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Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX

Susan P. Stuart

Abstract

Title IX peer sexual harassment cases present challenges to litigators because of the unique educational environment in which these cases arise. This Article attempts to educate litigators on the prima facie case, evidentiary issues, and the overall presentation of peer sexual harassment cases.

Introduction

Trying any case involving public schools can be difficult in the best of times. Courts are often loathe to interfere in the educational process because of schools' greater and somewhat specialized expertise in matters of legitimate pedagogical concern and because of the long-held notions that the running of the schools is best left to local and state control. There is some merit to that aloofness: In matters of education policy and the like, challenges to curriculum, teaching methods, and other assorted

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1 E.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (school district may control student speech so long as such control is "reasonably related to legitimate pedagogical concerns"); New Jersey v. T.L.O., 469 U.S. 325, 338-40 (1985) (schools are special environments in which the health and safety of children are high priorities).

2 E.g., Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863-64 (1982) (recognizing that "local school boards have broad discretion in the management of school affairs"); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (noting that "[t]he power of the state to compel school attendance[,] ... to make reasonable regulations for all schools," and "to prescribe a curriculum for institutions which it supports" is not questioned).
educational functions are better left to the professional judgment and discretion of school districts and their employees. Thus, so long as the school districts are not violating their students' constitutional or civil rights during the course of exercising that professional judgment and discretion, courts will more than likely leave them alone. Even in those instances, schools are considered a special environment wherein the law will allow a little more leeway for the control of constitutional rights than in other venues.

Where courts seem to have more expertise—or at least are more likely to interfere—are matters in which a student has been injured, be it through traditional tort liability, special tort liability for schools, student discipline, or criminal activity. Courts somehow feel more comfortable taking on a legal role in areas of expertise that have more lawyer-ese and less education-ese. These easy legal questions are torts committed against students and similar duty issues, such as schools' negligent or reckless supervision of students resulting in injury. True, special considerations may apply in these cases because of the type of victims and the special environment, that is, public school students and the environment necessary to care for, protect, and teach them.

However, such special educational circumstances do not seem to translate well into all civil rights violations. One such circumstance is suspicionless drug testing, when a school district determines that its own,

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6 Indeed, the notion of in loco parentis may be making a comeback. Compare New Jersey, 469 U.S. at 336 (student searches are not conducted as a function of in loco parentis) with Earls, 536 U.S. at 830-31 (student searches are conducted because schools are guardians).
personal “War on Drugs” necessitates that students be treated with no more respect for their privacy than cattle to the slaughter.\(^7\) Such programs are “capricious, even perverse.”\(^8\) Nevertheless, school districts have been given a great deal of discretion and local control in such cases.

Into this mix of easy personal injury cases and difficult civil rights cases are thrown Title IX sexual harassment claims. For courts, a teacher-on-student sexual harassment claim appears to be easy on its face. Courts have had increasingly comprehensive experience under comparable Title VII sexual harassment claims by employees against supervisors in the past few years. Hence, courts can act lawyerly when it comes to students being harassed by teachers: They know it when they see it. Indeed, the act of sexual harassment was not even at issue in *Gebser v. Lago Vista Independent School District*, when a teacher had sexual intercourse with an under-aged student.\(^9\) So given their parallels to Title VII cases, student-on-student (or peer) sexual harassment cases should be among those lawyerly cases with which courts would not have any problems. Not so.

The difficulty in trying student-on-student, or peer, sexual harassment cases is two-fold: First, courts are loathe to hold schools liable for sexual harassment under Title IX under any circumstances. The proof of the teacher’s harassment in *Gebser* was indisputable, but the school district’s accountability was not.\(^10\) To insulate a school district from being liable for acts of discrimination of which it was not “aware”\(^11\)–the secret sexual relationship of one of its teachers with a student—the Supreme Court abandoned employer-employee vicarious liability under respondeat superior.\(^12\) Instead, a wronged student must prove that “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [school district’s] behalf ha[d] actual knowledge of discrimination” and responded with deliberate indifference.\(^13\)

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\(^8\) *Earls*, 536 U.S. at 843 (Ginsberg, J., dissenting).


\(^10\) *Gebser*, 524 U.S. at 292.

\(^11\) Also integral to the Court’s restrictive analysis of school district liability was Congress’ failure to create an express right of action for Title IX sexual harassment claims. *Gebser*, 524 U.S. at 285.

\(^12\) *Id.*

\(^13\) *Id.* at 290 (emphasis added).
Adding to the difficulty is that Title IX is funding legislation without an express private right of action. As a consequence, the obligation of a school district to its students to comply with Title IX is more an arm’s-length contractual relationship as a condition of funding rather than a more personal obligation as directly imposed by Title VII.\(^\text{14}\)

Second, the rules of engagement in peer sexual harassment cases seem to require paying more attention to this special pedagogical environment and its special considerations. The playing field is different from Title VII sexual harassment causes of action for no other discernible reason than that the players—victims and harassers—are all public school students. Courts become confused in this environment and outside their lawyerly function, not because the cause of action is too educational or pedagogical, but because the environment is in a foreign landscape: a school. To better litigate these cases, counsel must learn to navigate the topography of that environment and persuade a court that the environment is not all that special in these tort-like cases, a distinction that does not seem to matter in teacher-on-student sexual harassment cases and clearly does not matter in other personal injury cases that occur on school grounds.

Under such constrictions, there should be little wonder at the difficulty in trying a Title IX peer sexual harassment case.\(^\text{15}\) However, with a better handle on that educational environment and on courts’ concerns about their own expertise, a litigator has effective ways to try these cases. In particular, a litigator might better educate courts to the supervisory liability of school districts and their deliberate indifference to that liability in matters of harassment just as they are in tort cases. With a litigator’s perspective in mind, Part I analyzes the prima facie case for Title IX peer sexual harassment in the K-12 public schools. Part II addresses evidentiary issues to confront the inevitable motion for summary judgment filed by the school district that successfully terminates most of these cases. Part III then discusses ways to incorporate greater knowledge of the educational environment to improve the presentation of the case. Winning these cases will never be easy—indeed other, more winnable causes of

\(^{14}\) Id. at 286-87.

action may better ameliorate the underlying problems\textsuperscript{16}--but ways exist to confront the courts’ concerns about these special environments that tend to favor school districts rather than students.

**I. Davis ex rel. LaShonda D. v. Monroe County Board of Education and the Prima Facie Case**

Title IX prohibits discrimination in public schools on the basis of sex: “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 . . . .”\textsuperscript{17} On the shoulders of Cannon \textit{v. University of Chicago}\textsuperscript{18} and Franklin \textit{v. Gwinnett County Public Schools},\textsuperscript{19} the Supreme Court set out the contours of a school district’s liability for sexual harassment of a student by a teacher in Gebser \textit{v. Lago Vista Independent School District}.\textsuperscript{20}

In Gebser, there was no question that sexual harassment occurred when a male high school teacher had sexual intercourse on numerous occasions with a freshman female student.\textsuperscript{21} While the school district claimed it was unaware of this sexual relationship, the student-plaintiff insisted that the school district was liable for the teacher’s misconduct and that such liability should be based on the same standard used for Title VII supervisor-on-employee sexual harassment, simple agency principles that

\textsuperscript{16}Title IX is not a very effective way to remedy the assaults, batteries, and other injuries suffered by children, which are litigated as acts of sexual harassment. \textit{See} Ivan E. Bodensteiner, \textit{Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools}, 79 \textit{Neb. L. Rev.} 1, 43-47 (2000). However, to the extent that Title IX does indeed try to rectify the “discriminatory impact” of sexual misconduct in schools, a few nice-sized judgments and loss of federal funding might just turn a few heads. Change necessarily starts small.

\textsuperscript{17}20 U.S.C. § 1681(a) (1994).

\textsuperscript{18}441 U.S. 677 (1979). Title IX provides for an implied private right of action. \textit{Id.} at 703.

\textsuperscript{19}503 U.S. 60 (1992). A victim can recover monetary damages for a violation of Title IX when a teacher sexually harasses a student. \textit{Id.} at 76.

\textsuperscript{20}524 U.S. 274 (1998).

\textsuperscript{21}\textit{Id.} at 278.
would have imputed liability to the school district. However, the Supreme Court meandered through a convoluted statutory interpretation and analysis of liability under Title IX to conclude that the Title VII statutory analysis cannot apply. In addition, the Court was uncomfortable with jerry-rigging liability on schools without Congress’ express permission, so Justice O’Connor instead relied on intuition and baling wire to construct a contract theory to establish a school district’s liability for proven sexual harassment by a teacher. This contractual construct for scaling back liability for student sexual harassment is premised on Title IX’s funding “agreement” between the government and the school district. The public school districts will countenance no gender discrimination in exchange for the distribution of federal funds to help run their schools.

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22 Id. at 283; see also Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (Title VII supervisor-on-employee sexual harassment). That agency liability arises when the employer knew or should have known of the harassing behavior and failed to stop it; see for example, Burlington Industries Incorporated v. Ellerth, 524 U.S. 742, 758-59 (1998).

23 Justice O’Connor reached this result because Title VII’s statutory definition of “employer”—which includes an “agent” of the employer—has no comparable parallel definition in Title IX’s funding entity, an “educational institution.” Gebser, 524 U.S. at 283. However, this statutory interpretation makes no sense because “educational institution” does not show up in the prohibitory language of Title IX as “employer” does in Title VII. Title VII prohibits unlawful employment practices by an employer. 42 U.S.C. § 2000e-2(a) (2000). On the other hand, Title IX prohibits the discrimination “under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (1994) (emphasis added). Thus, the meaning of “educational institution” does not even enter into who can or cannot be held liable for the discrimination under Title IX. Instead, the prohibition applies to “program or activity,” which includes “all of the operations of . . . a local educational agency.” 20 U.S.C. § 1687(2)(B) (1988). A “local educational agency” means

a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

20 U.S.C. § 7801(26)(A) (2003). That is not the same thing as Justice O’Connor’s concern for an “educational institution.” Nor does the “agency” of an employee of an educational institution or local educational agency seem to have anything to do with liability under Title IX.

24 Gebser, 524 U.S. at 286.
This promise by a school district is to "‘protect[]’ individuals from discriminatory practices carried out by recipients of federal funds."\(^{25}\) By this logic, according to Justice O’Connor, a school district cannot protect a student from a discriminatory practice of which it is unaware.\(^{26}\)

Justice O’Connor’s conclusion also relied on the statutory enforcement scheme under Title IX whereby a funding recipient is entitled an opportunity to get into compliance by correcting the discrimination before its funding is withdrawn.\(^{27}\) Thus, a person capable of taking corrective measures for the school district must be aware of the problem but fail to respond to the problem, in other words, be deliberately indifferent.\(^{28}\) In Gebser, the school district was not aware of the sexual congress of its teacher with a fourteen-year-old student, so no liability could attach under the contract, and the school district was not liable.\(^{29}\) Once the school district knew of the problem—the couple was caught in the act—it fired the teacher, and the school district instituted corrective action. Too late for the plaintiff’s injury, however. The school district was not liable for past acts of which it was unaware and for which it could not have enacted corrective measures,\(^{30}\) so there was no deliberate indifference.

Thus, the basic proof of teacher-on-student sexual harassment is (1) an act of sexual harassment by a teacher, of which (2) a school official who has the authority to take corrective action\(^{31}\) (3) has actual knowledge, (4) but that official acts with deliberate indifference in failing to take such action. The contractual duty to protect students from discrimination only

\(^{25}\) Id. at 287.

\(^{26}\) Id.

\(^{27}\) Id. at 288-89.

\(^{28}\) Id. at 290.

\(^{29}\) Id. at 291.

\(^{30}\) What “corrective measures” could any school institute under such circumstances? Give the student back her virginity?

\(^{31}\) It is ironic a school district will not be held liable under agency principles for actually having engaged in sexual harassment, but it will be held liable for sexual harassment if one of its agents acts incorrectly. As a consequence of the Davis reasoning, one sees a result exemplified by Rasnick v. Dickenson County School Board, 333 F. Supp. 2d 560 (W.D. Va. 2004). In Rasnick, the school district avoided all liability for teacher-on-student sexual harassment by proving that none of its board members knew of the harassing teacher’s activity. Because only the board could take the appropriate corrective measures, the district was not liable regardless of its school administrators’ knowledge and failure to act. Id. at 565-67.
kicks in when the school is actually aware that such activity is occurring. The Title IX standard for civil liability is thus more protective of the institution and less protective of the victim;\(^{32}\) it is no longer a duty to protect, but a duty to stop. *Gebser* and its reasoning eventually formed the foundation for student-on-student, or peer, sexual harassment under Title IX.

