to participate in Iona's grievance procedures), vacated sub nom. Kracunas, 119 F.3d at 80. It is significant to note that Iona did take a number of actions subsequent to receiving Pallett's complaint, including: providing Pallett with information relating to Iona's grievance procedures and encouraging its use; providing Pallett with counseling; discussing the complaint with Pallett and her parents; and suspending Professor Palma from teaching duties. Kracunas, 119 F.3d at 84-85. These responses to the school's actual notice of the harassment are appropriate and should satisfy Iona's duty to "act to remedy the situation." See supra note 322.

366. Kracunas, 119 F.3d at 90.

367. See supra notes 340-42 and accompanying text (discussing the issue of a request for confidence by the complaining student); see also Pallett, 914 F. Supp. at 1025 (stating that, without further involvement by plaintiff, Iona would have been "powerless" to proceed with termination proceedings against Professor Palma).

368. See supra notes 343-49 and accompanying text.
sider any of the following: the quality of the university's policy regarding sexual harassment, the grievance procedures that Iona had and their effectiveness, or whether Iona had conducted sexual harassment training or education programs for its faculty and students.\textsuperscript{369} Thus, it is necessary for the fact-finder to determine whether these measures adequately satisfy Iona's affirmative duty to prohibit sexual harassment on campus.\textsuperscript{370}

Accordingly, a fact-finder should determine, through the use of this Note's model standard of institutional liability, that Iona had constructive knowledge of the rampant nature of Professor Palma's harassing conduct, contingent on proof of the five previous complaints. In addition, the model standard would find that Iona had actual knowledge—obtained by the dean—of Pallet's sexual harassment, contingent on a finding that Pallet did not request the dean to maintain confidentiality. To assess liability under Iona's constructive or actual knowledge, the fact-finder must determine whether Iona acted appropriately to remedy the situation.\textsuperscript{371} Lastly, the model standard would render Iona liable if the fact-finder determines that the college did not have effective and accessible sexual harassment procedures at the time of Pallet's harassment.

CONCLUSION

The serious responsibility that universities have to their students to protect them from sexual harassment is not absolute. The use of a strict liability standard does not effectively achieve the ultimate goal of preventing sexual harassment before it occurs. Strict liability creates disincentives for effective grievance and investigative procedures. Universities may be tempted to adopt a head-in-the-sand approach rather than monitor or investigate a situation which may be in violation of Title IX and which would subsequently cause the institution to face liability.

The no knowledge liability standard may be prudent to apply against elementary and secondary schools because of the age of the students, the special responsibility that the State designates to these educational institutions, the inherent societal and legal disdain for

\textsuperscript{369} See Kracunas, 119 F.3d at 89 (discussing the application of agency principles and focusing solely on the occurrence of the harassment and Palma's relation to the college). In fact, Iona did have a sexual harassment policy that complied with statutory guidelines. Pallet, 914 F. Supp. at 1021-22. But see Kracunas, 119 F.3d at 89 (stating that "[a]lthough Iona maintained a sexual harassment policy . . . , the mere existence of reasonable complaint procedures does not insulate Iona from liability for sexual harassment claims"); see also supra note 365 (outlining other steps that Iona took upon receiving knowledge of Pallet's harassment complaint).

\textsuperscript{370} See supra note 8 (providing Title IX's language).

\textsuperscript{371} See Kracunas, 119 F.3d at 91 (remanding the case to resolve several factual issues including whether Iona took prompt and appropriate action upon its notice of Palma's sexually harassing conduct).
those who commit such acts, and because the school has, through its close association with its teachers, adopted the role of parent to the child. These factors, however, are not present in the university setting.

Title IX expressly asserts that no educational institution shall subject a student to sexual discrimination. This goal, however, is not achieved through the plain existence of a statute, or through imputing liability for every instance that a university falls short of this goal. Across the country, universities are failing to comply with Title IX due to regular occurrences of professor-student sexual harassment. The Supreme Court has stated that in order to give Title IX “the scope that its origins dictate, we must accord it a sweep as broad as its language.”\textsuperscript{372} Institutional liability is one important element of that sweep. This Note offers a standard of institutional liability which ensures the university’s effective application of the measures that a university must adopt to eradicate sexual harassment on campus.
