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Overcoming a Hostile Work Environment: Recognizing School District Liability for Student-on-Teacher Sexual Harassment under Title VII and Title IX

Heather Shana Banchek

OVERCOMING A HOSTILE WORK ENVIRONMENT: RECOGNIZING SCHOOL DISTRICT LIABILITY FOR STUDENT-ON-TEACHER SEXUAL HARASSMENT UNDER TITLE VII AND TITLE IX

HEATHER SHANA BANCHEK*

* Ms. Banchek graduated from Cleveland-Marshall College of Law in May 2007. She would like to thank Professors Kathleen C. Engel, Sandra J. Kerber and Barbara Tyler for all of their help throughout the writing process. She would also like to thank her husband Scott and the rest of her family and friends for their support.

I. INTRODUCTION

In October of 2000, Henar Plaza-Torres was excited to begin a teaching career with Petra Roman Vigo School in Puerto Rico as a junior-high school mathematics teacher.[1] A mere four months later, in February of 2001, Ms. Plaza-Torres resigned because she could not endure the continuous sexual harassment by two of her students.[2] Ms. Plaza-Torres had reported the incidents of sexual harassment to her school administration over a two month period, but the school refused to exercise its authority to discipline the students and prevent their continued misbehavior.[3] Ms. Plaza-Torres filed a complaint in the U.S. District Court in Puerto Rico, which alleged that the school lacked an anti-harassment policy to adequately address student-on-teacher sexual harassment, and that certain school officials failed to take appropriate remedial measures to correct the sexual harassment and hostile work environment that led to her constructive discharge.[4]

Ms. Plaza-Torres is not alone. Unfortunately, specific studies on the prevalence of sexual harassment of teachers by students are limited due to the relatively recent recognition of the problem. By analogy, however, studies that indicate that respect for authority is declining among teenagers provide helpful indications of possible causes of the problem.[5] For example, one study conducted in 1997 revealed that six percent of elementary school teachers, twenty-three percent of middle school teachers, and twenty percent of high school teachers reported experiencing verbal abuse from students.[6] Another study conducted in 1999 revealed that "19 [sic] percent of [United States] public schools reported weekly student acts of disrespect for teachers."[7] Even these statistics may not accurately represent the rate of student-

[1]Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 177 (D.P.R. 2005).

[2]*Id.* at 175, 177.

[3]*Id.* at 184.

[4]*Id.* at 175.

[5]Terry Nihart et al., *Kids, Cops, Parents and Teachers: Exploring Juvenile Attitudes Toward Authority Figures*, 6 W. CRIMINOLOGY REV. 79, 80-81 (2005); *see also* John O'Neil, *Cover Story: Classroom Management*, NAT'L EDUC. ASSN., Jan. 2004, http://www.nea.org/neatoday/0401/cover.html (noting that public attitudes have consistently identified lack of discipline as one of the top concerns facing schools since 1969 when Phi Delta Kappa first began conducting its annual Gallop poll of public attitudes toward schools).

[6]Ethics Resource Center, Statistics: Discipline Issues, http://www.ethics.org/character/stats_discipline.html (last visited Jan. 19, 2006) (reporting the results of a 1997 study on school violence, which was conducted with a nationally represented sample of 1234 regular public elementary, middle, and secondary schools in the fifty states and the District of Columbia).

[7]JILL F. DEVOE ET AL., U.S. DEP'TS OF EDUC. & JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2005 at v (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/iscs05ex.pdf; *see also*

on-teacher harassment, as teachers may underreport harassment in order to preserve their dignity and their jobs.[8]

Despite the prevalence of student harassment against teachers, many school administrators disregard teacher complaints. Inaction rarely has legal repercussions for schools or their administrators.[9] As a result, administrators do not feel obligated to take action against student perpetrators to remove sexual harassment from the work environment of their teachers. When school districts refuse to take appropriate action to protect their teachers from sexual harassment perpetrated by their students, teachers are forced to choose between their economic well-being and their emotional well-being.[10]

In the past, courts have been reluctant to hold schools accountable for student-on-teacher sexual harassment. The United States Supreme Court has not directly ruled on the issue of school liability for student-on-teacher sexual harassment.[11] As a result, teachers who have been sexually harassed by their students and who have brought claims against their schools for failure to intervene have struggled to survive summary judgment and, as a result, school districts avoid legal liability.[12] There is

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NAT'L CTR. FOR EDUC. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY (2005), http://nces.ed.gov/programs/crimeindicators.

[8]The author bases this assumption on the apparent similarity between student-on-teacher sexual harassment and rape in terms of the victim's reluctance to report out of embarrassment and fear. Rape is "the most underreported violent crime in America" because victims fear police response, minimize the importance of reporting, discredit the possibility of a favorable outcome, or prefer to protect their own privacy. Rape Trauma Services, Rape and Sexual Assault: The Demographics of Rape, http://www.rapetraumaservices.org/rape-sexual-assault.html (last visited Feb. 14, 2006) (citing D.G. KILPATRICK, ET AL., THE NAT'L CTR. FOR VICTIMS OF CRIME, RAPE IN AMERICA: A REPORT TO THE NATION (1992)) (emphasis omitted).

[9]Note that the U.S. Supreme Court has not directly ruled on the issue to establish a cause of action for teachers to assert against a school. *Plaza-Torres*, 376 F. Supp. 2d at 180. As a result, many jurisdictions have been unwilling to recognize a teacher's cause of action and complaints filed by victimized teachers are often dismissed on summary judgment. *See, e.g.*, Seils v. Rochester City Sch. Dist., 192 F. Supp. 2d 100, 113-14 (W.D.N.Y. 2002).

[10]*See* PEGGY CRULL, WORKING WOMEN'S INST., THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN 4 (1979) (indicating that psychological symptoms, including fear, anger, and nervousness, affect ninety-six percent of harassment victims); *see also* Jennifer L. Vinciguerra, Note, *The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 CLEV. ST. L. REV. 301, 306 & n.39 (1994) (citing CRULL, *supra* note 10).

[11]*Plaza-Torres*, 376 F. Supp. 2d at 180 ("[N]either the U.S. Supreme Court nor the First Circuit Court have discussed school liability for sexual harassment suffered by a teacher on account of a student . . . ."); Paul Lannon, School May Be Liable for Student-on-Teacher Harassment, Holland & Knight LLP, http://www.hklaw.com/Publications/OtherPublication.asp?ArticleID=3245, (last visited Nov. 23, 2007).

[12]In order for a court to grant summary judgment as a matter of law, the moving party must prove two elements: namely, that there is no genuine issue of material fact and that the evidence would lead reasonable minds to but one conclusion in favor of the moving party. FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986); *see also Seils*, 192 F. Supp. 2d at 110, 127 (granting summary judgment in favor of school district). *But see* Owen v. L'Anse Area Schs., No. 2:00-CV-71, 2001 U.S. Dist. LEXIS 19287, at *10

some evidence, however, that the tides are shifting. Recent court treatment of student-on-teacher harassment indicates that the courts may be more receptive to teachers' claims of sexual harassment by students.[13]

A split has emerged among the lower federal courts that have faced the issue of school liability for student-on-teacher sexual harassment. Some jurisdictions continue to refuse to recognize a teacher's cause of action against a school that fails to prevent student-on-teacher sexual harassment.[14] Recently, however, the precedent for analogous claims by public employees against their employers for employment discrimination based on sex has solidified; as a result, jurisdictions seem to be increasingly willing to recognize a cause of action against school districts in their capacity as a public employer for failure to intervene in acts of student-on-teacher sexual harassment.[15] These jurisdictions have found that teachers who experience employment discrimination may bring their cause of action under Title VII of the Civil Rights Act of 1964 ("Title VII"),[16] which prohibits discrimination in the workplace based on sex, as well as race, color, religion, or national origin,[17] or Title IX of the Educational Amendments of 1972 ("Title IX"),[18] which prohibits sex discrimination in schools that receive federal funding.[19] Most recently, in July of 2005, the United States District Court of Puerto Rico held for the first time that a teacher—Ms. Plaza-Torres—could bring a cause of action, under either Title VII or

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(W.D. Mich. Nov. 14, 2001) (denying summary judgment for Title VII discrimination claim on appeal).

[13]Lannon, *supra* note 11.

[14]*Seils*, 192 F. Supp. 2d at 118.

[15]*See, e.g.*, Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 956 (7th Cir. 2002) (finding that a cause of action, under the Equal Protection Clause, against a school for sexual orientation harassment of a teacher by students may exist).

[16]42 U.S.C. § 2000e-2 (2000).

[17]Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109, 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001) (recognizing a cause of action under Title VII against the school for race and national origin harassment of teacher by students; denying defendant's motion for summary judgment, in order to give plaintiff the opportunity to establish for a jury that a "hostile environment existed and . . . that the school board either provided no reasonable avenue of complaint or knew of the harassment and failed to take appropriate remedial action"). For cases that have recognized a cause of action for student-on-teacher harassment in alternative contexts, *see Schroeder*, 282 F.3d at 956 (recognizing a cause of action under the Equal Protection Clause for sexual orientation harassment of a teacher by students, although the claim was not proper in this case); Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002) (holding that plaintiff stated a cognizable cause of action under the Equal Protection Clause against the school district for failing to take appropriate measures to prevent sexual orientation harassment by students).