This foundation for determining school district liability under Title IX has a serious ramification in its contractual analysis that carries over into any analysis of liability for peer sexual harassment. The Court turned a school district’s contractual obligation into a “one-bite” rule. Under the *Gebser* analysis, a predatory teacher gets one bite at a student; past acts of discrimination are not remediable, only future ones are, despite the school district’s contractual promise to protect students from sexual harassment under Title IX. Thus, *Gebser* set the stage for a loose web of supervisory liability through which numerous student injuries may flow without recourse.\(^{33}\) As it turns out, the web of supervisory liability for peer sexual harassment has even larger holes, so large as to make the web almost nonexistent.

In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Supreme Court put its imprimatur on student-on-student sexual harassment as a private cause of action under Title IX.\(^{34}\) In deriving a prima facie case, Justice O’Connor adopted a rule in *Davis* for later application that is unavoidably linked to the sheer amount of evidence of overwhelmingly bad harassment that this plaintiff endured before filing suit. The case involved allegations brought by a fifth-grade female student, LaShonda, against G.F., one of her male classmates. Fifth-graders are usually ten or eleven years old, but G.F. was a bad actor in many adult senses of the word. According to the complaint, he tried to touch LaShonda’s breasts and genital area while telling her he wanted


\(^{33}\) Compare this attitude with the Court’s tighter net in the “War on Drugs” lest any drug-using students get away. *See, e.g.,* Earls, 536 U.S. at 822-24 (holding that a school’s policy of drug testing students who participated in extracurricular activities did not violate the Fourth Amendment).

\(^{34}\) 526 U.S. 629, 629-30 (1999).
to “get in bed” with her and wanted to feel her breasts. He also rubbed up against her in a sexual manner. On one occasion, G.F. put a door stop in his pants during physical education class and acted in a sexually suggestive manner to LaShonda. This conduct occurred during the course of several months and not just to LaShonda but to other girls in the class as well. These acts eventually led to G.F.’s being charged with and pleading guilty to sexual battery.\(^{35}\)

LaShonda further alleged that she and her mother complained repeatedly to her classroom teacher and her physical education teacher, but her complaints went unanswered. Indeed, it took three months of complaints before LaShonda’s classroom seating was switched so she would not have to sit next to G.F. Even her female classmates were unable to get an audience with the principal; a teacher told them, “If the principal wants you, he’ll call you.”\(^{36}\) G.F. was never disciplined, and the principal asked LaShonda’s mother why she was the only one complaining.\(^{37}\) LaShonda’s complaint set out her sufferings at the hands of G.F.: She could not concentrate in school and experienced a drop in her previously high grades. She also wrote a suicide note, which her father discovered. She filed suit under Title IX and was instantly challenged by the school district.\(^{38}\)

The Supreme Court determined that LaShonda’s complaint should survive the school district’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). In so doing, the Court formulated the following elements that a plaintiff must prove in order to hold a school district liable for peer sexual harassment under Title IX: (1) the sexually harassing student engages in conduct that is “so severe, pervasive, and objectively offensive” that (2) it “can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school,” and (3) the educational institution has actual knowledge of such harassment (4) but is deliberately indifferent to it.\(^{39}\)

\(^{35}\) *Id.* at 633-35.

\(^{36}\) *Id.* at 635.

\(^{37}\) Also according to the allegations, the school district had instituted no training for its personnel to deal with peer sexual harassment and had no official policy governing its reporting and discipline. *Id.*

\(^{38}\) *Id.* at 634.

\(^{39}\) *Id.* at 650; Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1246 (10th Cir. 1999). This rule is closely akin to the hostile work environment rule under Title
In *Davis* as it did in *Gebser*, the Court concentrated on the school district’s own misconduct in determining that it could be held responsible for peer sexual harassment and focused on intentional conduct that would violate the clear terms of Title IX. Shaded somewhat by her pursuit of a Title IX contractual duty in *Gebser*, Justice O’Connor’s analysis examined school districts’ common law duties to protect students from third-party tortious behavior of other students. She especially noted that schools have a “custodial and tutelary” responsibility over students that gives them a higher supervisory responsibility and control not exercised in other circumstances by the state over adults. In this respect, Justice O’Connor acknowledged the special educational environment in which peer sexual harassment can occur and concluded that a school district can be held liable for a student’s actions because it has substantial control over that student, over the harassing environment, and, under certain conditions, over the harassment itself. But then she injected the business-like, contractual responsibility of Title IX by asserting that school district liability arises when it “subjects” students to discrimination under an “operation” of the educational institution. Swerving from the typical supervisory liability of schools, the lawyerly, business-like cause of action

VII, except that it requires an adverse educational consequence that the hostile work environment claim no longer requires. See, e.g., *Burlington*, 524 U.S. at 758-59 (holding that an employer must show it exercised reasonable care in preventing harassment and that employee did not take advantage of preventive or corrective measures); *Meritor Sav. Bank*, FSB, 477 U.S. at 68, 72 (holding that economic harm is not necessary to bring a sexual harassment case and that the existence of an employer’s policy against discrimination will not insulate it from liability); see generally Verna L. Williams & Deborah L. Brake, *When a Kiss Isn’t Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 427-29, 442-456 (1997). But see *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002). According to *Frazier v. Fairhaven School Committee*, a plaintiff must prove “(1) that [she] was a student, who was (2) subjected to harassment (3) based upon sex; (4) that the harassment was sufficiently severe and pervasive to create an abusive educational environment; and (5) that a cognizable basis for institutional liability exists.” *Id.* at 66. There is no formal requirement of an adverse educational consequence.

40 *Davis*, 526 U.S. at 641-42.
41 *Id.* at 644.
42 *Id.* at 646.
43 *Id.* at 644.
44 *Id.* at 644-45.
from *Gebser* is infected with the messier, educational role of the school’s special circumstances over its charges. That new spin on proving Title IX violations for peer sexual harassment equally infects the manner of proving a prima facie case.

First, the plaintiff must prove that the harasser engaged in actionable sexual harassment, conduct that is severe, pervasive, and objectively offensive.\(^45\) Moving from the educational special environment to the lawyerly, business-like analysis, Justice O’Connor relied on a test from *Oncale v. Sundowner Offshore Services, Inc.*,\(^46\) a Title VII same-sex harassment case, that proof of a hostile working environment “depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”\(^47\) Continuing to follow *Oncale*, the Court determined that actionable conduct could cover circumstances when the school “is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s [educational opportunity] and create an abusive [school] environment.”\(^48\) That constellation of circumstances includes such things as the ages of the harasser and victim and the number of students involved, but the Court was not too keen on getting into any other specifics except to say what such conduct is *not*: peer sexual harassment is not mere teasing and name-calling. Apparently persuaded by the National School Boards Association brief, Justice O’Connor was reluctant to punish all gender-related behavior in which children are commonly wont to engage that might otherwise be unacceptable to adults. Thus, “insults, banter, teasing,

\(^{45}\) Proof of peer sexual harassment does not have the extra “hoop” required of Title VII sexual harassment cases that the victim also find the conduct subjectively offensive. *See*, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Justice O’Connor does not suggest why the victim’s subjective view is not important in peer sexual harassment in *Davis*. However, perhaps this lack of emphasis on subjectivity is a function of the probable victim’s age: the younger the child, the less likely the child will actually understand the sexual nature of the harassment. On the other hand, it is just as likely that the subjectivity has in reality been replaced by another element of O’Connor’s rule, the adverse consequence. *See infra* text accompanying notes 126-48.


\(^{47}\) *Id.* at 82; *Davis*, 526 U.S. at 651.

\(^{48}\) *Oncale*, 523 U.S. at 78 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it” are not enough to constitute actionable peer sexual harassment. Instead, the Court decried a vague notion of some other type of behavior that might constitute severe, pervasive, and objectively offensive sexual harassment.

Whatever the conduct, it must cause the second element of the prima facie case, that it is so severe and pervasive that it denies to the victim equal access to the educational function of the institution funded by Title IX. This somewhat recursive element does not require proof of a physical denial of access to the school and its resources. Instead, the pervasive nature of the harasser’s conduct must be systemic and “so undermine[] and detract[] from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”

In so concluding, Justice O’Connor obliquely referred to Meritor Savings Bank, FSB v. Vinson, which established that, under Title VII, a plaintiff need only prove that the sexual harassment “alter[ed] the conditions of [the victim’s] employment and create[d] an abusive working environment.” Clearly, Justice O’Connor relied on Title VII’s hostile work environment test in establishing whether a student has been discriminated against in her access to the educational program. However, a mere decline in grades is not enough. Again, what is enough is not clear, but there must be a “systemic effect” of denying “equal access to an educational program or activity.” Thus, one incident likely will not suffice; what will suffice are incidents on the other end of the spectrum, “severe, gender-based mistreatment played out on a ‘widespread level’ among students.”

Third in a prima facie case is the trigger for school district liability, its actual knowledge of the peer sexual harassment in an educational

49 Davis, 526 U.S. at 651-52 (emphasis added).
50 Id. at 652-53.
51 Id. at 651.
52 Meritor Sav. Bank, FSB, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
53 Davis, 526 U.S. at 653.
activity. The Court does not elucidate what facts would constitute actual knowledge in a hypothetical instance. However, the Davis evidence implied and Justice O’Connor so suggested that LaShonda’s and her mother’s reports to her teachers and her principal would be sufficient actual knowledge by individuals who should have controlled the situation and therefore imputed knowledge to the school district itself. Direct evidence of sexual harassment is sufficient proof: “recipients may be liable for their deliberate indifference to known acts of peer sexual harassment.” As a consequence, if the harassing conduct is reported to a teacher or school administrator, it is a “known act.”

Fourth and last, the school district’s deliberate indifference must subject students to harassment by causing them to undergo or “make them liable or vulnerable” to sexual harassment. The school district’s behavior must be “clearly unreasonable in light of the known circumstances.” Courts will not necessarily second-guess the remedial efforts

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54 “[P]etitioner may be able to show that the Board ‘subject[ed]’ LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G.F. ’s in-school misconduct from LaShonda and other female students.” Davis, 526 U.S. at 649. This proof is, of course, an agency imputation of liability to the school district for the bad acts of its teachers, which seems to somewhat undercut the liability analysis of Gebser and Davis itself. “[W]e reject[] the use of agency principles to impute liability to the district for the misconduct of its teachers.” Id. at 642.

55 Id. at 643, 644.
56 Id. at 648 (emphasis added).

57 As a consequence of the clarity with which Justice O’Connor made her point, a school district cannot defend itself by claiming it was not on notice that such conduct would trigger its liability. Justice O’Connor noted that, in March 1993, the National School Boards Association issued a publication advising school boards how to prevent sexual harassment in the schools. And by the time Davis was handed down, the United States Department of Education issued a Guidance through its Office for Civil Rights that advised that student-on-student sexual harassment was proscribed by Title IX’s anti-discrimination provisions. Davis, 526 U.S. at 647-48. As a consequence, a school district’s actual knowledge is contextualized by contemporary policies and concerns. In other words, actual knowledge is now more easily imputed to school districts because peer sexual harassment is a cutting-edge issue that has captured the interest of those groups that define school district policies, thereby putting school districts on notice of “proscribed misconduct” for which they will be held accountable. Id. at 648; see infra text accompanying notes 200-15.

58 Davis, 526 U.S. at 644-45 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966) (defining “subject’’)).
59 Id. at 649.
of school officials in trying to control the situation, but they should respond in a manner that is "not clearly unreasonable." In LaShonda's case, the school district did not respond at all for five months.

Applying this four-part principle to LaShonda's allegations, the Court determined that the case should proceed, reversing the trial court's granting the school district's motion to dismiss. She made a prima facie case of peer sexual harassment; from LaShonda's case, subsequent plaintiffs can make their cases.

Obviously, any complaint brought under Title IX for peer sexual harassment will have to establish these four elements. Since the Davis decision, a 12(b)(6) motion to dismiss such cases on the basis that no such cause of action exists is no longer an option for school districts. That, of course, still leaves those cases challenged by a 12(b)(6) motion because the pleadings themselves allegedly lack proof of the elements. For instance, in Carroll K. v. Fayette County Board of Education, the school district asserted that the plaintiff's pleadings failed to allege that gender-related harassment occurred, that the school district knew, that the school district acted with deliberate indifference, and that the school district had the discriminatory intent to violate Title IX. The court ruled, to the contrary, that the victim pleaded adequately when she alleged that, when she was a sixth-grader, she was the victim of several crimes of violence (including physical assaults) on school grounds because of her gender. The incident that finally prompted the victim's parents to remove her from school occurred during lunch hour when a male student approached the victim in a bullying fashion. When the victim was unable to escape, the male student threw her over his shoulder, swung her around, and flung her into a steel pole. The teacher on duty failed to intervene, saying only, "Here we go again." The victim suffered spinal injuries and loss of vision in her left eye. The court indicated that these well-pleaded facts overcame

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60 Id.

61 See also Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996) (peer sexual harassment complaints must allege that female students' complaints are treated differently than male students') (pre-Davis); see generally Emmalena K. Quesada, Note, Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability under Title IX, 83 CORNELL L. REV. 1014, 1039-47 (1998).

the school district’s 12(b)(6) motion. Similar results were reached in *Haines v. Metropolitan Government of Davidson County, Tennessee* and *Ray v. Antioch Unified School District,* wherein the trial courts determined that well-pleaded complaints setting forth factual allegations of each of the elements would survive a motion to dismiss. Less certain, however, is the fate of peer sexual harassment cases on motions for summary judgment.

II. Motion for Summary Judgment: Testing the Quality of the Evidence

A motion for summary judgment is the ultimate test for the quality of evidence compiled by the plaintiff before trial. It is an oft-used—and successfully so—tool filed by school districts to rid themselves of Title IX peer sexual harassment suits. Governed by Federal Rules of Civil Procedure 12(b)(6), the court’s using Federal Rule of Civil Procedure 12(b)(6) as the appropriate vehicle for attacking proof issues when all that is required is notice pleading.

A cursory examination of the post-*Davis* reported cases reveal an abysmal success rate for plaintiffs. Of the couple dozen cases reported to date in which school districts...
Procedure 56, summary judgment is granted if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." A method for adjudicating cases short of trial, summary judgment invokes a review of factual presentations—pleadings, depositions, the fruits of discovery, and affidavits—when the facts are disputed and is the ultimate test of the quality of evidence. A party is not entitled to summary judgment if a reasonable jury could decide the case for either party. Because school districts are the movants in these cases, the burden is on the victim to come up with something more than vague, conclusory allegations in order to create a genuine issue of material fact.

This burden requires presentation of specific probative facts showing that there is a need to go to trial. Even construing the evidence most favorably to the nonmovant, a court must have before it something filed motions for summary judgment on the Title IX student-on-student sexual harassment issue, very few victims made it past the motion. Ironically, more male victims were successful at this stage than female victims: Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000) (female); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005) (male); Schroeder ex rel. Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869 (N.D. Ohio 2003) (male); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000) (male); see generally ROBERT SHOOP & DEBRA L. EDWARDS, HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS: A HANDBOOK AND CURRICULUM GUIDE FOR ADMINISTRATORS AND TEACHERS 99-104 (1994) (addressing sexual harassment of male students and gay, lesbian, and bisexual students). Furthermore, peer sexual harassment cases seem to have a lower success rate than teacher-on-student sexual harassment cases. See Davies, supra note 32, at 431-33.

67 "When a motion for summary judgment is made and supported as provided in this rule, an adverse party . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 822 (7th Cir. 2003).

68 The test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

69 FED. R. CIV. P. 56(e); Gabrielle M., 315 F.3d at 822.

70 FED. R. CIV. P. 56(e).


72 See, e.g., CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1527-30 (1st Cir. 1996); Anglemyer v. Hamilton County Hosp., 58 F.3d 533, 536 (10th Cir. 1995).
besides conjecture, speculation, and fantasy. 73 Resting on the pleadings is also not sufficient. The victim must bring to the gunfight something more than "conclusory allegations, improbable inferences, and unsupported speculation." 74 These material facts must be developed as soon as it is feasible, if not before the complaint is filed, then immediately thereafter. However, one should never rely on the fruits of discovery to make one's prima facie case. Rather, plaintiff's counsel needs to build the case from the outset with information from which to develop affidavits and with any other evidence or official documents to which a witness will attest. When a school district's typical opening gambit is to suggest that there are no genuine issues of material fact to show it is not liable, the immediate response must be to show there is such a dispute sufficient to go to trial. And that means the litigator has to have facts for each of the elements.

In addition, counsel must account for and tinge those facts within the specialized educational environment. Preparing a case for peer sexual harassment will require conscious preparation for entering what is the undisputed bailiwick of the school district's counsel. Consequently, victims' lawyers must be prepared contextually for these motions, to the point of gathering information from expert witnesses familiar with the area. Even at the summary judgment stage, plaintiff must outmaneuver the school district's essential strength: the court's willingness to cut it some slack because of special educational circumstances and legitimate pedagogical concerns arising in the school environment, and because running these enterprises is left to the discretion of the local school boards as outside the expertise of the court. Plaintiff's counsel will have to take the fight to the school boards. 75

74 E.g., Coll v. PB Diagnostic Sys., Inc., 50 F.3d 1115, 1121 (1st Cir. 1995); Celex Group, Inc. v. Executive Gallery, Inc., 877 F. Supp. 1114, 1134 (N.D. Ill. 1995).
75 As a tactical matter, one might consider filing a cross-motion for summary judgment on one element that engenders sympathy for the victim. Preparing a well-founded issue as a matter of law will at least detract some attention from the school district's motion. One might also consider whether filing in state court might give a strategic advantage on summary judgment. For example, winning a motion for summary judgment is harder in Indiana under Indiana Trial Rule 56 than under Federal Rule of Civil Procedure 56 because the reasonable jury standard does not apply. Compare Anderson, 477 U.S. at 250, with Link v. Breen, 649 N.E.2d 126, 128 (Ind. Ct. App. 1995).
The following are suggestions for gathering facts for and otherwise preparing against summary judgment and each element of a Title IX peer sexual harassment case.

**A. Hostile School Environment: Actionable Harassment and the Denial of Educational Benefits**

Two elements of the prima facie peer sexual harassment case flow seamlessly one into the other and thus are of that nature that is the bane of a litigator’s existence. Those elements are whether the harasser’s conduct was severe, pervasive, and objectively offensive, and whether such conduct prevented the victim from having equal access to the educational opportunities offered by the school district. To the extent that they cannot be unwound from each other—they pose more a recursive cause-and-effect scenario rather than two discrete elements—proving one or the other as distinct elements may be difficult. On the other hand, the fact that they turn on each other could be to plaintiff’s advantage by presenting evidence that one element is so egregiously bad that, on balance, the court will be more lenient on the matter of proof of the other.

Perhaps the best way to describe these two elements is the two steps of the analysis for hostile environment: one is the objective and the other is the subjective test. They constitute a type of balancing that suggests that, if an objective view of the conduct is so egregious, less bad effects are necessary and vice versa. Thrown into the mix of the subjective analysis, however, is the amount of frustration and fear engendered by the school district’s deliberate indifference to the matter. Sometimes, it is just too much for a schoolchild to cope with by himself, especially if one considers the special circumstances of the victims, children aged five to eighteen.

The two elements are also an odd combination of hostile environment proof (the actionable conduct) and *quid pro quo* harassment proof (the

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adverse consequence) that Justice Kennedy distinguished in *Burlington Industries v. Ellerth*.

Cases based on threats which [sic] are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful . . . in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether . . . . The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment [*quid pro quo*] and to explain the latter must be severe or pervasive [hostile work environment].

In *Ellerth*, the Court actually backed away from the distinction between the two types of harassment in determining that an employee could bring a Title VII sexual harassment claim against an employer for the acts of its supervisor even without an adverse job consequence. As a result, an employee does not have to prove "adverse, tangible job consequences" when she refuses her supervisor's threatening and unwanted sexual advances then sues her employer. Public school students, however, have to prove characteristics of both: a hostile environment and an adverse effect as if it were a *quid pro quo* case. Together, however, they

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79 The Court did, however, formulate an affirmative defense to such a suit if the employer can prove that it exercised reasonable care in preventing or correcting such behavior, and the harassed employee unreasonably failed to take advantage of the employer's efforts or otherwise to avoid the harm. *Burlington Indus., Inc.*, 524 U.S. at 765.

80 Imagining a *quid pro quo* context for public schoolchildren is difficult because such harassment is most associated with victims who perceive something to gain or to lose from the sexual relationship. In institutions of higher education, the *quid pro quo* analysis might work for teacher-on-student sexual harassment as an avenue to higher grades. Similar concerns might motivate secondary school students (and maybe precocious elementary students), but the younger the child, the less likely that *quid pro quo* considerations are any factor. Less so is there any *quid pro quo* motivation to peer sexual harassment.
constitute the hostile environment\textsuperscript{81} proof that the plaintiff must present to get beyond a motion for summary judgment on this issue as well as the first, the harasser's conduct.\textsuperscript{82}

Although one would think that its fact-specific nature would preclude such use, the character of the harasser's conduct has often been the subject of summary judgment. And, on occasion, a school district has prevailed on that issue.\textsuperscript{83}

One difficulty in developing evidence to a level sufficient to prove actionable harassment is the vagueness of the adjectival phrase "severe, pervasive, and objectively offensive." No precise meaning has been attributed to these words in peer harassment cases, but the conduct must be either sexually oriented or targeted at a victim because of gender. Obviously, the sheer weight of evidence of harassing conduct can get a plaintiff past summary judgment, not just the character of the conduct. More specific guidance from the reported cases is scant; few Title IX sexual harassment cases are reported. Thus, one might find analogous hostile environment analysis and proof in Title VII case law if for no other reason than to attach meanings to "severe" and "pervasive." However, counsel must keep in mind that Title VII cases are disjunctive—only one needs to be proved—while Title IX cases are conjunctive; both must be proved along with objective (not subjective) offensiveness.\textsuperscript{84}

\textsuperscript{81} See, e.g., Frazier, 276 F.3d at 52.

\textsuperscript{82} This test is not unlike the definition of "hostile working environment" under Title VII: "To establish hostile work environment, plaintiffs ... must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment."" Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). Furthermore, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (citations omitted).

\textsuperscript{83} See, e.g., Hawkins v. Sarasota County Sch. Bd., 322 F.3d 1279, 1288-89 (11th Cir. 2003) (holding that alleged behavior was not severe enough to have a "systematic effect" of denying girls access to an educational program as required under a Title IX claim against the school district); Gabrielle M., 315 F.3d at 822; Cubie v. Bryan Career Coll., Inc., 244 F. Supp. 2d 1191, 1203-04 (D. Kan. 2003).

\textsuperscript{84} See, e.g., Williams & Brake, supra note 39, at 442-56. If only for the minimal rubric, Title VII cases on sexual harassment are useful guides to Title IX analysis. Id. at 442. But see Sasha Ransom, Comment, How Far Is Too Far? Balancing Sexual Harassment Policies and Reasonableness in the Primary and Secondary Classrooms,
What little can be gleaned from the reported Title IX cases is that the harassment must be motivated by the victim’s gender—on “the basis of sex”—albeit not just “because of sex.” When it comes to judging students’ conduct on the basis of gender, courts will obviously view behavior with overt sexual overtones as actionable misconduct, such as rape, fondling, other forms of molestation, lewd remarks and acts, sexually oriented touching, and even challenges to gender roles of masculinity. Such behavior picks out a particular gender because of that gender, not just because of sexuality. The individual markers of bad conduct—severe, pervasive, objectively offensive—are also provable by examining the “constellation” of surrounding circumstances espoused by Justice O’Connor in Davis ex rel. LaShonda D. v. Monroe County Board of Education. That constellation analysis implies that any of the three might have unequal weight to counterbalance the others, just as Title VII balances severity and pervasiveness: “[T]he more severe the conduct, the less pervasive it need be to be actionable. Conversely, the more pervasive the conduct, the less severe it need be to be actionable.” Often, actionable conduct must be “extremely serious,” by review of the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating.” Although evidence a victim was treated in a sexually subservient and demeaning fashion might be enough, outright threatening and intimidating conduct and “discrimi-
natory intimidation, ridicule, and insults" are usually required in peer sexual harassment cases, as discussed below.

The behavior must be objectively offensive as well, and in the Title VII context, that means that a reasonable person must find the behavior offensive, or the conduct must be so "objectively offensive as to alter the 'conditions' of the victim's employment." What student-plaintiffs must override in the school district's side of the case—perhaps by affidavit of an expert witness—is the notion that children cannot engage in sexual harassment because they do not understand the seriousness of what they are doing. The younger the child, the greater doubt a court might have about whether the victim perceives the sexual nature of the alleged harassment. Such slant to the evidence does not comport with the Davis test because the behavior must be objectively offensive; subjectivity is not the standard for judging peer sexual harassment under Title IX. In addition, that notion flies in the face of long-standing sexual harassment theory that one can be harassed even if sexual relations were voluntary—if those relations were unwelcome. Thus, a special education student who has been raped has still been subjected to sexual harassment regardless of her mental capacity. Similarly, youth and immaturity should not shade the objective offensiveness of the harasser's conduct.