[18]20 U.S.C. § 1681(a) (2000).

[19]N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982) (extending Title IX to protect employees of educational institutions from sex discrimination); *see also* Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 179 (D.P.R. 2005) ("Title IX . . . provides protection from sex discrimination in employment."); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

Title IX, against a school district that refused to take action to prevent sexual harassment perpetrated by students.[20]

It is essential to the safety and protection of our nation's educators that schools adopt preventative and corrective measures to stop student-on-teacher sexual harassment. Schools should consider developing training programs devoted to educating the school community, revising current anti-harassment policies to explicitly prohibit student-on-teacher sexual harassment, and establishing effective complaint procedures to help victimized teachers report incidents of sexual harassment. By taking these proactive measures, schools will prepare themselves for the potential liability suggested by recent case law.

This Note urges all school districts to take proactive measures to end sexual harassment of teachers by students. Additionally, it urges state legislatures to pass legislation mandating school adoption of anti-harassment policies that include provisions prohibiting all forms of student-on-teacher harassment, including sexual harassment. Following this introduction, Part II of this Note provides a background on the current climate in the public schools in the United States, identifies the statutory protections available to victims of sexual harassment, and discusses the definitions of sexual harassment used by the Equal Employment Opportunity Commission ("EEOC") and the courts. Part III examines relevant sexual harassment decisions in the school environment, as well as analogous sexual harassment decisions in the employment context. Part IV explores the court's analysis in *Plaza-Torres v. Rey*[21] and considers the policy rationales for imposing liability on schools that refuse to intervene in incidents of student-on-teacher harassment. Part V of this Note recommends that school districts revise their existing anti-harassment policies and develop proactive training programs directed at teachers, students, parents, and the entire school community to prohibit student-on-teacher harassment effectively, increase awareness of the problem, and emphasize a commitment to strict disciplinary action for offenders. Finally, Part VI concludes that elimination of student-on-teacher sexual harassment will require proactive school administrations that are interested in both taking the requisite steps to protect teachers from student harassment and avoiding costly legal liability that could result from their inaction.

II. BACKGROUND

A. Current Climate of U.S. Schools

Disrespect and disorder are increasingly common problems facing teachers in schools in the United States.[22] Teachers constantly struggle to maintain order in their classrooms and authority over their students.[23] The concerns teachers face in the

[20]*Plaza-Torres*, 376 F. Supp. 2d at 180-81.

[21]*Id.* at 180-84.

[22]Mary Ellen Flannery, *The D Word: Discipline Problems Weigh on Educators Today More than ever. But Don't Despair—there's Plenty You Can Do to Knock Your Challenges Down to Size*, NAT'L EDUC. ASS'N, Sept. 2005, http://www.nea.org/neatoday/0509/coverstory.html ("[S]urvey found 82 percent of adults agree kids are less respectful.").

[23]O'Neil, *supra* note 5.

classroom today are quite different from fifty years ago.[24] Students today become violent with their classmates[25] and verbally or physically attack their teachers.[26] In 1999, Reb Bradley suggested that children lack the discipline and self-control necessary for learning in the classroom because parents no longer take the time to teach self-control to their children.[27] Instead of teaching self-control and self-denial,[28] parents focus on being popular with their children.[29] Parents are intimidated by their children and distracted by work and other commitments, and, as a result, children run the homes.[30] Not surprisingly, these children expect to run their classrooms as well.[31] Consequently, conflict and tension between teachers and students arise in the classroom and pose problems for schoolteachers.

Students lack the respect for teachers, parents, and other authority figures that society once expected and enforced.[32] Some blame the decline in respectful behavior on violent television programs, movies, and videogames.[33] Others blame weak gun laws,[34] increased work commitments,[35] or lack of after-school programs.[36] Still others

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[24]Nancy A. Braun et al., *Establishing a Descriptive Database for Teachers with Aggressive Students*, 8 J. BEHAV. EDUC. 457, 457 (1998) (noting the shift in the last half-century in social issues that concern families, schools, and communities, including increased "poverty, suicide, drug and alcohol abuse, divorce, child abuse, weapon use, and gang involvement").

[25]Flannery, *supra* note 22; *see also* DEVOE ET AL., *supra* note 7 at vi ("In 2003, 12 percent of students ages 12–18 reported that someone at school had used hate-related words against them. . . [and] 7 percent of students ages 12–18 reported that they had been bullied . . . at school during the previous 6 months.").

[26]Flannery, *supra* note 22; *see also* DEVOE ET AL., *supra* note 7 at v ("In 1999–2000, 19 percent of public schools reported weekly student acts of disrespect for teachers, 13 percent reported student verbal abuse of teachers, 3 percent reported student racial tensions, and 3 percent reported widespread disorder in classrooms.").

[27]Reb Bradley, *What's Happened to America? The Ultimate Answer*, WORLD NET DAILY, June 1, 1999, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=16149 ("Until parents get the vision for teaching their children to be self-controlled, America will continue its downward slide into the moral cesspool.").

[28]Self-denial refers to "practicing self discipline" and "controlling . . . impulses." WordNet 3.0, http://wordnet.princeton.edu (last visited Oct. 28, 2007); *see also* Dictionary.com, http://www.dictionary.com (last visited Oct. 28, 2007) (Defining self-denial as "[s]acrifice of one's own desires or interests.").

[29]Bradley, *supra* note 27.

[30]*Id.*

[31]*Id.*

[32]Braun, *supra* note 24, at 458 ("Major concerns listed in the 1940's [sic] included talking without permission, chewing gum in class, making noises, running in the hallway, getting out of line, wearing improper clothing, and not putting paper in the wastebasket.").

[33]Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1487 (1995); *see also* Bradley, *supra* note 27.

[34]Bradley, *supra* note 27.

[35]New America Found., Workforce and Family Program, http://www.new america.net/programs/workforce_and_family (last visited Apr. 21, 2007) ("Nearly two-thirds

blame inadequate school funding, which leads to larger school buildings, larger classes, and higher student-to-teacher ratios.[37] Regardless of the actual cause of the increase in violence and disrespect among students, alleviating the problem of student disrespect will necessitate dedication and effort from the entire school community—teachers, administrators, parents, coaches, and students.

In the 1980s, people began to recognize sexual harassment as a form of student disrespect.[38] In 1998, the National Education Association ("NEA")[39] recognized sexual harassment and other acts of disrespect in the classroom and posted twenty-five classroom management tips on their website to help teachers regain control.[40] Efforts like these are a good start toward prevention; however, violent and disrespectful behavior, including sexual harassment, will continue to plague the schools until school administrators make it a priority to consistently exercise their heightened authority over students who have sexually harassed their teachers.[41]

B. Statutory Protections

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964,[42] as amended in 1991,[43] forbids employment discrimination based on an "individual's race, color, religion, sex, or

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of families are now headed by either two working parents or a single working parent."); *see also* Parents Action for Children, Key Facts about Child Care in America, http://www.parentsaction.org/act/childcare/key-facts/ (last visited Feb. 16, 2006).

[36]Kevin P. Dwyer, *Children Killing Children: Strategies to Prevent Youth Violence*, COMMUNIQUE: NAT'L ASS'N OF SCH. PSYCHOLOGIST, Spring 1999, at 3, http://www.naspcenter.org/pdf/bbcqcrisisfamily.pdf.

[37]Public Agenda, Public Agenda Report: Sizing Things Up – What Parents, Teachers, and Students Think About Large and Small High Schools, http://www.publicagenda.org/specials/smallschools/smallschools.htm (last visited Jan. 22, 2006).

[38]Pam Chamberlain, 66 RADICAL TCHR. 32, 32 (2003) (book review) ("[S]exual harassment became recognized as prevalent in schools in the 1980s.").

[39]National Education Association, About NEA, http://www.nea.org/aboutnea/index.html (last visited Jan. 22, 2006). "The National Education Association (NEA), the nation's largest professional employee organization, is committed to advancing the cause of public education. NEA's 3.2 million members work at every level of education—from pre-school to university graduate programs. NEA has affiliate organizations in every state and in more than 14,000 local communities across the United States." *Id.*

[40]Flannery, *supra* note 22 (suggesting the following tips for educators: modeling desired behavior, setting parameters, avoiding confrontation, keeping students busy, creating more interesting lesson plans, ignoring excuses, going on home visits, ensuring that students and parents understand the rules and expectations, and finding the triggers); *see also* O'Neil, *supra* note 5 (indicating that teachers who are experts in managing behavior in today's classrooms establish effective rules and procedures, create a supportive classroom environment, build strong relationships with parents and students, handle disruptions quietly while traveling the room, and are flexible).

[41]Chamberlain, *supra* note 38 ("Schools tend to treat the problem [of sexual harassment in schools], however, as something to be hidden, a secret.").