Thus, a skeleton of what constitutes actionable harassment comes into view. Everyday pedestrian harassment and bullying will not trigger Title IX. However, the spectrum of evidence that would come within the

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93 Harris, 510 U.S. at 21-22.
94 Oncale, 523 U.S. at 81; Ochettree, 335 F.3d at 333.
95 "But the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" Meritot Sav. Bank, FSB, 477 U.S. at 68; see also JOHN F. LEWIS & SUSAN C. HASTINGS, SEXUAL HARASSMENT IN EDUCATION 9 (2d ed. 1994).
96 It is a bit disconcerting that Justice Kennedy, in dissent in Davis, seems to accept the "ubiquitous" nature of bullying in schools as if it were an acceptable part of growing up. Davis, 526 U.S. at 677-78. "Ubiquitous" does not mean "innocuous." Bullying in school has its own ramifications for schools and the law that protects children under their supervisory care. See, e.g., Nan Stein, Bullying or Sexual Harassment? The Missing
meaning of severe, pervasive, and objectively offensive behavior could be long and broad.

At one end of that spectrum is evidence like that alleged in *Davis*. Fifth-grade LaShonda (and some of her female classmates) were subjected to several months’ worth of the criminal antics of G.F. that included offensive touching, lewd behavior, and verbal abuse. Similarly grim evidence prompted the Sixth Circuit Court of Appeals, in *Vance v. Spencer County Public School District*, to determine that a female high-schooler underwent sufficiently actionable bad conduct when she endured repeated verbal and physical sexual harassment beginning in sixth grade. That conduct included teasing and regular occurrences of being shoved into walls while other students grabbed her book bag and made off with her homework. She was stabbed in the hand by a male student who referred to the female students in physical education class as “whores” and “motherfuckers.” Some students called her crude names while others grabbed at her hair and tore her shirt. In still other instances, students fondled her breasts and buttocks and requested sexual favors.

Of a similarly prolonged and pervasive nature was the ordeal in *Doe v. Londonderry School District*, during which a seventh-grade girl was subjected to increasingly hostile verbal assaults, threats of retaliation if she reported the behavior, physical contact, abusive telephone calls to her home, a pornographic cartoon depicting her engaged in anal sex, and

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97 526 U.S. 629.

98 *Davis*, 526 U.S. at 629.

99 231 F.3d 253, 259 (6th Cir. 2000). The *Vance* case actually went to trial, but the school district appealed from the court’s denial of its motion for judgment as a matter of law, the post-verdict equivalent of a motion for summary judgment.

100 *Id.* at 256.

101 *Id.*

102 *Id.*

103 *Id.* at 257.
being hit with a piece of meat covered with a sexual lubricant. Likewise, a young male student avoided summary judgment on evidence that, while he was in fifth, sixth, and seventh grades, fellow students inflicted a prolonged barrage of verbal abuse because of his stance in favor of gay rights. He was called “little fag,” “queer,” “little faggy queero,” and “little bitch” by both male and female students. He was involved in numerous fights, including one occasion during which his face was pushed into a bus window and he was told to “’kiss it, you little fag. Kiss it.” Two older students even accosted him in the bathroom and slammed his head into a urinal, chipping his tooth.

Widespread verbal abuse got past a motion for summary judgment when high school basketball team members constantly harassed a pair of brothers by challenging their masculinity: they were called “Stiffy” and “Little Stiffy,” “fag,” “homo,” and “jewboy,” and endured other comments suggesting the boys were homosexual. Further evidence of severe, pervasive, and offensive conduct have included teasing that escalated to assault and battery, multiple instances of assault and battery that include fondling and verbal abuse, sexual verbal comments, and multiple sexual assaults. These examples certainly

105 Schroeder, 296 F. Supp. 2d at 871-72.
106 Id. at 870-71.
107 Id. at 879.
108 Id. at 871.
109 Snelling v. Fall Mountain Reg’l Sch. Dist., No. CIV. 99-448-JD, 2001 WL 276975, at *1 (D.N.H. Mar. 21, 2001). The brothers were also subjected to physical abuse during the course of basketball practices, which the coaches ignored.
111 Carroll K., 19 F. Supp. 2d at 620-21 (pre-Davis).
112 Haines, 32 F. Supp. 2d at 995 (pre-Davis).
114 Murrell, 186 F.3d at 1243-44, 1248.
evidence both the pervasiveness and severity that would entitle a plaintiff to Title IX remedies for peer sexual harassment.

However, at the other end of the spectrum are stories of conduct that are a tad more vague, that do not quite seem to prick at a court’s conscience as the preceding cases did. For instance, in Gabrielle M. v. Park Forest-Chicago Heights, Illinois School District 163, one problematic male kindergarten student, Jason, engaged in fairly randy behavior from his first day in school. Jason jumped on Gabrielle’s back during recess and leaned against her while holding his crotch, apparently habitual recess behavior that also included kissing his little female classmates. On more than one occasion, he unzipped his pants when the teacher was not looking and exposed his underpants to his classmates. Jason and another classmate were caught with their hands down each other’s pants. These specific incidents were deemed not of a sexual nature because the “children . . . were not engaging in knowingly sexual acts, a fact that (at a minimum) detracts from the severity and offensiveness of their actions.” And the evidence that might have borne some sexual connotation was clothed in Gabrielle’s kindergarten parlance, that Jason “bothered” her, did “nasty stuff” and wanted to spend recess time playing .

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115 315 F.3d 817, 818-19 (7th Cir. 2003).
116 Gabrielle M., 315 F.3d at 818-19.
117 Id. at 819.
118 Id.
119 Id. at 822-23. But see Borrero v. Collins Bldg. Servs., Inc., No. 01 Civ. 6885 (AGS), 2002 WL 31415511 (S.D.N.Y. Oct. 25, 2002) (similar behavior was objectively and subjectively offensive under Title VII). When dealing with very young children, at least one court ruled that vague allegations of similar behavior did not reach the level of proof necessary for actionable sexual harassment because the children were “unaware” of the sexual nature of the conduct. Gabrielle M., 315 F.3d at 823. This conclusion was premised upon the evidence of the school psychologist and should prompt the good litigator to prepare one’s own expert and challenge the relevance of such evidence. The test is not whether the children believed they were engaging in sexual behavior; the test is whether the objective observer would think so. One of the strictures of Davis is that the children’s subjective concerns about the behavior are not at issue when they must be “objectively offensive.” See Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). Furthermore, the terms often used by elementary students for gender bullying behavior will sound more like run-of-the-mill bullying behavior than sexual harassment. The latter concepts do not compute, although “pestering,” “annoying,” “bothering,” “hassling,” and “bugging” might. STEIN, supra note 96, at 61-62.
with her in “funny ways.” This evidence was too vague and unspecific to defeat the school district’s motion for summary judgment.

Similar acts of prolonged and pervasive teasing, name-calling, and general botherment between seven-year-olds are not enough to constitute severe, pervasive, and objectionably offensive sexual harassment conduct. And lest one suspect that problems of proof occur only with younger children, the same resulted at the secondary level when male high school students called a female student “slut,” “bitch,” and “puss[y].” This verbal harassment was not deemed sexual harassment because, according to the court, it occurred during the course of a running dispute fueled by personal animus, not sex. Even an incident of oral and anal sex upon a special education student was not sufficiently egregious conduct because there was no proof of pervasive gender-related harassment, despite a history of teasing and bullying. Thus, the other end of the spectrum seems inhabited by behavior that might be classified as more innocuous teasing or incidents that courts believe are unrelated to sex.

Plaintiff’s evidence might fit within an exception to the mere teasing end of the spectrum if it were prolonged and systemic. Evidence of a long-term pattern of name-calling, teasing, and crude sexual gestures was sufficient to survive summary judgment in *Theno v. Tonganoxie Unified School District No. 464*. The harassment took place over a four-year period, and

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120 *Gabrielle M.*, 315 F.3d at 822.
121 Id.
122 *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 454 (S.D.N.Y. 2000). The court left unresolved whether a single incident of the harasser’s having put his hand between the victim’s legs and briefly touching her vagina was sufficient, as it would be in the workplace. *Id.* at 454-55.
124 *Id.* at 930-931. “Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.” *Id.* at 931. (emphasis in original).
the bulk of the more severe harassment traced its origins back to the rumor that began when plaintiff was in seventh grade that he was caught masturbating in the bathroom. The fact that plaintiff’s peers made crude drawings and teased him because he was perceived to be a masturbator, when combined with arguably related crude name-calling, reflects that plaintiff’s harassers believed that he did not conform to male stereotypes by not engaging in such behavior at school, i.e., that he did not act as a man should act.\textsuperscript{127}

Whether this case was the exception because it involved a male student rather than a female student remains to be tested.

Obviously, the more evidence of sexually charged behavior that is available, the better it is for the plaintiff. That is not to say that a lesser level of proof might not win out; however, as school districts continue to challenge all aspects of the prima facie peer sexual harassment case, plaintiff’s counsel is best served by accumulating as much evidence as possible for the eventual and dreaded motion for summary judgment. Of some help is the conjunction of the nature of the conduct with its related element, its effect on the victim.

Under Title IX, sexually harassing behavior must have a “systemic effect of denying the victim equal access to an educational program or activity.”\textsuperscript{128} This element is obviously related to Title VII analysis in which the behavior “must be extreme to amount to a change in the terms and conditions of employment.”\textsuperscript{129} However, student-on-student sexual

\textsuperscript{127} Theno I, 377 F. Supp. 2d at 965 (emphasis in original); see also Doe ex rel. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993), reconsideration granted by 949 F. Supp. 1415 (N.D. Cal. 1996) (pre-Davis). In the Petaluma case, the plaintiff was subjected to sexually charged verbal abuse throughout seventh and eighth grade and alleged facts sufficient to suggest to the court that she might have a case for hostile environment sexual harassment. Beginning with the innocuous statement, “I hear you have a hot dog in your pants,” rumors spread by both male and female students about the plaintiff’s having had sex with a hot dog. Classmates started to call her “hot dog bitch,” “slut” and “ho” and wrote comments on the bathroom walls every day, such as “Jane is a hot dog bitch.” Id. at 1564-66; see also Sarah Diane Stevenson, \textit{The Revenge of the Hot Dog Slut: Peer Harassment After Davis v. Monroe}, 10 S. CAL. REV. L. \& WOMEN’S STUD. 137 (2000).

\textsuperscript{128} Davis, 526 U.S. at 652.

\textsuperscript{129} Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Similarly, the Court has defined actionable sexual harassment under Title VII as being “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” Meritor Sav. Bank, FSB, 477 U.S. at 67.
harassment takes a somewhat narrower view of the end result. Such a narrow view might be the result of the Court's failing to inquire whether the victim subjectively believed she was being harassed. The view might also be narrowed because of the Court's perspective that peer sexual harassment is "less likely" to deny equal access opportunities than teacher-on-student sexual harassment.130

Perhaps because of the specialized school environment, the Court might have felt constrained in deciding what evidence did or did not constitute a denial of equal access to educational opportunity. Whatever the reason, the evidentiary burden for this element is pretty vague in Davis. Outright deprivation of physical access to educational opportunities is not required, but further direction is lacking.131 The problem thus becomes determining what evidence will prove that the severity and pervasiveness of the harassment undermined and detracted from the educational experience.132 Evidence of a mere drop in grades may not be enough to stave off a motion for summary judgment on this element, but Justice O'Connor does not foreclose victory if that evidence combines with the persistence and severity of the actionable conduct itself.133 Whatever the source, the impact should have a "concrete, negative effect on [the victim's] ability to receive an education"134 in line with the theme of educational equality contained in Title IX; the victim must show a distinct connection between the behavior and the resultant problems in school. One might suggest that this element is the equivalent of the Title VII analysis of the subjective perception of the victim, especially for those students who cannot articulate a sexual aspect to the harassment.

Obviously, a motion for summary judgment will have a greater likelihood of success when the effect of the harassment is worse. For example, in Manfredi v. Mount Vernon Board of Education, a second-grader did not provide adequate evidence that she suffered adverse effects

130 Davis, 526 U.S. at 653.
131 See id. at 651.
132 See id. at 650-51.
133 See id. at 652. Grades are the work-product for this workplace of public school students. Students usually do not view a drop in grades as being mere. Too much rides on academic success to be cavalier about grades in this manner.
134 Id. at 654.
from a classmate's sexual harassment when she passed all her courses and could not connect her absences to the alleged harassment. The panic attacks that could not be directly linked to the offensive conduct were not of sufficiently deleterious effect when the alleged victim satisfactorily completed her exams and was elected student of the month. The case of *Hawkins v. Sarasota County School Board* held that none of the alleged victims were denied equal access to educational opportunity when they suffered no decline in grades and suffered no observable behavioral changes. Such evidence may not be enough to avoid summary judgment.