[42]42 U.S.C. § 2000e-2 (2000).

national origin."[44] Title VII purports to achieve equality and remove barriers in employment.[45] The prohibition against sex discrimination means that an employee may not be discriminated against because of sex.[46] Title VII applies to all employers with fifteen or more employees—including school systems—to ensure that employees are protected from sex discrimination in the workplace.[47]

Courts have not always interpreted Title VII to protect employees from sexual harassment. Prior to the 1980s, many courts refused to recognize sexual harassment as a form of sex discrimination.[48] Then, in *Meritor Savings Bank v. Vinson*,[49] the United States Supreme Court established that sexual harassment is a form of sex discrimination and, therefore, a violation of Title VII.[50]

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[43]For a discussion of the effect of the Civil Rights Act of 1991 on sexual harassment, see, for example, Edward J. Costello, Jr., Note, *Sexual Harassment After the Civil Rights Act of 1991*, 23 UWLA L. REV. 21 (1992).

[44]42 U.S.C. § 2000e-2. The statute states, in pertinent part, that it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* Importantly, "[i]ts original purpose as a civil rights measure was to outlaw racial segregation. Sex, as a category, was added at the last minute as an amendment in a cynical attempt to defeat the bill altogether." PAUL I. WEIZER, SEXUAL HARASSMENT: CASES, CASE STUDIES, & COMMENTARY 151 (David A. Schultz ed., 2002) (citing Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)). Even so, "sex-based criteria have developed into one of the most litigated parts of the civil rights agenda." *Id.*

[45]Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

[46]Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79-80 (1998).

[47]Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 180 (D.P.R. 2005) ("Title VII's absolute ban of sex discrimination . . . is binding for all employers, regardless of whether their employer receives federal funding."); *see* Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189 (2005); *see also* Staci D. Lowell, Note, *Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 CLEV. ST. L. REV. 441, 464 (2004-2005) ("Title VII . . . applies to employers with over 15 employees . . . .").

[48]ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 443 (7th ed. 2004). *But see* Williams v. Saxbe, 413 F. Supp. 654, 663 (D.D.C. 1976) (recognizing sexual harassment as a cognizable cause of action under Title VII).

[49]477 U.S. 57 (1986).

[50]*Id.* at 65; *see also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (recognizing a cause of action for a discriminatory work environment for the first time); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2006).

2. Title IX of the Educational Amendments of 1972

Title IX of the Educational Amendments of 1972,[51] amended in 1990,[52] states in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education[al] program or activity receiving [f]ederal financial assistance."[53] Title IX seeks to prevent educational institutions from using federal funds to support discriminatory practices.[54] Thus, in order to meet its purpose of protecting individuals from discrimination in schools, Title IX's express prohibition against discriminatory practices applies to sex discrimination occurring in federally-funded schools.[55]

Originally, courts interpreted Title IX narrowly as a measure intended to protect students against sex discrimination at school.[56] Then, in 1982, in *North Haven Board of Education v. Bell*, the United States Supreme Court extended the application of Title IX to provide protection to employees of federally-funded schools from employment discrimination.[57] In *North Haven*,[58] the Court examined the broad language of the statute, particularly the meaning of "person."[59] The Court also explored the legislative history of Title IX[60] to ultimately conclude that Title IX prohibits employment discrimination based on sex under any federally-funded education program or activity.[61]

C. Sexual Harassment: Definition and Types

1. Quid Pro Quo Sexual Harassment

One form of sexual harassment is quid pro quo harassment.[62] Quid pro quo sexual harassment is the classic form of sexual harassment under Title VII.[63] Quid

[51]20 U.S.C. § 1681(a) (2000).

[52]Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 128 (2000).

[53]20 U.S.C. § 1681(a).

[54]Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 63 & n.1 (1992).

[55]Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); U.S. Dept. of Just., Title IX Legal Manual (2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.htm

[56]*See, e.g.*, Lakoski v. James, 66 F.3d 751, 753 (5th Cir. 1995) (holding that Title VII is the exclusive remedy available for an employee of a federally-funded educational institution who alleges sex discrimination).

[57]N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 (1982).

[58]*Id.*

[59]*Id.* at 516, 520.

[60]*Id.* at 522.

[61]20 U.S.C. § 1681(a)(2000); *N. Haven*, 456 U.S. at 537.

[62]Paula N. Rubin, *Civil Rights and Criminal Justice: Primer on Sexual Harassment*, *in* SEXUAL HARASSMENT: ISSUES AND ANALYSES 1, 3 (Janet V. Lewis ed., 2001).

pro quo sexual harassment generally refers to carried-out threats[64] by "an individual [who] explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment upon an employee's acceptance of sexual conduct."[65] To be actionable, quid pro quo sexual harassment requires that the employee experience an economic impact.[66] Employers will be subject to liability under a vicarious liability theory if the sexual harassment is perpetrated by an individual with control over the victim, such as a supervisor. Application of this theory to student-on-teacher sexual harassment would be difficult because it would require students to have the power and ability to impose economic consequences on their teachers; this is unlikely even in schools with the most uninvolved administrations.

2. Hostile-Work-Environment Sexual Harassment

The second form of sexual harassment is hostile-work-environment harassment.[67] Hostile-work-environment sexual harassment refers to "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[68] The definition of hostile-work-environment sexual harassment applies to harassment that occurs in a school, office, or other type of workplace.[69]

In order for an individual to have a cause of action for hostile-work-environment sexual harassment, the "workplace . . . [must be] permeated with [discrimination] . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[70] Over the years, the courts have further clarified what acts may constitute a hostile work environment. First, a hostile work environment usually requires more than casual or isolated

[63]Williams v. Saxbe, 413 F. Supp. 654, 663 (D.D.C. 1976) (recognizing, for the first time, a cause of action under Title VII for sexual harassment); BELTON, *supra* note 48, at 443.

[64]Burlington Indus. v. Ellerth, 524 U.S. 742, 751 (1998) ("Cases based on threats which are carried out are referred to often as *quid pro quo* [sic] cases . . . .").

[65]Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994).

[66]Rubin, *supra* note 62, at 3.

[67]WEIZER, *supra* note 44, at 151. This form of sexual harassment is "more problematic" for employers. *Id.*

[68]EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (2006); *see also* Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (holding that a hostile work environment exists when 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 and create an abusive working environment.") (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-67 (1986).

[69]Latosha Higgins, Note & Comments, *Lack of Knowledge of Sexual Harassment Shields School Districts from Employer Liability under Title IX* Gebser v. Lago Vista Indep. Sch. Dist., 18 ST. LOUIS U. PUB. L. REV. 317, 319 (1999) (citing Franklin v. Gwinnett County Schs., 510 U.S. 60, 75 (1992)).

[70]*Harris*, 510 U.S. at 21 (citations omitted). Note that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious." *Id.* at 22 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

incidents.[71] Second, hostile-work-environment sexual harassment requires that the conduct be "severe or pervasive."[72] Third, a single act alone will generally be insufficient to prove the existence of a hostile environment.[73] Lastly, the conduct must be both subjectively and objectively severe or pervasive such that it alters the conditions of employment and creates an abusive working environment.[74]

Several characteristics distinguish hostile-work-environment sexual harassment from quid pro quo sexual harassment. Unlike quid pro quo sexual harassment, where the harasser imposes conditions on the victim's job in order to receive sexual benefits,[75] hostile-work-environment sexual harassment refers to harassing conduct that creates a work environment for the employee that is so unbearable that it hinders the victim's work performance.[76] In addition, hostile-work-environment sexual harassment does not require that the victim suffer an economic impact in order to be actionable.[77] Moreover, the conduct does not have to be sexual in nature[78] or even directed specifically at the victim so long as the conduct is based on the victim's sex and affects the victim's ability to perform the job.[79] Further, while quid pro quo

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[71]BELTON, *supra* note 48, at 457. *See, e.g.*, Dawson v. County of Westchester, 373 F.3d 265, 273 (2d Cir. 2004); *see also* Brooks v. City of San Mateo, 229 F.3d 917, 926 (9th Cir. 2000); Jones v. Clinton, 990 F. Supp. 657, 675 (E.D. Ark. 1998) (holding that single proposition was not sufficiently severe to create hostile environment sexual harassment). *But see* Hostetler v. Quality Dining, Inc., 218 F.3d 798, 812 (7th Cir. 2000) (holding that two incidents were sufficient to survive summary judgment); Quantock v. Shared Marketing Servs., 312 F.3d 899, 905 (7th Cir. 2002) (holding that three propositions at the same business meeting were sufficiently severe for sexual harassment claim to survive summary judgment).

[72]*Harris*, 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

[73]*Id.*; *see also* WEIZER, *supra* note 44, at 157 ("[W]hile no single factor will be a clear indication of a hostile environment, a lack of any tangible harm will not by itself sink a sexual harassment claim.").

[74]*Harris*, 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

[75]Rubin, *supra* note 62, at 3.

[76]Susan L. Webb, *The History of Sexual Harrassment on the Job*, *in* ISSUES AND ANSWERS 136, 139 (Linda LeMoncheck & James P. Sterba, eds., 2001) ("[H]ostile environment sexual harassment, as defined by the courts, is . . . unwelcome and demeaning sexually related behavior that creates an intimidating, hostile, and offensive work environment.") (emphasis omitted); *see also* WEIZER, *supra* note 44, at 152 (describing hostile environment harassment as including a "workplace [that] is so polluted with discrimination that it makes the environment of the employment setting hostile or intimidating."); Rubin, *supra* note 62, at 4; Karen J. Lewis & Jon O. Shimabukuro, *Sex Discrimination and the United States Supreme Court: Recent Developments in the Law*, *in* SEXUAL HARASSMENT: ISSUES AND ANALYSES 82, 92 (Janet V. Lewis ed., 2001).

[77]Rubin, *supra* note 62, at 4.

[78]*Id.* at 4 ("Hostile work environment harassment . . . can include hostile or offensive behavior based on the person's sex.").

[79]*Id.* at 5.

sexual harassment is limited to supervisors and authority figures,[80] hostile-work-environment sexual harassment may be committed by co-workers or even third parties,[81] such as students.[82]

Courts apply "hostile-work-environment" analysis to sexual harassment claims brought under either Title VII or Title IX.[83] The courts also employ virtually the same sexual harassment definitions to resolve sexual harassment claims brought under Title VII or Title IX.[84] One distinction, however, is the applicable vicarious liability theory. Under Title VII, a negligence standard determines whether an employer will be subject to vicarious liability. Under Title IX claims, on the other hand, a federally funded school will be subject to vicarious liability if the school demonstrated "actual [notice] . . . and . . . deliberate[] indifferen[ce]."[85]

3. Sexual Harassment in School Settings

The U.S. Supreme Court and the lower federal courts have handed down case precedent that confirms the applicability of "hostile-work-environment" analysis to the harassment of employees by co-workers or third parties.[86] These decisions did not specifically involve school employees. The willingness of courts to extend Title IX to apply to school employees is just one indication that it will become

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[80]*Id.* at 4.

[81]*Id.*

[82]*See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e) (2006).

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Id.; Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 183 (D.P.R. 2005) ("[I]t is clear that the term 'non-employee,' as defined in the EEOC Guidelines, does not exclude students, especially if the Court finds that a school has control and legal responsibility over student misconduct."). For further support that, in the instance of student-on-teacher harassment, students fall under the classification of third-parties or non-employees, see generally Joanna L. Routh, *The $100,000 Kiss: What Constitutes Peer Sexual Harassment for Schoolchildren Under the* Davis v. Monroe County Bd. of Educ. *Holding?* 28 J.L. & EDUC. 619, 622 (1999) ("Students are a non-employee, non-agent third party.").

[83]Vickie J. Brady, Case Note, *Borrowing Standards to Fit the Title—Do They Really Fit? Title VII Standards Applied in Title IX Educational Sexual Harassment Claim as the Conflict Among the Courts Continues.* Kinman v. Omaha Pub. Sch. Dist., *94 F.3d 463 (8th Cir. 1996)*, 22 S. ILL. U. L.J. 411, 412 (1998) ("The *Kinman* court clearly borrowed principles and authority from Title VII of the Civil Rights Act to set [the] standard under Title IX.").

[84]U.S. Dept. of Just., *supra* note 55.

[85]Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

[86]*Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274.

increasingly difficult for school districts, as employers, to escape liability for student-on-teacher sexual harassment.

In the context of student-on-teacher sexual harassment, Title VII may protect teachers who, as employees, experience a hostile-work-environment created by students if the student conduct is so subjectively and objectively severe or pervasive that it alters the conditions of employment and creates an abusive working environment.[87] Similarly, Title IX may subject federally-funded school districts to vicarious liability for student-on-teacher sexual harassment because Title IX prohibits "discrimination under any education[al] program or activity receiving [f]ederal financial assistance."[88] Whether the cause of action is brought under Title VII or Title IX, courts will likely use hostile-work-environment sexual harassment theory, rather than quid pro quo sexual harassment theory, because hostile work environment sexual harassment analysis does not require that the victim suffer an economic impact, that the conduct is sexual in nature, or that the conduct is imposed by supervisors or authority figures.[89]

4. Administrative Guidelines

In 1980, the EEOC[90] established sexual harassment guidelines that apply to sexual harassment claims under Title VII.[91] The EEOC's Guidelines[92] ("Guidelines") define sexual harassment as "'[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.'"[93] The Guidelines prohibit unwelcome sexual advances as a condition for a job benefit.[94] In addition, the Guidelines prohibit unwelcome conduct with "the purpose or effect of unreasonably interfering with an individual's work performance or creating an

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[87]Harris v. Forklift Sys., 510 U.S. 17, 21-23 (1993); BELTON, *supra* note 48, at 455 ("*Harris v. Forklift* requires a plaintiff to satisfy both an objective and subjective test in proving that sexual harassment was sufficiently 'severe or pervasive' to affect 'the conditions of the victim's employment.'").

[88]20 U.S.C. § 1681(a) (2000).

[89]*See supra* notes 81-87.

[90]The EEOC is the Equal Employment Opportunity Commission and

> has five commissioners and a General Counsel appointed by the President and confirmed by the Senate . . . . The five-member Commission makes equal employment opportunity policy and approves most litigation. The General Counsel is responsible for conducting EEOC enforcement litigation under Title VII of the Civil Rights Act of 1964 (Title VII), the Equal Pay Act (EPA), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).

EEOC, http://www.eeoc.gov/abouteeoc/commission.html (last visited Jan. 21, 2006).

[91]Guidelines on Discrimination Because of Sex: Sexual Harassment, 29 C.F.R. § 1604.11 (1980).

[92]29 C.F.R. § 1604.11(a) (1980).

[93]Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a) (1980)).

[94]29 C.F.R. § 1604.11(a) (1980).

intimidating, hostile, or offensive working environment.'"[95] The prohibitions the EEOC promulgated in the Guidelines have become an important stepping stone in the development of case law interpreting Title VII claims.

5. Court Adoption of the EEOC Guidelines

In the 1980 EEOC Guidelines, the EEOC distinguished between quid pro quo and hostile environment sexual harassment. Federal courts relied on these categories of sexual harassment in their subsequent interpretation of Title VII. *Henson v. City of Dundee*[96] is recognized as one of the first federal circuit cases to adopt the two forms of sexual harassment contained in the EEOC Guidelines.[97] In *Henson*, the plaintiff brought suit against her supervisor, alleging that his daily inquiries about her and her female coworker's sexual habits created a hostile work environment.[98] In holding for the plaintiff, the *Henson* court relied on the EEOC's Guidelines and identified quid pro quo sexual harassment[99] and hostile-work-environment sexual harassment[100] as the two forms that sexual harassment can take.

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[95]*Id.*

[96]Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

[97]*Id.* at 911.

[98]*Id.* at 899.

[99]S*ee* BLACK'S LAW DICTIONARY 1407 (8th ed. 2004) (defining quid pro quo sexual harassment as "[s]exual harassment in which the satisfaction of a sexual demand is used as the basis of an employment decision."). Note that the definition of quid pro quo is "something for something." *Id*. at 1282. For a more detailed discussion of quid pro quo harassment, see, e.g., M. David Alexander et al., *Sexual Harassment in the Workplace*, *in* 70 THE PRINCIPAL'S LEGAL HANDBOOK 317, 319 (Kenneth E. Lane et al. eds., 3d ed. 2005); *see also* JAMIN B. RASKIN, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS 203 (2d ed. 2003) (explaining quid pro quo harassment in the context of teacher-on-student sexual harassment under Title IX); Webb, *supra* note 76 at 138-39.

> *Quid pro quo* ("this for that") harassment, as defined by the courts, encompasses all situations in which submission to sexually harassing conduct is made a term or condition of employment or in which submission to or rejection of sexually harassing conduct is used as the basis for employment decisions affecting the individual who is the target of such conduct.

Id. at 138; WEIZER, *supra* note 44, at 151 (defining quid pro quo harassment as "something for something, such as an employer demanding sex in exchange for a job or promotion."); Rubin, *supra* note 62, at 3 ("Quid pro quo harassment. . . . occurs when an employee is required to choose between submitting to sexual advances or losing a tangible job benefit."); Lewis, *supra* note 76, at 92 (observing that quid pro quo harassment "occurs when submission to unwelcome sexual advances or other conduct of a sexual nature is made a condition of an individual's employment or is otherwise used as the basis for employment decisions.").

[100]*See, e.g.*, Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (following the EEOC guidelines promulgated in 29 C.F.R. § 1604.11 in holding that sexual harassment is established with respect to the terms, conditions, or privileges of employment "where an employer created or condoned a substantially discriminatory work environment, regardless of whether the [plaintiff] lost any tangible job benefits."). For the definition of hostile-work-environment harassment see, e.g., BLACK'S LAW DICTIONARY 1407 (8th ed. 2004) (defining hostile-work-environment sexual harassment as "[s]exual harassment in which a work environment is created where an employee is subject to unwelcome verbal or physical sexual

In 1986, the United States Supreme Court issued its decision in *Meritor Savings Bank v. Vinson*, which followed *Henson* and recognized the two types of sexual harassment found in the EEOC Guidelines.[101] In *Meritor*, a supervisor at Meritor Savings Bank made sexual advances toward Vinson, the plaintiff.[102] The Supreme Court determined that the focus in any hostile-work-environment harassment claim should be "whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome."[103] In finding that the supervisor intimidated Vinson into having sexual intercourse with him forty to fifty times over a period of four years,[104] the Supreme Court held that "an employee's coerced participation in a sexual relation creates a hostile environment[]"[105] and ruled that Vinson had been the victim of hostile-work-environment sexual harassment.[106]

Over the decades following *Meritor*, the United States Supreme Court continued its struggle to clarify the definitions and appropriate standards to apply to both quid pro quo and hostile-work-environment sexual harassment claims.[107] Today, most courts begin their analysis by identifying the type of sexual harassment at issue. Identification is important because quid pro quo sexual harassment and hostile-work-environment sexual harassment require the plaintiff to prove different elements[108] to establish a prima facie case.[109] For both types of sexual harassment claims, courts

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behavior that is either severe or pervasive."); Alexander, *supra* note 99, at 319; RASKIN, *supra* note 99, at 203 (applying the definition of hostile-work-environment to teacher-on-student harassment under Title IX); Webb, *supra* note 76, at 139; WEIZER, *supra* note 44, at 152; Rubin, *supra* note 62, at 4; Lewis, *supra* note 76, at 92.