In contrast, evidence of a denial of access to education seems directly linked to the pervasiveness of the harassing conduct such that proof of one is proof of the other: the more the better. For instance, Alma McGowen was subjected to numerous physical and verbal attacks that resulted in her being diagnosed with depression and settling for being schooled at home. Similarly, Jesse Montgomery experienced systemic problems with same-sex sexual harassment that deprived him of physical access to the educational programs when, for years, he feared using the school's restroom and "avoided eating in the cafeteria, riding the school bus, or participating in intramural sports." Although his grades did not particularly suffer, the district court determined that the activities from which he felt excluded were benefits of the educational program, and he thereby experienced substantial interference with his education.

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135 94 F. Supp. 2d at 455. In addition, she had not met with a psychologist until after her mother had retained counsel. *Id.* at 451-52. Similarly, Gabrielle M. did not "suffer." Although Gabrielle was diagnosed with some psychological problems, her grades remained steady and she did not experience serious absenteeism. *See Gabrielle M.*, 315 F.3d at 823.


137 322 F. 3d at 1289.

138 Although the victims asserted they were upset, they did not report the problems to their parents until several months later. *See id.* Their absences from school were determined to have no probative value when two had faked illness to avoid going to school for four or five days. *See id.*

139 *Vance*, 231 F.3d at 257, 259.


141 *Id.*
two brothers, summary judgment was granted when widespread sexual harassment by fellow students and some coaches went “far beyond” teasing.142 Another victim was “totally deprived” of educational benefits by the actionable sexual harassment of a fellow student when she became suicidal and engaged in self-destructive behavior, causing her to be institutionalized and later home-bound.143 Therefore, proof of physical school avoidance is clearly useful when added to the psychological reactions.

However, an adverse psychological reaction may be enough as a measure of the victim’s subjective reaction. A demonstration of such psychological trauma sufficient to deny a student access to educational opportunities was the subject in Theno v. Tonganoxie Unified School District No. 464.144 In Theno, the victim was tormented for four years by his fellow students, routinely called “fag,” “faggot,” “jack-off boy,” “banana boy,” “queer,” “flamer,” or “masturbator.”145 He was the subject of crude drawings and comments that reinforced the belief that he was gay.146 As a result of this continuous and unrelenting torment, he suffered stomach problems and depression that required medication and counseling.147 He was diagnosed with post-traumatic stress disorder, anxiety disorder, and avoidant personality disorder, and he eventually left school.148 The school district’s motion for summary judgment on this issue was denied,149 and the plaintiff eventually won a $250,000 verdict against the school district.

If any trend can be found in these cases, it is the overwhelming magnitude of the evidence that a plaintiff must bring to a motion for

142 Snelling, 2001 WL 276975, at *5.
143 Murrell, 186 F.3d at 1244, 1248-49.
145 Theno I, 377 F. Supp. 2d at 968.
146 Id. at 965, 968.
147 Id. at 968.
148 Id.
149 Id. at 976; Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299 (D. Kan. 2005) (Theno II). But see Burwell, 213 F. Supp. 2d at 931-32 (female student diagnosed with post-traumatic stress syndrome was not denied educational opportunities when she achieved her highest grades in high school during the problematic semester).
summary judgment for both elements. To create a genuine issue of material fact about the harassing conduct, a victim usually must prove more than a single incident. That evidence can be other than just sexually-oriented behavior; it can also be teasing and pervasive harassment targeted at a particular gender. Also, in line with these cases, a plaintiff should show some quantitative psychological harm, especially in the absence of de facto physical exclusion from the educational program. Although one would think that any child’s aversion to school caused by fear would be actionable, some cases suggest otherwise. Something more than just being afraid of one’s everyday environment is required. Such judicial attitude ignores the fact that these students are “twice-victimized”: they are victims of harassing behavior and of a denial of “their rights to a quality education in a tranquil learning environment.” \[^{150}\] Unless and until some plaintiff can create that theme in a Title IX peer sexual harassment case, which is not unlike the hostile environment that is actionable under Title VII, children are going to have a much harder time showing how they have suffered in their own workplace, especially in the absence of a clearly articulated, objective test of the harassment.

**B. See No Evil, Hear No Evil: Actual Knowledge**

This next element of the Title IX peer sexual harassment test involves a much simpler task. Who knew what, and when did he know it? *Davis* is not terribly enlightening in the matter of the school district’s “actual knowledge” or its response to “known acts of sexual harassment.” \[^{151}\] Indeed, the school district’s knowledge was not at issue in *Davis*. However, according to *Gebser v. Lago Vista Independent School District*, \[^{152}\] actual knowledge is the ultimate hook that makes a school district liable under Title IX and not of mere vicarious liability that might otherwise arise from an employment situation or some other type of custodial

\[^{150}\] See *SHOOP & EDWARDS*, *supra* note 66, at 109.


control-agency relationship that creates liability for student-on-student sexual harassment.\footnote{153 See Davis, 526 U.S. at 644-48.}

Also unlike the Gebser decision, Davis does not instruct that actual knowledge must be possessed by a school district official with authority to take corrective action.\footnote{154 See Gebser, 524 U.S. at 289-90.} That distinction is likely because, when dealing with the custodial-control aspect of a school district, almost any school official, whether teacher, administrator, or school board member, ostensibly has the supervisory power to take the corrective action necessary between and among students to keep from being deliberately indifferent.\footnote{155 This differs from teacher-on-student harassment where the notified official must have authority over the harassing teacher.} At the very least, proof must show that the victim advised at least one of these categories of officials because their actions likely can be attributed to the statutory recipient of federal funds for Title IX liability.\footnote{156 See, e.g., Murrell, 186 F.3d at 1247; Schaffner, supra note 151, at 87-88.} This custodial control arises because schools are typically charged with a duty of supervision.\footnote{157 See, e.g., Miller v. Griesel, 308 N.E.2d 701, 706-07 (Ind. 1974); Sheehan v. St. Peter's Catholic Sch., 188 N.W.2d 868, 870 (Minn. 1971); see also Davis, 526 U.S. at 644.} The supervisory requirement can vary by the age of the children\footnote{158 See, e.g., Johnson ex rel. Johnson v. Sch. Dist. of Millard, 573 N.W.2d 116, 119 (Neb. 1998).} and be heightened by knowledge of dangerous conditions in the school.\footnote{159 See, e.g., Dixon v. Chi. Bd. of Educ., 710 N.E.2d 112, 116 (Ill. App. Ct. 1999); Johnson v. City of Boston, 490 N.E.2d 1204, 1206-07 (Mass. App. Ct. 1986).} Therefore, if a victim wants to assure that someone in authority has actual knowledge, that individual will likely need to possess "the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision."\footnote{160 Murrell, 186 F.3d at 1247; see also Snelling, 2001 WL 276975, at *5.}
The very nature of the educational environment suggests that notice can be transmitted in any number of ways in order to be found acceptable. Schools must be flexible, particularly because children are less likely than employees to tell a school authority figure they have been sexually harassed. Instead, children are more likely to tell a friend or family member. Although one decision determined that mere observation is not enough without a particular report, the required supervisory duties of school officials suggest that seeing is believing. Even though actionable peer sexual harassment does not have an explicit subjective component, school observers must use their objective antennae when confronted with untoward behavior that the victim is not enjoying. Combining students’ immaturity with their innate fear of school administrators, teacher observers are the front-line of protection. Accordingly, a school district’s motion to dismiss was denied on the strength of evidence that a teacher witnessed a playground incident that amounted to sexual harassment, because the teacher had supervisory authority at the time and failed to intervene. But a teacher’s knowledge of nonspecific and generally problematic misconduct may not be actual knowledge of sexual harassment.

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161 Davies, supra note 32, at 423.
162 See id.
163 AM. ASS’N OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 29-30 (2001), available at http://www.aauw.org/member_center/publications/HostileHallways/hostile hallways.pdf [hereinafter 2001 HOSTILE HALLWAYS]. Only 11% of both physically and non-physically harassed students were likely to tell a teacher, while 9% were likely to tell another school employee. Id.
164 See Winzer v. Sch. Dist. of Pontiac, 105 F. App’x 679, 681 (6th Cir. 2004) (principal aware that middle school students were engaging in sexual activity on school grounds but did not know that it was not consensual; therefore he had no actual notice of sexual harassment); see also Harris & Grooms, supra note 76, at 608-09.
166 Carroll K., 19 F. Supp. 2d at 621-22; see also Murrell, 186 F.3d at 1248.
167 Gabrielle M., 315 F.3d at 823-24.
The safest route to recovery is for the victim to have informed a school administrator, and not just a teacher, of the acts of harassment. 168 This notice should have sufficient specificity so that the school district can actually take action. 169 In these cases, a victim’s parent typically calls a school principal to discuss the harassment, 170 makes repeated reports to the teachers and the principal, 171 calls the principal and the superintendent, 172 or calls the principal and the assistant principal. 173 A victim-litigant who has not reported the harassment at all or cannot otherwise prove that school officials had actual knowledge of the conduct to do something about it likely will not prevail. Rebuilding the chronology would be useful, and the higher the reports went the better. Some severe and pervasive conduct might be sufficiently reported if teachers or administrators actually observed the behavior. However, the best evidence remains a recounting and chronology of the victim’s and her parents’ reports to both.

C. Do No Evil: Deliberate Indifference

Oddly enough, proving deliberate indifference has been problematic in getting past a motion for summary judgment due in no small measure to the great deference courts traditionally bestow on school districts’ policy actions. “Courts should refrain from second-guessing the

168 Schaffner, supra note 151, at 90. “By requiring that the ‘appropriate person’ be an ‘official’ and by requiring that that person have at a ‘minimum’ authority to institute corrective measures, it is more likely that the Davis Court intended that the principal have actual notice of peer sexual harassment before liability under Title IX may be imposed upon the recipient.” Id. (citation omitted).

169 See Harris & Grooms, supra note 76, at 607-08.

170 Murrell, 186 F.3d at 1247-48.

171 Vance, 231 F.3d at 259; see also Morlock v. W. Cent. Educ. Dist., 46 F. Supp. 2d. 892, 908-09 (D. Minn. 1999) (pre-Davis) (attributing actual knowledge to teacher, technical tutor, and the Title IX coordinator, a building principal “equivalent” in special education district).


173 Schroeder, 296 F. Supp. 2d at 880. School board members likely do not have to have actual knowledge. Id. But see Rasnick, 333 F. Supp. 2d at 564 (holding that the school board is not liable under Title IX because the division superintendent lacked authority to take action on behalf of the school board against the harassing teacher).
disciplinary decisions made by school administrators.”¹⁷⁴ This deference arises from the power given to local school boards to control and manage the affairs of local education.¹⁷⁵ Thus, prevailing at the summary judgment level on this element can be difficult for victim-litigants because of schools’ discretion in matters of discipline and management.

Deliberate indifference seems to be the other hook for Title IX liability under the contractual theory set out in *Gebser*. In response to known teacher-on-student sexual harassment, a school district’s deliberate indifference must amount to an official decision not to remedy a Title IX violation.¹⁷⁶ Although *Davis* is not especially illuminating on the matter,¹⁷⁷ peer sexual harassment prompts a somewhat lower standard of care. A school district is not charged with trying to eradicate peer harassment by implementing preventive codes of conduct. It will be held liable “where the [school’s] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”¹⁷⁸ That might mean more than recklessness but is at least a failure to act in the face of certain or substantial certainty of student harm.¹⁷⁹ It clearly means

¹⁷⁴ *Davis*, 526 U.S. at 648 (citing New Jersey v. T.L.O., 469 U.S. 325, 342-43 n.9 (1985)).

¹⁷⁵ Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26, 457 U.S. at 863-64. But that is a double-edged sword: schools are charged with teaching “the shared values of a civilized social order” so they have the power to limit certain offensive student conduct that might otherwise be constitutionally protected. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-84 (1986) (stating that a school has the authority to limit and/or discipline the use of lewd, vulgar, and offensive language). Those limits of this special educational environment are vaguely defined as those that are “reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist.*, 484 U.S. at 273. With that power and responsibility, does not a school district have a concomitant, heightened responsibility to teach such “civilized social order” when local school employees have actual knowledge of peer sexual harassment? Perhaps not. School-initiated decisions limiting students’ freedoms seem to be given greater deference than school failures to protect their students.

¹⁷⁶ *Gebser*, 524 U.S. at 290.

¹⁷⁷ Schaffner, supra note 151, at 90 (stating that it remains unclear from *Davis* “whether notice of peer sexual harassment to an individual teacher satisfies the *Gebser* standard,” that is, whether an individual teacher is an official with authority to address and correct the harassment); see generally Harris & Grooms, supra note 76, at 612.

¹⁷⁸ *Davis*, 526 U.S. at 648.