[101]Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); s*ee also* Alexander, *supra* note 99, at 319.

[102]*Meritor*, 477 U.S. at 60.

[103]*Id.* at 68.

[104]*Id.* at 60.

[105]Alexander, *supra* note 99, at 319.

[106]*Meritor*, 477 U.S. at 67.

[107]*Id.* at 65. Note that the definition of sexual harassment in Title VII is borrowed by courts in interpreting other statutes, such as Title IX. Brady, *supra* note 83, at 412.

[108]In a hostile-work-environment case, the plaintiff must prove that "the conduct was unwelcome[,] . . . was severe, pervasive, and regarded by the claimant as so hostile or offensive as to alter his or her conditions of employment . . . [and] was such that a reasonable person would find it hostile or offensive." Rubin, *supra* note 62, at 5. Alternatively, proving quid pro quo harassment requires that "[t]he harassment was based on sex . . . [and] [t]he claimant was subjected to unwelcome sexual advances." *Id.* at 3-4. Note that the former requirement that the plaintiff also suffer "loss of a tangible job benefit" became inoperative after *Meritor*. *Id.* at 4; *Meritor*, 477 U.S. at 57-58.

[109]Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982) (establishing the elements of a prima facie case for a hostile work environment claim). The *Henson* court defined the elements as:

> (1) [t]he employee belongs to a protected [class]. . . [;] (2) [t]he employee was subject[ed] to unwelcome sexual harassment . . .[;] (3) [t]he harassment was based [on] sex . . .[;] (4) [t]he harassment . . . affected a 'term, condition, or privilege' of employment . . .[; and] (5) [that the doctrine of] [r]espondeat superior [applies].

will decide whether the defendant's conduct was unwelcome[110] and will examine the "'totality of the circumstances[]'"[111] to determine whether or not sexual harassment occurred.[112]

D. Sexual Harassment Laws: Application to Student-on-Teacher Harassment

Although Title VII is meant to protect all employees from workplace harassment,[113] many courts still refuse to recognize a cause of action under Title VII by teachers sexually harassed by their students. Only recently have any courts been willing to recognize that a harassed teacher, as a school employee, may have a valid cause of action under Title VII against the school for its failure to intervene to protect its employees from student harassment.[114] As a result, schools often remain free from legal liability,[115] even though courts readily impose vicarious liability on employers in non-school contexts for sexual harassment of employees by non-employees.[116] Given that courts have extended the application of Title VII to apply to all employers in order to meet fully the statute's purpose,[117] schools face an increased risk of liability for failing to act when students harass their teachers.

The United States Supreme Court has held employers liable under Title VII for most sexual harassment that arises in the workplace, including harassment by individuals in non-supervisory positions. For example, the Supreme Court has recognized employer liability for co-worker harassment.[118] When claims arise based

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Id. See BELTON, *supra* note 48, at 453. The focus of this Note, school district liability for student-on-teacher sexual harassment, requires analysis under hostile-work-environment sexual harassment.

[110]Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (citing the Supreme Court's holding in *Meritor*); *see also* BELTON, *supra* note 48, at 453.

[111]*Meritor*, 477 U.S. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

[112]EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b) (2006); *see* Harris v. Forklift Sys., 510 U.S. 17, 23 (1993); *see also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998) (reaffirming the importance of focusing on the "surrounding circumstances, expectations, and relationships"); Williams v. Gen. Motors, Corp., 187 F.3d 553, 562 (6th Cir. 1999) (using the "totality of the circumstances" term of art that the EEOC introduced).

[113]Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 180 (D.P.R. 2005).

[114]Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002) (recognizing that, although the former teacher brought his claim under § 1983, the school district could be liable to plaintiff under a negligence theory if the claim had been brought under Title VII). Note that in this case the students subjected Schroeder to harassment based on his sexual orientation. *Id.* at 948.

[115]*Plaza-Torres*, 376 F. Supp. 2d at 180 (noting that the United States Supreme Court has not directly ruled on this issue).

[116]*See, e.g.*, Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1027-28 (D. Nev. 1992).

[117]*Plaza-Torres*, 376 F. Supp. 2d at 180.

[118]Faragher v. City of Boca Raton, 524 U.S. 775, 776 (1998) ("[T]he lower courts, [have] uniformly judg[ed] employer liability for co-worker harassment under a negligence standard . . . ."). *But see* Lipsett v. Univ. of P.R., 864 F.2d 881, 902 (1st Cir. 1988) (indicating that the

on co-worker-on-employee sexual harassment, courts apply the negligence standard to determine whether the employer should be held liable.[119] Further, although the United States Supreme Court has not directly ruled on employer liability for harassment of employees by non-employees, the lower federal courts have recognized a cause of action under Title VII for non-employee-on-employee sexual harassment,[120] such as sexual harassment of an employee by a customer.[121] These courts have uniformly applied the negligence standard to determine an employer's liability under Title VII for non-employee-on-employee sexual harassment.[122] Further, the EEOC Guidelines have designated the negligence standard as the appropriate standard by which to establish employer liability for sexual harassment of employees by non-employees.[123]

III. WHERE WE ARE TODAY

The United States Supreme Court has not directly ruled on the issue of school district liability for student-on-teacher sexual harassment.[124] There has not been a direct ruling on this issue by the lower federal courts either.[125] Even so, schools should be aware that, in light of recent case law, the Supreme Court could recognize such a claim.

Given the present uncertainty in the law, school districts do not have a clear understanding of the extent of their legal responsibility, if any, to intervene when a teacher is sexually harassed by students. As a result, many schools exert minimal effort to prevent or stop this form of sexual harassment.[126] Based on recent court

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appropriate standard under Title IX is deliberate indifference). Note, however, that the U.S. Supreme Court has not directly ruled on employer liability for co-worker-on-employee sexual harassment.

[119]*Faragher*, 524 U.S. at 799-800. The negligence standard is applied to co-worker harassment claims instead of the vicarious liability standard on the rationale that employers do not give co-workers as much control over the harassed employee as supervisors. *Id.*

[120]*See, e.g.*, Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 854 (1st Cir. 1998); *Plaza-Torres*, 376 F. Supp. 2d at 181.

[121]Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998).

[122]See Rodriguez-Hernandez, 132 F.3d at 854.

> [A]n employer is held responsible for "the acts of sexual harassment towards his employees in the workplace by persons not employed by him if the employer or his agents or supervisors knew or should have known of such conduct and did not take immediate and adequate action to correct the situation."

Id. (quoting P.R. LAWS ANN. tit. 29, § 155f (1995)); *see also Plaza-Torres*, 376 F. Supp. 2d at 181; *Lockard*, 162 F.3d at 1073; Erickson v. Wis. Dept. of Corr., 358 F. Supp. 2d 709, 726 (W.D.Wis. 2005).

[123]EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e) (2006).

[124]*See* Mark Walsh, *High Court Declines Case on Harassment of Gay Teacher*, 22 EDUC. WK., Oct. 30, 2002, at 28 (discussing the U.S. Supreme Court's denial of certiorari for a claim of student-on-teacher sexual orientation harassment).

[125]Lannon, *supra* note 11.

[126]Chamberlain, *supra* note 38, at 32; *see also* Alan Dessoff, *Harassed Teacher Wins in Court of Last Resort*, 40 DISTRICT ADMIN. 50 *available at* http://www.district

treatment of this and related issues, however, school districts might not remain liability-free for long. Recent decisions suggest that courts may be willing to extend both Title VII and Title IX to allow teachers to bring lawsuits against their schools for student-on-teacher sexual harassment. To avoid costly litigation, school districts should become familiar with the decisions that suggest the potential for liability for student-on-teacher sexual harassment and pay particular attention to the standard under which they may become liable.

Schools may soon be subject to liability under Title VII or Title IX for failure to intervene in incidences of student-on-teacher sexual harassment.[127] As discussed earlier, Title VII is a federal statute that applies to all employers with fifteen or more employees to prohibit sex discrimination in the workplace.[128] School liability for student-on-teacher sexual harassment may arise under Title VII based on the willingness of courts to recognize an employee's cause of action against an employer for sexual harassment by an individual who is not employed by the defendant employer.[129] Additionally, schools may become subject to liability for student-on-teacher sexual harassment under Title IX, a federal statute that prohibits sex discrimination under federally-funded school programs and activities,[130] based on the United States Supreme Court's recognition of school liability under Title IX for both teacher-on-student and student-on-student sexual harassment.[131]

A. Employers May Be Liable for Non-Employee-on-Employee Sexual Harassment

Employers may be liable under Title VII for failing to intervene in incidences of hostile-work-environment sexual harassment perpetrated by non-employees against employees.[132] The EEOC Guidelines recognize employer liability in this situation if the employer knew or should have known of the harassment and failed to take appropriate action to prevent or correct it.[133] To determine the appropriateness of

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administration.com/viewarticle.aspx?articleid=597 (recognizing the abuse that teachers endure by reporting the experience of a teacher who filed suit because her school administration tried to minimize the situation and refused to take action to prevent her continued harassment by students).

[127]Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 180 (D.P.R. 2005).

[128]*Id.*; *see also* Weiner, *supra* note 47, at 189.

[129]*See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073 (10th Cir. 1998) ("[A]n employer may be found liable for the harassing conduct of its customers."); *see also* Turnbull v. Topeka State Hosp., 255 F.3d 1238 (10th Cir. 2001) (finding that the plaintiff doctor had a cause of action against her employer hospital for sexual harassment committed by a patient).

[130]*See* 20 U.S.C. § 1681(a) (2000).

[131]Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (student-on-student harassment); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (teacher-on-student harassment).

[132]*See generally* Robert J. Aalberts & Lorne H. Seidman, Sexual Harassment of Employees by Non-employees: When Does the Employer Become Liable? 21 PEPP. L. REV. 447 (1994).

[133]EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e) (2006) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory

imposing liability, the EEOC Guidelines recommend an inquiry into the employer's level of control or legal responsibility over the non-employee.[134]

When the lower federal courts first began ruling on employer liability for the harassment of employees by non-employees, they followed the EEOC Guidelines to determine whether the employer should be held liable for the actions of non-employees. For example, in *Powell v. Las Vegas Hilton Corp.*,[135] the District Court relied on the EEOC Guidelines[136] to hold, in a case of first impression, that a casino could be held liable under Title VII for the sexual harassment of a dealer by gamblers "in the appropriate case."[137] The circuit courts quickly followed the district court's lead and adopted the EEOC's formulation for handling this issue. For example, in *Lockard v. Pizza Hut, Inc.*,[138] the Tenth Circuit held that an employer could be liable for negligently ignoring a waitress's complaints of harassment from her customers.[139]

Over the years, the circuit courts began to emphasize the level of control or legal responsibility that the employer had over the non-employee and the work environment when determining whether to impute liability.[140] In *Crist v. Focus Homes, Inc.*,[141] employees who worked at a private residential facility for autistic individuals were assaulted by their patients.[142] In holding that the employer failed to properly respond, the Eighth Circuit focused on the employer's ability to control the environment to determine the appropriateness of finding the employer liable for the harassment.[143] Also, in *Turnbull v. Topeka State Hospital*,[144] the Tenth Circuit emphasized the employer's control over the work environment to hold the state mental hospital liable for the sexual assault of a psychologist by a patient.[145]

Today, an employer may be held vicariously liable for a hostile-work-environment created by non-employees if the employer had the requisite level of

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employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

[134]*Id.*

[135]841 F. Supp. 1024 (D. Nev. 1992). Note that the court was ruling on a motion for summary judgment. *Id.* at 1025.

[136]*Id.* at 1027-28.

[137]*Id.* at 1028.

[138]162 F.3d 1062 (10th Cir. 1998).

[139]*Id.* at 1072.

[140]Undoubtedly, this is also in reliance on the EEOC Guidelines. 29 CFR § 1604.11(e) (1985) ("In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.").

[141]122 F.3d 1107 (8th Cir. 1997).

[142]*Id.* at 1108.

[143]*Id.* at 1112.

[144]255 F.3d 1238 (10th Cir. 2001).

[145]*Id.* at 1244.

control or legal responsibility over the non-employee and failed to act "in accordance with its statutory duty not to discriminate in the workplace."[146] The negligence standard remains the accepted standard by which courts determine whether or not the employer should be held liable under Title VII for failing to prevent sexual harassment of its employees by non-employees.[147] Indeed, "the focus in a 'failure to prevent' situation . . . should be on the employer's knowledge of the harassment, the employer's ability to end or prevent it and the "adequacy of the employer's remedial and preventative responses."[148]

Courts readily apply Title VII's prohibition against sexual harassment in the workplace to protect school employees.[149] For example, courts recognize that Title VII protects school employees against harassment by a coworker[150] or supervisor.[151] As discussed earlier, Title VII applies to all employers, whether public or private, to ensure that employees are protected against various forms of discrimination, including sex discrimination,[152] no matter the perpetrator.[153] In fact, courts have now begun to extend Title VII to impose a duty on schools to protect all of their employees, including teachers, from harassment by non-employees, such as students.[154] As a result, school districts should anticipate eventual uniform extension of Title VII to school liability for student-on-teacher sexual harassment.

B. Schools May Be Liable for Teacher-on-Student Sexual Harassment

Under Title IX, schools may be held liable for teacher-on-student sexual harassment. In 1998, the United States Supreme Court recognized the importance of imposing liability on a school for failing to prevent or respond to harassment of students by teachers when it decided *Gebser v. Lago Vista Independent School District*.[155] In *Gebser*, a high school teacher, Frank Waldrop, in the Lago Vista

[146]Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1020 (5th Cir. 1996).

[147]*See* Erickson v. Wis. Dept. of Corr., 358 F. Supp. 2d 709, 727 (W.D. Wis. 2005) ("[D]efendant's liability for failing to prevent plaintiff from being sexually harassed should be governed by the negligence standard . . . .").

[148]*Id.* (quoting *Turnbull*, 255 F.3d at 1244).

[149]*See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 (1982).

[150]Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998) (recognizing uniform treatment by the lower courts of co-worker-on-employee harassment under the negligence standard of liability).

[151]Burlington Indus. v. Ellerth, 524 U.S. 742, 745 (1998); *see also Faragher*, 524 U.S. at 780 (holding that an employer is vicariously liable for sexual harassment of an employee by a supervisor). Further, the *Faragher* court recognized the employer's affirmative defenses that it acted reasonably and the employee acted unreasonably if the harassment did not create a tangible employment action. *Id.* at 807.

[152]Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

[153]Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (indicating that the actions of supervisors, coworkers, "or even strangers to the workplace" can create a hostile environment for an employee).

[154]Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 180 (D.P.R. 2005).

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

Independent School District made sexually suggestive comments to students in his book discussion group.[156] Mr. Waldrop began directing these comments specifically to the plaintiff, an eighth-grader who joined the teacher's book discussion group.[157] Mr. Waldrop eventually initiated sexual contact with the student, and ultimately engaged in sexual intercourse with her over a period of months.[158] The student failed to report the teacher's inappropriate conduct to school officials, and the contact continued until the two were caught by a police officer.[159] When the student brought suit under Title IX against the school district, the United States Supreme Court recognized that a cause of action could arise in this situation, but that school officials with authority to end the sexual harassment must have actual notice of the harassment and act with deliberate indifference before the school would be held liable for the teacher's harassing conduct.[160]

C. Schools May Be Liable for Student-on-Student Sexual Harassment

Under Title IX, schools may be held liable for student-on-student sexual harassment as well. Shortly after the U.S. Supreme Court held that a school could be liable for teacher-on-student harassment in certain circumstances, it held that a school could be liable for student-on-student sexual harassment. In *Davis v. Monroe County Board of Education*,[161] fifth-grader LaShonda Davis endured sexually harassing comments from one of her peers over a period of five months.[162] Despite the efforts of LaShonda and her mom to notify teachers and school officials of the inappropriate behavior, the school never disciplined the other student.[163] The Supreme Court ruled that the school district would be liable for the sexual harassment of LaShonda by her peer only if "the funding recipient acts with deliberate indifference to known acts of harassment . . . that [are] so severe, pervasive, and objectively offensive that [they] effectively bar[] the victim's access to an educational opportunity or benefit."[164] As in *Gebser*,[165] the Supreme Court held

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[156]*Id.* at 277-78.

[157]*Id.*

[158]*Id.* at 278.

[159]*Id.*

[160]*Id.* at 290.

> [A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond.
>
> . . . [M]oreover . . . the response must amount to deliberate indifference to discrimination.
>
> *Id.*

[161]Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

[162]*Id.* at 633-34.

[163]*Id,*

[164]*Id.* at 633.