¹⁷⁹ The Sixth Circuit approved the following language in the jury instructions given in *Vance*:
something more than just an explicit institutional decision to ignore harassment\textsuperscript{180} but might impose something less than the duty of an employer to its employee.\textsuperscript{181}

Evidence of deliberate indifference to overcome a motion for summary judgment is not evidence of intent to discriminate but rather evidence that proves causation of harassment\textsuperscript{182} and appears to have the following three stages. (1) Did the school investigate properly? (2) If it did investigate, did it implement remediation? (3) If it did remediate, was it effective?\textsuperscript{183}

Therefore, this evidence has the flavor of causation in it. To be held liable, what did the school fail to do that promoted a violation of its Title IX duties?\textsuperscript{184} The focus then is determining when a school’s response is clearly unreasonable.

As for the first two rhetorical questions, an official response necessarily starts with the Department of Education’s Sexual Harassment Guidance.\textsuperscript{185} This requires that,

\begin{quote}
“Deliberate Indifference” means more than mere “recklessness” on the part of the appropriate person. “Recklessness” requires only proof that a reasonable person would have appreciated the great degree of risk of harm to the plaintiff. In order for an act to be “deliberate,” the particular appropriate person must have been shown to have been aware that adverse consequences from his or her action were certain or substantially certain to cause the harm. Before you can find that any appropriate person was deliberately indifferent, the plaintiff must prove that the appropriate person was aware that a particular act or inaction was certain or substantially certain to cause the Plaintiff harm and that the appropriate person decided to act or not to act in spite of that knowledge.
\end{quote}

\textsuperscript{180}See Davies, supra note 32, at 427-31.

\textsuperscript{181}Deborah L. Brake, School Liability for Peer Sexual Harassment After Davis: Shifting from Intent to Causation in Discrimination Law, 12 HASTINGS WOMEN’S L.J. 5, 25-29 (2001).

\textsuperscript{182}Id. at 22-23.

\textsuperscript{183}See generally Harris & Grooms, supra note 76, at 612-16 (discussing the “deliberate indifference” concept).

\textsuperscript{184}“[T]he implicit theory of discrimination underlying the Davis decision [is] that schools cause the discrimination by exacerbating the harm that results from sexual harassment by students.” Brake, supra note 181, at 6.

[o]nce a school has notice of possible sexual harassment of students ... it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.\textsuperscript{186}

In illustration, a principal’s failure to investigate allegations of sexual harassment is deliberate indifference.\textsuperscript{187} Likewise, a principal and assistant principal who did nothing after a report of sexual harassment “fostered an environment in which such harassment was accepted, and which made [the victim] more vulnerable to further harassment.”\textsuperscript{188} In another case, a principal not only did not investigate the victims’ complaints, he told one victim that the nicknames and physical abuse that he endured were “a part of growing up and should be tolerated.”\textsuperscript{189} Similar indifference was exhibited by teachers who had actual knowledge of the alleged harassment and attempted to conceal it by advising the disabled victim not to tell her mother.\textsuperscript{190} Thus, lack of investigation and failure to implement any remedy are the first avenues of proof for the victim.

The third question examines post-investigation remediation. A court will also measure the efficacy of the remedy; doing \textit{something} is not enough. “[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior.”\textsuperscript{191} Merely talking to the offending students without any further discipline or reports to law enforcement of physical abuse may be deliberate indifference in continuing to employ obviously ineffective methods to stop unrelenting harass-

\begin{footnotes}
\footnotetext{186}{\textit{Id.} at 15-16. The Department of Education has recommended investigations since the issuance of its 1997 version of the Guidance. Harris & Grooms, \textit{supra} note 76, at 615-16 (citations omitted). The victim must also cooperate with the investigation. See \textit{Johnson}, 194 F. Supp. 2d at 947-48.}

\footnotetext{187}{\textit{Murrell}, 186 F.3d at 1248.}

\footnotetext{188}{\textit{Schroeder}, 296 F. Supp. 2d at 880.}

\footnotetext{189}{\textit{Snelling}, 2001 WL 276975, at *6. Even after the victims’ parents met with the superintendent, and the superintendent issued an action memo to the principal, the principal did nothing. \textit{Id.} at *6-7.}

\footnotetext{190}{\textit{Murrell}, 186 F.3d at 1248.}

\footnotetext{191}{\textit{Vance}, 231 F.3d at 261.}
\end{footnotes}
Likewise, doing too little of more substantial disciplinary measures may also be deliberate indifference. Even though a school took some steps to stop the harassment by suspending and expelling some offending students, the evidence revealed that the harassment was "open, recurring, and frequently tolerated" by school officials. The evidence also revealed that school officials told the victim that nothing could be done and advised her to tolerate it. This incomplete remedy was deliberate indifference in the face of pervasive sexual harassment. Thus, school district liability may still accrue if individual disciplinary actions are not enough to stop the hostile environment experienced by a victim.

The school district's remedy to overcome the deliberate indifference hurdle must be related to the severity of the harassment. For example, a school district did not display deliberate indifference when its remedy for unremitting teasing included "counseling [the victim], meeting with the offending students, sending letters to parents, threatening suspension, and alerting teachers to the problem." Further evidence of a lack of deliberate indifference might include meting out discipline after each event and taking similar steps to prevent future harassment. In one such case, the school disciplined a harassing kindergartner with suspension from recess privileges, detention, transfer to another classroom, isolation, and an adjustment of lunchroom schedules to separate him from the victims. The school called the parents, and the school psychologist met with the students. Eventually, the alleged victim was allowed to transfer

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192 Id. at 262. Indeed, the "talking-to" method only increased the harassment. Id.

193 Morlock, 46 F. Supp. 2d at 909-10. See also Montgomery v. Independent School District No. 709, where modest action by the school administration was not enough remediation for a ten-year pattern of harassment. 109 F. Supp. 2d at 1095. The victim alleged that he had made "hundreds of complaints about the harassment to school teachers, cafeteria and playground monitors, bus drivers, principals, assistant principals, locker room attendants, counselors, and even the superintendent." Id. The evidence on summary judgment indicated that other than verbal reprimands or sending a harasser out to the hall, not much else was done to stop the harassment. By the time the victim finally filed a formal complaint, the school suspended several of the offending students but not the most egregious offenders. Id. at 1086.


to avoid any contact even during recess. These acts were not clearly unreasonable responses to the problem, and there was no deliberate indifference.

The insurmountable evidence for a victim in a peer harassment case is a school district’s systemic response to a problem. A school administration that has made a concerted effort to change the environment itself may prevail on summary judgment even if the victim claims the response was not 100% perfect. Evidence of response to the systemic problem might include not just warning students but also counseling and suspending offenders, circulating memoranda to faculty and staff to prevent further harassment of the victim, training faculty and staff, and creating school-sponsored assemblies and policies to address peer harassment.

Victim-litigants must understand that no court is likely to determine they are entitled to the perfect remedy, particularly in light of the harassing student’s own rights. Separating and giving the students a “talking-to” (rather than expulsion) may be a sufficiently reasonable response when a male student is annoying a female student. Indeed, not every complaint may even require an investigation if the school officials doubt the report’s credibility, especially if the school administrators actually follow up with the accused students and warn them off.

The foregoing analysis should warn plaintiff’s counsel that this last element in the prima facie case is the most deceptively difficult to

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196 Gabrielle M., 315 F.3d at 820.
197 Id. at 823-25.
199 Id. at 800. Several systemic prevention programs and curricular guides are available. See, e.g., JUDITH BERMAN BRANDENBURG, CONFRONTING SEXUAL HARASSMENT: WHAT SCHOOLS & COLLEGES CAN DO 66-96 (1997); SHOOP & EDWARDS, supra note 66, at 141-59, 173-239.
201 Cubie, 244 F. Supp. 2d at 1203 (holding that a business college did not act with deliberate indifference in a matter of a male student paying unwanted attention to a female student, and the female student was not entitled to the male student’s expulsion when the college administration met with the male student and discussed the female student’s concerns, notified instructors of the problem, and coordinated class breaks so the students would not be in contact with each other).
202 Burwell, 213 F. Supp. 2d at 933-34.
overcome on summary judgment. The challenge is the deference a court is likely to give a school district in matters of discipline. To the extent that the school district’s proof in opposition is overborne by the weight of the victim’s subjective psychological and physical alienation from the educational environment, the deliberate indifference standard might be turned on a school district: too little is not good enough. However, all four of these elements clearly are affected by the special environment in which the harassment takes place.

III. Educating the Litigator:
Title IX and the School Environment

In any education case, a couple of truisms stand out. The first truism was addressed in the Introduction: public schools are a unique environment. Unfortunately, many lawyers taking on such cases are woefully ignorant of that environment, often to their own chagrin and school board counsel’s glee. School litigation reflects this special environment both for its very existence and by reason of case law that has developed during the past century. That environment is special because of the nature of the business and the age of the clientele, and even conventional tort and civil rights theories must be molded to accommodate that environment. As a consequence, any successful party to a Title IX peer sexual harassment case prevails because of a conjunction of greater knowledge of that environment and, to a lesser extent, the court’s lack of that knowledge and therefore inherent deference to the party exhibiting the greater expertise.

The second truism is that defense counsel for the schools, whether insurance or school board counsel, often have significantly more experience in this specialized area of litigation than plaintiff lawyers, even if they specialize in tort or civil rights litigation. Even if they have not actually tried that many cases under Title IX, school board lawyers are more fluent in the lingo and more attuned to the specialized constitutional issues than plaintiff lawyers. Furthermore, they have a great support network in the National School Boards Association; this is the environment in which school board lawyers make their living. Plaintiff lawyers, on the other hand, are often engaged in a one-off case in an area fraught with problems they have not bothered to educate themselves about. That is a mistake.
There are at least five specific areas to which counsel in these Title IX cases must be attuned. The first two areas were addressed at length in Parts I and II: The first is that the bounds for a plaintiff’s succeeding in a peer sexual harassment case are extremely narrow, making it difficult to win. Second, these cases are usually challenged right out of the box, requiring a plaintiff to be fully and immediately prepared for the inevitable motion for summary judgment. That leads to the other three crucial areas to which counsel should be attentive: (a) understanding the school environment vis-à-vis student sexual harassment, (b) understanding the dynamics of childhood and adolescent sexuality and gender identity and how they relate to Title IX litigation, and (c) creating litigation themes for casting a plaintiff’s case in the best light.

A. The Horse that Has Left the Barn: The School Environment and Peer Sexual Harassment

Regardless of whether a court has faced a Title IX peer sexual harassment case before, it must be convinced that it is not a new problem—a difficult problem perhaps but not a novel one. Title IX’s prohibition against sex discrimination in educational programs receiving federal funds has been in place since 1972.203 Granted, private causes of action under Title IX for sexual harassment have a much shorter pedigree, only showing up in federal courts around the mid-1990s204 and finally receiving the Supreme Court’s imprimatur in 1998 with Gebser and the recognition of a right of action for teacher-on-student sexual harassment.205 Just a year later, the Court recognized peer sexual harassment causes of action in Davis ex rel. LaShonda D. v. Monroe County Board of Education.206 However, the United States Department of Education’s Office of Civil Rights (OCR) was on the ball and issued its Sexual Harassment Guidance

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205 Gebser, 524 U.S. at 285.
in 1997\textsuperscript{207} and revised Guidance in 2001 to acknowledge Gebser and Davis.\textsuperscript{208} Thus, school districts have been on official notice of the problems and were given strategies for coping with them nearly ten years ago. Furthermore, the upsurge in litigation has put them on notice that the school itself as a hostile environment is the entity on trial, especially in peer sexual harassment cases.

The OCR Guidance is now an integral part of this special and protected school environment and therefore of the culture that school districts must enhance to comply with Title IX in matters of sexual harassment. Whether school districts have or will comply with the Guidance may be up for debate, but they now have a detailed roadmap that the OCR states it will follow when investigating school districts’ Title IX compliance and approving or withholding federal funding.\textsuperscript{209} The Guidance details the legal structure for Title IX compliance responsibilities. It also details the OCR’s sense of what constitutes student sexual harassment and how school districts should respond to complaints. Among the requirements is that schools have a grievance procedure in place to deal with Title IX complaints generally. The OCR urges school districts to apply this same grievance procedure to sexual harassment complaints.\textsuperscript{210} Although the Gebser Court determined that the failure to have such a policy did not establish the actual knowledge and deliberate indifference elements of a sexual harassment claim,\textsuperscript{211} the passage of time and intervening cases may recommend that such failure is no longer excusable and constitutes evidence of a hostile school environment.\textsuperscript{212}

School districts now know that they bear some responsibility for the environment in their schools.\textsuperscript{213} Supreme Court precedent is clear that


\textsuperscript{208} REVISED SEXUAL HARASSMENT GUIDANCE, supra note 185, at ii.

\textsuperscript{209} Id. at i.

\textsuperscript{210} Id. at 19-21.

\textsuperscript{211} Gebser, 524 U.S. at 291-92.

\textsuperscript{212} See generally LEWIS & HASTINGS, supra note 95, at 38-41.

\textsuperscript{213} The author does not in any way think that such burdens are necessarily fair in most circumstances, but is merely pointing out that they exist. Sometimes other issues become more immediate concerns. For instance, as America’s gun culture comes into schools,
in matters relating to student drug use and student civility, school districts bear a great deal of responsibility for their charges. Although one may bemoan requiring that schools be responsible for controlling sexual harassment, that horse has left the barn: school districts know it is out there, and the Guidance tells them what to do about it. Having been put on actual notice of this pandemic, school districts are now going to be harder pressed to inoculate themselves from responsibility for doing nothing in the face of any type of complaint. It therefore behooves the litigants to be cognizant of not just the details of any particular harassing event but also of hostility in the school environment itself, particularly in light of those cases when successful plaintiffs stressed the systemic failure of the school district to protect the children involved.

In its own review of Title IX compliance, the OCR looks at the following indicia of a hostile environment in schools:

- The degree to which the conduct affected one or more student’s education.
- The type, frequency, and duration of the conduct.
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject or subjects of the harassment.
- The size of the school, location of the incidents, and context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based but nonsexual harassment.

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214 See, e.g., Earls, 536 U.S. at 831 (approving drug testing of students involved in extracurricular activities).

215 See, e.g., Bethel, 478 U.S. at 683-84 (approving restrictions on students’ First Amendment rights while on campus).

216 See, e.g., Martha McCarthy, Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond, 12 HASTINGS WOMEN’S L.J. 177, 212 (2001).

217 REvised Sexual Harassment Guidance, supra note 185, at 6-7.
The wise litigant investigates all these bases in preparation for filing a complaint and in preparing for the inevitable motions. Stressing that these responsibilities already redound to school districts as recipients under Title IX should make it harder for school officials to suggest they have no actual knowledge.\footnote{In addition, a growing bank of literature exists to assist school districts and school administrators in curbing hostile school environments, some of which predates Gebser and Davis. A school district that feigns lack of knowledge of the problem simply is not looking. See, e.g., \textit{Brandenburg}, supra note 199; \textit{Lewis \& Hastings}, supra note 95; \textit{Michele A. Paludi \& Richard B. Barickman, Academic and Workplace Sexual Harassment: A Resource Manual} (1991); \textit{Shoop \& Edwards}, supra note 66; \textit{Stein, supra note 96}.}

In contrast, students have been aware of sexual harassment in schools long before the courts were aware. In its 1993 seminal survey, \textit{Hostile Hallways},\footnote{AM. ASS’N OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, \textit{Hostile Hallways: The AAUW Survey on Sexual Harassment in America’s Schools} 4 (1993).} the American Association of University Women (AAUW) Educational Foundation painted a bleak picture: four in five students experienced sexual harassment in school, affecting the educational environment for \textit{both} girls and boys.\footnote{\textit{Id.}; \textit{Bodensteiner}, supra note 16, at 3-4. Other national and state surveys are outlined by Nan Stein. \textit{Stein, supra note 96}, at 10-27, 98-102, 117-21.} One-third of the students stated that they experienced sexual harassment in elementary school.\footnote{2001 \textit{Hostile Hallways, supra note 163, at 20.}} The 2001 AAUW Survey\footnote{\textit{Id.}} evinced no improvement in the intervening years and nearly a generation of public school students; the same percentage of students surveyed reported that they were sexually harassed in school at some time in their lives, while the percentage of boys so reporting increased.\footnote{\textit{Id. at 3-4. The 2001 survey reported that “[eighty percent] of students experience some form of sexual harassment during their school lives.” \textit{Id.} The survey acknowledged, however, that school districts made progress since the 1990s to either impose sexual harassment policies and/or distribute educational literature. \textit{Id.}}

In their special and presumably protected school environment, students report that sexual harassment most often occurs in the hallways and classroom.\footnote{\textit{Id. at 27.}} The publicity of humiliation is often the motivation for this
gendered terrorism. As the above-described cases exemplify, "[i]n schools, sexual harassment happens in full view of others—in public places such as hallways, lunchrooms, physical education classes, on school buses, on school playgrounds, in classrooms, and at school sponsored activities." Of course, the public nature of the humiliation has more serious ramifications for the victims.

As such, litigants need to be cognizant of two things vis-à-vis the school environment. First, the existence of a hostile environment makes it harder for school officials to claim they do not have actual knowledge. Even if a school official were to testify to the contrary, students know better. Second, schools now have actual notice of their responsibilities concerning Title IX, and the failure to abide by them may contribute to a plaintiff’s proof of the school’s deliberate indifference. It is now no longer acceptable to ignore the very public face of peer sexual harassment and chalk it up to childhood immaturity, flirting, or rites of passage. That innocence is gone in some schools, and viciousness has taken its place.

B. Of Sugar & Spice and Snips & Snails: Gender and Student Sexuality Under Title IX

Peer sexual harassment is fundamentally about gender issues in the special school environment. However, student sexuality is a critical adjunct to both gender issues and the hostility of the environment, especially in understanding the following two elements of a peer sexual

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Examples of sexual harassment that happen in public include attempts to snap bras and grope at girls’ bodies; to pull down gym shorts or flip up skirts; circulation of “summa cum slutty” or “piece of ass of the week” lists; designation of special weeks for “grabbing the private parts of the girls;” nasty, personalized graffiti written on the bathroom walls; sexualized jokes and taunts which mock girls’ bodies; and outright physical assault and even rape in schools.

Ibid. at 2-3. Recent evidence indicates similar harassment occurs with boys whose sexual orientation or sexuality is questioned.

226 Ibid. at 3.

227 See ibid.; Lewis & Hastings, supra note 95, at 25.
harassment claim: whether the perpetrator's behavior is severe, pervasive, and objectively offensive, and whether the victim's response to that behavior is proof of denial of access to the school's educational opportunities. Both elements are tied to each other in an objective-subjective paradigm as the litigator prepares the evidence in the case and frames the issues around that evidence. First, was the behavior objectively offensive? Second, did the student subjectively believe that the school's response to the behavior denied him equal access to educational opportunities?

In proving gender discrimination, the actionable misconduct often has sexual overtones. Accordingly, a child's ability to understand those overtones—as both perpetrator and victim—may color a claim. Courts must not be allowed to underestimate the sexual development of children at a very early age. In many of the reported cases, the courts seemed to distance themselves from the realities of human sexuality. Relying on children's inability to formulate abstract thought about their sexuality, courts assume that children are not sexual (or perhaps are viewed as asexual) and therefore either cannot engage in sexual harassment or misunderstand mere flirting. The courts are sadly mistaken.

From birth, children are in an intimate and physical relationship with their mothers. From suckling at their mothers' breasts to hygienic care of their genitalia, children are early stimulated in sensual areas of their bodies. They also observe appropriate forms of showing affection such as kissing, stroking, and similar forms of affection. By the age of four or five, children start experimenting with secret sex play—playing doctor-nurse-patient games and familial role-playing games—and start experimenting with nudity. Children may not articulate their reasons for engaging in such behavior other than that it feels good; at the same time, adults begin to punish them for this forbidden behavior. In response, children become more conscious and modest about such behavior. Early childhood is also the stage when children begin being educated about avoiding sexual abuse through such programs as Good-Touch/Bad-

228 See, e.g., Gabrielle M., 315 F.3d at 823.
230 Id. at 35-36.
231 Id. at 36-38.
Touch®. This instruction begins as early as preschool and reaches well into the intermediate grades in elementary school. Thus, very young children have a pretty good idea of what is and what is not sexual behavior although they may not be able to articulate it.

Farther along that continuum, preadolescents have an extremely high interest in sex although they have abandoned the innocent play of childhood. Instead, sexual information comes through the influence of adults through their taboos and other observed behaviors. Separate gender roles also become more apparent, with a male-oriented sexual subculture encouraging and supporting sexual activity. By this time, sexual thinking becomes more abstract, and children understand more about biological issues and wish to have more information than perhaps their parents would prefer or are willing to offer.

Adolescents have their own, often problematic, chronology of sexual development and maturity. Part of these problems of course arises because sexual maturity that begins in preadolescence has far outstripped adolescent cognitive functioning: what they lack in social maturity, they more than make up for in sexual maturity. Adolescent sexual challenges include adjusting to the altered appearance and functioning of a sexually maturing body, learning to deal with sexual desires, confronting sexual attitudes and values, experimenting with sexual behaviors, and integrating these feelings, attitudes, and experiences into a developing sense of self. The challenge is accentuated by the unfamiliar excitement of sexual arousal, the attention connected to being sexually attractive, and the new level of physical intimacy and psychological vulnerability created by sexual encounters.

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232 To visit the Good-Touch/Bad-Touch® program website, go to http://www.goodtouchbadtouch.com.

233 MARTINSON, supra note 229, at 39-40.

234 See, e.g., RONALD GOLDMAN & JULIETTE GOLDMAN, CHILDREN'S SEXUAL THINKING: A COMPARATIVE STUDY OF CHILDREN AGED 5 TO 15 YEARS IN AUSTRALIA, NORTH AMERICA, BRITAIN AND SWEDEN 389-93 (1982).


Pile onto these challenges the fact that many cultural influences promote sexual permissiveness, if not promiscuity, and the fact that American adolescents often receive little guidance in responsible sexual behavior, and schools face a potent brew of hormones and violence.

These are the variously aged and variously maturing customers for whose safety and well-being schools are being held accountable, hence courts’ deference to governance in these special environments and the responses to the problems.

Sometimes lost in the consideration of peer harassment cases is the analysis that focuses on the conduct’s gender—not just sexual—context. Similar to sexuality, gender relationships have a role in school environments. For young children, gender roles do not have much definition although they are aware of physical differences. Not until they are told they can no longer expose their nudity to each other do children concretely perceive the differences, although perhaps not the stereotypical roles. Children then learn gender distinctions by the real and cultural behaviors to which they become socialized. Pre-adolescence blurs distinctions between the genders: boys and girls often overlap in activities, sports, and apparel. However, girls are more likely to become the untouchables in society, and children start to perceive social status differences in the genders. Likewise untouchable are those children who are perceived as less popular, less likely to have a romantic (and therefore sexual) liaison. Therefore, teasing at this age is linked with gender roles and stigma. Later, adolescents experience an intensification of gender roles, and their psychological handicaps in wrestling with those roles result in exaggerated gender stereotyping. Intensified gender stereotyping leads to inappropriate expectations of how the genders must and should

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238 MARTINSON, supra note 229, at 37-39.


240 Id. at 143-45.
act at both extremes of the spectrum, stereotypes that are often reinforced in schools. Thus, in tandem with a better abstract cognition of sexual behavior, the sexuality of adolescent peer harassment takes on a sharper focus than in elementary school.

But even at this more abstract level of cognition, sexual harassment is viewed by its effect on the victim, not necessarily by the action. Thus, students see this as a gender rather than a sexual issue. Courts that examine sexuality or lack thereof in the harassing act to the exclusion of the gender roles miss the point.

Both boys and girls emphasize in their definitions of sexual harassment the effects of the action on the victim, whether intended or not, rather than the action itself. For many, sexual harassment connotes verbal or physical actions that create discomfort for the subject. These definitions mirror prevalent legal definitions of sexual harassment in the workplace, which emphasize the creation of a hostile work environment through verbal or physical actions that cause discomfort.

From the students' standpoint, the most egregious forms of sexual harassment in which their fellow students engage are spreading sexual rumors, pulling off (or down) their clothing, saying they were gay or lesbian, forcing them to do something sexual other than kissing, spying on them as they dressed or showered at school, and writing sexual messages or drawings on school property.

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241 LEVESQUE, supra note 235, at 213-14. The intensity of the adolescent experience also increases the violence in the gender dynamics. Adolescents engage in more high-risk behaviors yet are more susceptible to peer pressure and conformity. Consequently, adolescents are also more susceptible to abusive "romantic" relationships as well as experimentation with dangerous, adult behaviors. Unfortunately, they are not emotionally able to deal with the fallout. Id. at 223-27. Adolescents also receive the message that each gender has its own "sexual scripting." Mara Sapon-Shevin & Jesse Goodman, Learning to Be the Opposite Sex, in SEXUALITY AND THE CURRICULUM, supra note 237, at 89.

242 BRANDENBURG, supra note 199, at 43-44.

243 The AAUW study used subjects in eighth through eleventh grades, approximately ages thirteen to seventeen. 2001 HOSTILE HALLWAYS, supra note 163, at 46.