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

in *Davis* that a school is liable for student-on-student sexual harassment if it knew about the harassment and acted with deliberate indifference.[166] In its decision, the Supreme Court imposed a duty on schools to take appropriate remedial action to promptly stop sexual harassment among students.[167]

D. Schools May Be Liable for Student-on-Teacher Harassment

Teachers bringing sexual harassment claims based on harassment by students have struggled to overcome certain obstacles. In one case, a school was not held liable because it took prompt remedial action to end the harassment of the teacher by students.[168] In doing so, the court found that the school district demonstrated that it did not act unreasonably by either negligently refusing to protect its teachers[169] or by acting with deliberate indifference to known instances of student harassment of teachers.[170] In another case, the court held that the school was not liable because the harassing conduct perpetrated by the students did not rise to a level sufficient to constitute hostile-work-environment sexual harassment.[171]

Recently, the District Court of Puerto Rico denied summary judgment to the defendants in a student-on-teacher sexual harassment claim brought under Title VII. The plaintiff, Henar Plaza-Torres, was a school teacher at Petra Roman Vigo School from October 2000 until February 2001.[172] Two students, Johnny Davila and Angel Vera, made sexually suggestive comments to Ms. Plaza-Torres.[173] Ms. Plaza-Torres began reporting the harassing conduct to Ms. Evelyn Matos, the Mathematics Supervisor for the school district, in November or December of 2000, and met with the Discipline Committee to discuss Johnny Davila's conduct.[174] Nevertheless, the harassment continued with no intervention by the school district.[175] In February of 2001, Ms. Plaza-Torres resigned, and stated that she felt intimidated by the students' comments.[176] On August 8, 2001, Ms. Plaza-Torres filed a charge of discrimination with the EEOC to bring a Title VII sexual harassment claim against the former

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[166]*Davis*, 526 U.S. at 633. Specifically, the court held that a school may be liable under Title IX for student-on-student sexual harassment if the school "acts with deliberate indifference to known acts of harassment in its programs or activities . . . [and the] harassment . . . is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.*

[167]*Id.*

[168]*See, e.g.*, Warnock v. Archer, 380 F.3d 1076, 1082-83 (8th Cir. 2004) (finding that the school district took the requisite prompt remedial action to avoid liability for student-on-teacher harassment).

[169]Recall that this is the Title VII standard. *See supra* note 122 and accompanying text.

[170]Recall that this is the Title IX standard. *See supra* note 160 and accompanying text.

[171]*See, e.g.*, Seils v. Rochester City Sch. Dist., 192 F. Supp. 2d 100 (W.D.N.Y. 2002).

[172]Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 177 (D.P.R. 2005).

[173]*Id.*

[174]*Id.*

[175]*Id.* at 175.

[176]*Id.* at 177.

Secretary of the Department of Education, as well as the School Director of Petra Roman Vigo School, the Department of Education, and the Commonwealth of Puerto Rico.[177]

Although the ruling of the United States District Court of Puerto Rico is not binding on other jurisdictions, its reasoning may be useful to other courts faced with the issue of student-on-teacher sexual harassment. In denying defendants' motions for summary judgment, the *Plaza-Torres* court acknowledged that "neither the U.S. Supreme Court nor the First Circuit Court have discussed school liability for sexual harassment suffered by a teacher on account of a student."[178] The court then concluded that "a cause of action for student-on-teacher sexual harassment may be inferred from recent Title VII, Equal Protection and Title IX case law."[179]

1. *Plaza-Torres* Analysis

Plaza-Torres v. Rey[180] provided the United States District Court of Puerto Rico with the first opportunity to address the issue of school liability for student-on-teacher sexual harassment.[181] In July of 2005, the District Court denied the defendants' motions for summary judgment, and held that an "employee of an educational institution, who has suffered sex discrimination [during] employment, may file a cause of action under Title VII or Title IX."[182] This holding means that teachers, as employees of an educational institution, may bring a cause of action against their school district under either Title VII or Title IX for sexual harassment, a form of sex discrimination,[183] perpetrated by students. The court proceeded to analyze the case under Title VII, the statutory basis asserted by the plaintiff.[184] The court reasoned that Title VII's prohibition against "unlawful employment practices, based upon a person's race, color, religion, sex or national origin[,]"[185] applies to all employers, including schools.[186] In dicta, the court carefully considered congressional intent and concluded that Title IX's prohibition against discrimination by any educational program or activity receiving federal funds covers employment

[177]*Id.* at 175, 177.

[178]*Id.* at 180.

[179]*Id.*

[180]*Id.* at 171.

[181]Alex Londono, *Costly Crushes: Student-on-Teacher Sexual Harassment*, EDUC. LAB. LETTER, Nov. 2005, at 4, *available at* http://laborlawyers.com/showarticle.aspx?Type=1119&ArticleType=-1&NewsLetterType=3388&Show=3954.

[182]*Plaza-Torres*, 376 F. Supp. 2d at 180.

[183]EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2006); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) ("[I]n 1980[,] the EEOC issued Guidelines specifying that 'sexual harassment' . . . is a form of sex discrimination prohibited by Title VII.").

[184]*Plaza-Torres*, 376 F. Supp. 2d at 179-80, 180 & n.3.

[185]*Id.* at 178 (citing Provencher v. CVS Pharm., 145 F.3d 5, 13 (1st Cir. 1998)).

[186]*Id.* at 179.

discrimination, such as sexual harassment, by educational institutions receiving federal funds.[187]

In *Plaza-Torres*,[188] the District Court also determined the standard for assessing school district liability for student-on-teacher sexual harassment claims brought under Title VII. To reach the proper standard, the district court reviewed the law governing supervisor-on-employee,[189] co-worker-on-employee,[190] and non-employee-on-employee[191] sexual harassment claims and ultimately held that the negligence standard that courts apply to non-employee-on-employee sexual harassment claims would be the appropriate standard to apply to student-on-teacher sexual harassment claims brought under Title VII.[192]

The *Plaza-Torres* court provided persuasive support for its decision to adopt the negligence standard to resolve the issue of school liability for student-on-teacher sexual harassment. The court relied in part on the standard adopted by *Peries v. New York City Board of Education*,[193] in which a teacher's Title VII claim against the school district for harassment by students based on race and national origin survived summary judgment.[194] Relying on prior relevant case law that had addressed employer liability for harassment of employees in non-school settings, the *Peries* court concluded that "it is difficult to conceive of a test more appropriate for student-on-teacher harassment than that suggested for customer harassment."[195] Customer-on-employee, or non-employee-on-employee, harassment uses the negligence standard to determine whether to impose liability on the employer.[196]

The court relied on the general rule that "[a]n employer's liability for hostile [work] environment sexual harassment depends on the relationship between the employer and the person responsible for the sexual harassment."[197] The *Plaza-Torres* court applied this general rule to the situation of student-on-teacher sexual

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[187]*Id.* at 180; *see also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-21 (1982); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (interpreting Title IX as a prohibition of hostile-work-environment harassment in cases involving employees of educational institutions).

[188]*Plaza-Torres*, 376 F. Supp. 2d at 171.

[189]*Id.* at 181.

[190]*Id.*

[191]*Id.*

[192]*Id.* at 183.

[193]Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109, 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

[194]*Id.* at *5-6.

[195]*Id.* at *6.

[196]Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1998) (citing 29 C.F.R. § 1604.11(e)).

[197]*Plaza-Torres*, 376 F. Supp. 2d at 183 (citing Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F. Supp. 2d 108, 112 (D.P.R. 2002)); *see also Molina Quintero*, F. Supp. 2d at 112. For a discussion of the relationship between the employer and the harasser in terms of the agency relationship, *see, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

harassment and determined that resolution of the issue of school liability for student-on-teacher sexual harassment necessarily requires that fact finders look at the relationship between the school officials and the student or students responsible for the sexual harassment.[198] Hence, the *Plaza-Torres* court clarifies that fact finders should look at the relationship between the school officials and the students to determine the school's level of control over the students responsible for the sexual harassment of its employees.[199]

Although the *Plaza-Torres* court specified negligence as the appropriate standard for determining whether a school district should be held liable, as an employer, for failing to prevent student-on-teacher sexual harassment under Title VII, it did not address the appropriate standard for resolving the issue under Title IX.[200] The standard for determining a school's liability for student-on-teacher sexual harassment under Title IX likely differs from the Title VII standard. Had the court considered this issue, it likely would have concluded that the school must have had actual notice of the harassment[201] and acted "deliberately indifferent"[202] to be subject to liability. Relevant case law has ruled that, in order to establish school liability for the harassing conduct of its students or teachers under Title IX, the school must have had actual notice of the harassment[203] and acted "deliberately indifferent."[204] While *Plaza-Torres* is not binding on other jurisdictions of the United States,[205] as the most recent case on point, this decision is instructive to school districts seeking to understand their legal responsibility and avoid potential liability.

2. Policy Considerations

Courts often rely on policy considerations when deciding questions of law. There are strong policy rationales for imposing liability on schools for student-on-teacher sexual harassment, including the public interest in school safety, teacher safety, and order in the classroom. Further, the government has a strong interest in preventing an "unpleasant, unproductive work atmosphere."[206] The disruption that student-on-

[198]*Plaza-Torres*, 376 F. Supp. 2d at 183.

[199]*Id.*

[200]*Id.* at 180 ("Plaintiff s[ought] relief under Title VII[] . . . .").

[201]*Id.* at 183; Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109, 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001); Lipsett v. Univ. of P. R., 864 F.2d 881, 901 (1st Cir. 1988).

[202]*See* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 953 (7th Cir. 2002).

[203]*Plaza Torres*, 376 F. Supp. 2d at 183; *Lipsett*, 864 F.2d at 901.

[204]*Schroeder*, 282 F.3d at 951 (7th Cir. 2002) (citing Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996), in holding that, to survive summary judgment, plaintiff "must show that there is a genuine issue of material fact as to whether the defendants 'acted either intentionally or with deliberate indifference'").

[205]HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 10 (rev. 4th ed. 2003) ("Precedent becomes 'binding authority' on a court if the precedent case was decided by that court or a higher court in the same jurisdiction.") In addition, "[t]he decisions of the Supreme Court of the United States are binding on all courts in all jurisdictions for matters of constitutional and other federal law." *Id.* at 12.

[206]Cannon v. Univ. of Chi., 441 U.S. 677, 691 (1979).

teacher sexual harassment creates should motivate schools to take action to prevent and correct student-on-teacher harassment.

Student-on-teacher sexual harassment has far-reaching effects. It is upsetting to the victims who must endure the treatment as part of the work environment. Other students also suffer because a victimized teacher is unable to teach as effectively as a teacher in a harassment-free environment.[207] The students who remain free to harass their teachers may not learn to treat authority figures with respect. Student-on-teacher sexual harassment is a distraction to students in the United States schools. Without proper intervention now, student-on-teacher sexual harassment will further impair our nation's ability to educate its young people effectively.

School officials with the power to control the behavior of students should intervene to stop student-on-teacher sexual harassment. Courts already realize that "as a general rule, school administrators and school board officials have disciplinary authority that exceeds that of a classroom teacher."[208] School officials have the power to use their heightened authority to impose disciplinary sanctions to stop the behavior of student harassers and set an example for other students, thereby creating safer schools overall.[209]

IV. RECOMMENDATIONS

The following recommendations are made to school boards in anticipation of increased court willingness to extend precedent and impose liability on schools for student-on-teacher sexual harassment. School districts should revise their current anti-harassment policies to explicitly prohibit student-on-teacher sexual harassment, establish effective complaint procedures to help victims report incidents of sexual harassment, and develop training programs to educate the entire school community on the school's stance against sexual harassment.[210] In addition, states should adopt legislation to mandate that school policies include a clear prohibition specifically directed against student-on-teacher sexual harassment.

A. Revise School Anti-Harassment Policies

Currently, many school districts fail to include student-on-teacher sexual harassment in their anti-harassment policies. The EEOC Guidelines recommend that all employers "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise

[207]*See* New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.").

[208]Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109, 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001) (recognizing that school officials have heightened authority over students as compared to the authority of classroom teachers); *see also* Howard v. Bd. of Educ. of Sycamore Cmty. Unit Sch. Dist., 893 F.Supp. 808, 819 (N.D. Ill. 1995) ("[T]he principal, is in a unique position to . . . control the behavior of students. . . . [H]e has a responsibility to the teachers . . . in his role as chief administrator of the school.").

[209]*See* The Principals' Partnership, Research Brief: Teacher Intimidation by Students, http://www.principalspartnership.com/teacherintimidation.pdf (last visited Feb. 16, 2006).

[210]Inspired by the National Education Association, http://www.nea.org/he/resolution/heres-I51.html (last visited Feb. 12, 2006).

the issue of harassment under title VII [sic], and developing methods to sensitize all concerned."[211] Studies show that anti-harassment policies are effective at reducing the incidents of student harassment of teachers.[212] Since courts look to the EEOC Guidelines to determine employer liability,[213] schools should establish anti-harassment policies with prohibitions against all forms of sexual harassment.[214]

The new policies that schools adopt should include clear prohibitions against sexual harassment of teachers by students. To comply with the EEOC's recommendations, schools that rely on model policies created by governmental entities need to be careful to ensure that the model policy reflects a strong stance against student-on-teacher sexual harassment. Some model policies fail to do so. For example, the Department of Education provided an Arizona Sample Policy, prepared by the Office of the Attorney General, which provided that "[i]t shall be a violation of District policy for any student, teacher, administrator, or other school personnel of this District to harass *a student* through conduct of a sexual nature, or regarding race, color, national origin or disability, as defined by this policy."[215] This policy is problematic today, in light of the implications of *Plaza-Torres*,[216] because it fails to ban harassment of teachers and other school employees by students. Schools can increase the effectiveness of their anti-harassment policies in several ways. First, schools can modify the language of the policy so it resembles the language of the Minnesota Sample School Board Policy:

> It shall be a violation of this policy for any pupil, teacher, administrator or other school personnel of the School District to harass a pupil, teacher, administrator or other school personnel through conduct or communication of a sexual nature or regarding religion and race as defined by this policy. (For purposes of this policy, school personnel includes school board members, school employees, agents, volunteers,

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[211]EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (2006); The U.S. Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, http://www.eeoc.gov/policy/docs/currentissues.html (last visited Feb. 12, 2006).

[212]*See* The Principals' Partnership, *supra* note 209.

[213]Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

[214]AM. ASS'N. OF UNIV. WOMEN EDUC. FOUND. SEXUAL HARASSMENT TASK FORCE, HARASSMENT-FREE HALLWAYS: HOW TO STOP SEXUAL HARASSMENT IN SCHOOL: A GUIDE FOR STUDENTS, PARENTS, AND SCHOOLS 22 (Susan K. Dyer ed., 2004), *available at* http://www.aauw.org/research/upload/completeguide.pdf. [hereinafter SEXUAL HARASSMENT TASK FORCE] .

[215]Department of Education, *Protecting Students from Harassment and Hate Crime: A Guide for Schools – January 1999* Appendix A: Sample School Policies 57, *available at* http://www.ed.gov/offices/OCR/archives/pdf/AppA.pdf (emphasis added) [hereinafter Appendix A].

[216]*See* Plaza-Torres v. Rey, 376 F. Supp. 2d 171 (D.P.R. 2005).

> contractors or persons subject to the supervision and control of the District.)[217]

Second, schools should include in the anti-harassment policy specific complaint procedures available to victims. These complaint procedures should outline the process of investigation that the school will follow upon receipt of a complaint and specify clear expectations as well as disciplinary consequences for perpetrators.[218] Finally, schools should place the anti-harassment policy in the school handbook to assure distribution of the policy to students, parents, school employees, and other members of the school community.

B. Develop Proactive Training Programs for School Communities

Establishing clear anti-harassment provisions that prohibit student-on-teacher sexual harassment is important, but is usually not enough. School districts must "spur changes in behavior and not just policy[]"[219] by developing proactive training programs for the entire school community. Some schools already use training programs to address other common school problems. For example, the Steps to Respect bullying-prevention program,[220] Bully Busters,[221] and the Olweus Bully Prevention Program model[222] address bullying behavior. Similarly, the Second Step violence-prevention program[223] deals with violence. Schools can adapt these or similar programs to specifically address sexual harassment of teachers by students.

C. State Legislation

Some states have enacted laws that require school districts to adopt anti-sexual harassment policies.[224] For example, North Carolina passed legislation, effective July

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[217]Appendix A, *supra* note 215, at 63 (providing the Minnesota Sample School Board Policy Prohibiting Harassment and Violence, as prepared by the Minnesota School Boards Association).

[218]*See* SEXUAL HARASSMENT TASK FORCE, *supra* note 214, at 17-19.

[219]AM. ASS'N. OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 44 (Jodi Lipson ed., 2001), *available at* http://www.aauw.org/research/upload/hostilehallways.pdf.

[220]Committee for Children Homepage, http://www.cfchildren.org/cfc/strf/str/strindex (last visited Feb. 12, 2006).

[221]Bully Busters, http://www.bullybusters.org (last visited Feb. 16, 2006).

[222]Olweus Bullying Prevention Program, http://www.clemson.edu/olweus (last visited Feb. 16, 2006).

[223]Committee for Children Homepage, http://www.cfchildren.org/cfc/ssf/ssf/ssindex (last visited Feb. 12, 2006).

[224]*See, e.g.*, ARK. CODE ANN. § 6-15-1005(b)(1) (West 2005); CAL. EDUC. CODE § 231.5 (West 2006); COLO. REV. STAT. ANN. § 22-32-109.1 (West 2005); LA. REV. STAT. ANN. § 17: 416.13 (2005); MICH. COMP. LAWS ANN. § 380.1300a (West 2006); MINN. STAT. ANN. § 121A.03 (West 2005); N.J. STAT. ANN. § 18A: 37-15 (West 2005); OKLA. STAT. ANN. tit. 70, § 24-100.4 (West 2005); OR. REV. STAT. ANN. § 339.356 (West 2005); R.I. GEN. LAWS § 16-21-26 (2004); TENN. CODE ANN. § 49-6-1016 (West 2006); TEX. EDUC. CODE ANN. § 37.083 (Vernon 2005); VT. STAT. ANN. tit. 16, § 166 (2007); WASH. REV. CODE ANN. § 28A.300.285 (West 2006); W. VA. CODE ANN. § 18-2C-3 (West 2007).

1, 2001, to address harassment of school employees.[225] The statute provides that "[e]ach local board of education may adopt a policy addressing the sexual harassment of . . . employees by students."[226] To afford school employees necessary protection, all state legislatures should follow the example of North Carolina. For even greater protection, legislation should mandate adoption of such a policy, instead of merely allowing for its adoption.

V. CONCLUSION

Students often test the boundaries of appropriate behavior. Disorder ensues in the schools when authority figures refuse to correct student misbehavior. Schools should not be complacent about this problem. Recent cases suggest that courts are increasingly willing to hold schools liable for student-on-teacher harassment.

Student-on-teacher sexual harassment has a devastating impact on teachers, other students, and society that will continue until school administrators with the power to stop the harassment take action to do so. School districts should anticipate legal liability and adopt proactive policies and programs to prevent and correct all forms of sexual harassment, including student-on-teacher sexual harassment.

225 N.C. GEN. STAT. ANN. § 115C-335.5 (West 2005).

226 *Id.* § 115C - 335.5.