244 Id. at 9. "When defining sexual harassment, many students emphasize that the behaviors must be unwelcome, unwanted, or unreciprocated. Several male respondents, in particular, define sexual harassment as the persistence of unwanted behaviors even after the subjects make their intentions clear or behaviors and actions that do not mesh with the subjects' desires or wishes." Id.
graffiti about them on bathroom walls, in locker rooms, etc. This list and the students’ perceptions that these were the most upsetting forms of sexual harassment do not jibe with some courts’ requirement that the behavior be of a sexual nature as well as being objectively offensive. To the contrary, children have the same responses to gendered harassment that adults in the workplace do; the law just does not always recognize that. Plaintiff’s counsel must therefore be sensitive to the fact that both gender roles and sexual politics are integral to proof of the perpetrator’s actionable conduct—proof of its severity, pervasiveness, and objective offensiveness. In so doing, counsel must account for the differing weights accorded those factors by victims of different ages.

Counsel also must weave throughout such proof the thread of the conduct’s objective offensiveness on the reasonable student. Perhaps a reasonable-child standard should be advocated. For instance, a reasonable-girl standard could be adopted when the cause of action involves a boy harassing a girl. This standard would more closely reflect the reality of being a girl in the specialized environment at a certain maturity level and with the particularized experiences of the gender, not unlike the reasonable-woman standard used in Title VII cases. It is also a permutation of the reasonable-child standard used in tort law, the generic source which should make a similar inquiry adaptable to those cases when boys are the victims. An additional, helpful, and objective perspective might appeal to parental protectiveness, an in-court use of the “teachable moment”: hypothesizing how the judge or the individual members of the jury would react if counsel asked when the judge’s daughter could come to court so the jury “could get a look at her tits.”

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245 Id. at 10-11.


247 Id. at 233-34; see also STEIN, supra note 96, at 31-32.

248 Hoon, supra note 246, at 226.


250 SHOOP & EDWARDS, supra note 66, at 54-55. At least it worked for Matthew McConaughey in the climactic closing argument in the film, A Time to Kill.
At that moment, the Title IX doubter understands not only the objective offensiveness of the behavior but also the impact on the child’s access to education.

A litigator also needs to be cognizant of the specialness of the school environment when assessing whether the victim’s access to that environment has been affected. Every school has its idiosyncrasies, but the basic physical plant, curriculum, and extracurricular activities must be examined. The student workplace has little parallel in the adult workplace, so the physical plant and the public areas are relevant. These little workers are crammed in relatively large numbers to work together in rooms, in closer proximity than production-line, factory work. Then there are the public corridors for passing between classes, student storage in lockers, and passage to anyplace in the building. The next aspect is the academic environment: what children learn, under what circumstances they learn best, their learning styles, their work habits, and their ultimate success in any particular subject. The third concern includes other activities that may comprise the educational program to which a student might be excluded. If one views extracurricular activities as integral to academic success, such as sports, theatre, social and academic organizations, and musical groups, then a student’s feeling unable to participate could affect her access to the educational program. Any number of other idiosyncrasies can be included that might be affected by harassment, like group undress and communal toilet facilities.

Counsel must also be attentive to the very subjectivity of the victim’s response to the offensive conduct, the proof of which is a bit like quick-silver and hard to quantify: what constitutes exclusion from the educational program? Harassing conduct often occasions an emotional impact; nearly half the students surveyed by the AAUW reported being very or somewhat upset after experiencing perceived sexual harassment.\(^{251}\) Although such evidence may not of itself warrant recovery under Title IX,\(^{252}\) an emotional impact can have a direct effect on students’ access to their educational programs. Significant percentages of students found themselves not talking as much in class, not wanting to go to school, changing their seating assignments, finding it hard to pay attention in

\(^{251}\) 2001 HOSTILE HALLWAYS, supra note 163, at 32.

\(^{252}\) But see Harris, 510 U.S. at 22 (holding that Title VII does not require proof of psychological harm).
school, staying away from certain school locations, finding it hard to study, and staying home from school or cutting class. 253

The fallout of Title IX harassment must be directly tied to the program, not just the fact of the emotional, psychological, and physical consequences. So, counsel must be able to define what exactly that environment should be or should have been for the victim. Perhaps an educator’s or a parent’s perspective will be useful. Regardless, the child’s own subjective notions of what he expects from the safety of school must figure prominently in presenting evidence of denial of his access. All such proof must stress the importance of education to children’s growth, maturity, and civic responsibilities.

One of America’s preeminent educational philosophers, John Dewey, attributed several distinct values to education: necessity of life, social function, growth, and instillation of direction and discipline. 254 As an institution integral to democracy, schools must inculcate the values of a democratic society. 255 To do that, schools should ideally create a climate and culture conducive to a learning community, a positive school climate that is committed to students and their learning. 256 And to do that, schools should be safe. “A safe school is where teachers can teach and students can learn in a welcoming environment, free of fear and intimidation. It is an educational setting where the climate promotes a spirit of acceptance and care for every child . . . .” 257 The Supreme Court most famously characterized schools this way:

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253 Id. at 36-37. Girls are more likely than boys to suffer these experiences, while students who underwent physical sexual harassment were more likely to suffer. Id.

254 See generally JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION (Macmillan Co. 1966) (1944).

255 “Such a society must have a type of education which gives individuals a personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder.” Id. at 99.

256 JAMES W. KEFE & JOHN M. JENKINS, INSTRUCTION AND THE LEARNING ENVIRONMENT 9-10 (1997). “All major stakeholders—students, teachers, parents and community—will view the school environment in a positive fashion. The shared perceptions of all these stakeholders will validate the academic orientation of the school, its sense of collective responsibility and the sustained commitment to students and their learning.” Id. at 10.

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\textsuperscript{258}

The litigator might thus emphasize that there is a certain tipping point at which, physical exclusion or not, psychological exclusion from an education not only violates Title IX but also is a dereliction of the state’s duty to the child.

The preceding discussion should impress upon counsel to immerse herself in this very unusual world. She must frame the case—and indeed the themes of the case—around that unique climate.

C. The Litigation Themes

Based on the literature and the cases, counsel might consider adopting one or more of several themes in a peer sexual harassment case. Such themes may include the fundamental gender-bullying aspect of the most successful cases, emphasis on the severity of the harassment, the two primary models of peer harassment, and the nature of exclusion from the educational program. Given the facts of the cases above in which a plaintiff was successful in progressing beyond a dispositive motion, these themes can be distilled as follows.

First, the systemic harassment in successful cases was directed either at female students or at male students who were perceived as having effeminate qualities (i.e., who were believed to be gay). The attacks smacked of sexuality but really were directed more at that gender or victim who seemed weaker. That pattern buttresses the notion that these

cases really are perhaps more about gender discrimination than about sex. 259 One of the lessons learned in these successful cases is that the ostensibly sexual aspects are coupled with gender-bullying, a combination of power and sex. 260

Tied to the first is the second feature of a successful plaintiff’s response to summary judgment, which is an emphasis on the severity of the harassment. Obviously, the pervasiveness of repeated and unrelenting attacks adds to that emphasis. But proof in the successful harassment cases combined power issues as well as gender and sexuality in a manner intended to humiliate—virtual rape, if you will. Rape is often acknowledged to be less a crime of sexuality and more a crime of violence. Indeed, one theory of rape is derived from the “cultural spillover” theory that “rape may be influenced by the implicit or explicit approval of violence in various areas of life such as education, the mass media, or sports.” 261 Although a direct correlation between rape and legitimate, socially approved violence cannot necessarily be drawn, an indirect corre-

259 The sexual harassment-discrimination dichotomy has borne at least four different explanatory models that might fruitfully be applied to define sexual harassment: (1) the “formal equality” model, (2) the “sexual content” model, (3) the “subordination” model, and (4) the “gender regulation” model. Daniel G. McBride, Guidance for Student Peer Sexual Harassment? Not!, 50 STAN. L. REV. 523, 541-547 (1998); see also Katherine M. Franke, What’s Wrong with Sexual Harassment?, 49 STAN. L. REV. 691 (1997). These philosophical models, of course, were extrapolated before Davis. However, because each case is so fact-sensitive and motive-specific, no one model really assists in creating the theme, nor for practical purposes are they really necessary.

260 “Most theories and models describe sexual harassment as a way to obtain sex and/or to abuse or increase power.” BRANDENBURG, supra note 199, at 40 (citation omitted). One approach suggests that we re-orient our thinking about the sexuality part of the behavior when it comes to children: the motive is not to receive something sexual from the victim; rather the motive is to foist sexual abuse on the victim. Shelby Jean, Peer Sexual Harassment Since Oncale and Davis: Taking the ‘Sex’ out of ‘Sexual Harassment,’ 2000 MICH. ST. L. REV. 485, 489-90 (2000).

261 LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS 9 (1989) (emphasis added); see generally SUSAN BROWN Miller, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION 124-28 (2000). Another theory suggests that rape is a biological and evolutionary construct that might be triggered by many things, including violence. THORNHILL & PALMER, supra, at 4. However, other studies dispute the significance of both genetic and hormonal influences on male violence. Angela K. Turner, Genetic and Hormonal Influences on Male Violence, in MALE VIOLENCE 233, 246-47 (John Archer ed. 1994).
lation exists because the status of women is usually lower in those areas where violence is more highly valued. Likewise, the motivation for sexual harassment is as much about power as it is about sex. "Like any other power struggle, many instances of sexual harassment are initiated and negotiated by a person in a position of authority and are sustained at the expense of another who cannot counter demands without risk of reprisal."

Although peer harassment does not fall neatly into that theorem, student victims tend to be those who are considered weaker or are subjected to harassment by a group. As a result, more successful cases protect males rather than females, perhaps because the notion of male rape is so alien to the bench that the perception of harm to boys is considered greater.

That power dynamic is then mixed with the biological imperative of humans in children, which cannot be underestimated as a motive for student sexual harassment. The primary reasons for which students admit they engaged in sexually harassing behavior toward other students—"it's just a part of school life," the perpetrator thought the victim liked it, the perpetrator wanted a date with the victim, and the perpetrator's friends encouraged him—have mixed motivations of sexual socialization and approval of violence. The more violent reasons for these students engaging in sexual harassment were to exert power over the victim or to extract something from the victim.

The theme therefore for severe, pervasive, and objectively offensive behavior—its severity in particular—is to blur the lines between sexual behavior and power over the weak, especially in instances when the harassment did not last for months or years. The victim who proves the school atmosphere both intimidated the victim and had an aura of sex and

262 BARON & STRAUS, supra note 261, at 187.
263 ROBERT J. SHOOP & JACK W. HAYHOW, JR., SEXUAL HARASSMENT IN OUR SCHOOLS: WHAT PARENTS AND TEACHERS NEED TO KNOW TO SPOT IT AND STOP IT! 29-32 (1994).
264 BRANDENBURG, supra note 199, at 5 (citation omitted).
265 That harm may be actual: because boys are expected to "take it like a man," they endure such harassment without complaint longer than girls do.
266 See generally THORNHILL & PALMER, supra note 261.
267 2001 HOSTILE HALLWAYS, supra note 163, at 41.
power is better able to prove a hostile environment sufficient to hold a school district liable.\textsuperscript{268} If the severity of the attacks is emphasized, perhaps less proof of pervasiveness will be required.

Third, the victim might be attentive to the theme suggested by the mode of harassment. The illustrative cases usually involve only the following two models of peer sexual harassment: one perpetrator with one or more victims, or one victim with numerous perpetrators. Historically, the one perpetrator-one victim scenario is harder to win. That outcome might be because those cases isolate individual acts of harassment without accounting for either a hostile environment surrounding the victim or the victim's perception of a hostile environment. Proving systemic harassment in a one-on-one situation could be more successful if the victim proves that, as far as he is concerned, the harassment was systemic and that the one perpetrator made the victim's school environment hostile. Of course, evidence from the perpetrator's other victims, if any, should be sought out, even if the incidents evinced only violence rather than sex or gender issues. But the point here is to piggy-back this theme onto the previous theme when few incidents have occurred.

On the other hand, when the group harasses the pariah—the several perpetrators-one victim scenario—plaintiff-victims have a much easier time proving a Title IX claim. The number of incidents, the ongoing nature of the harassment, and the cultural acceptance of the pack to attack the weak leads the courts to a better sense of a systemic hostile environment. The theme of this type of harassment should obviously emphasize pervasiveness and the systemic nature of the violence. But related to this is the theme of the very public nature of the ongoing attacks, hence, a lower burden of proving the school district’s actual knowledge and deliberate indifference.

Fourth is the theme necessary to persuade the trier of fact that the victim has been excluded from equal access to educational opportunity, even with only psychological results. To begin, the litigant must associate herself with the appropriate reasonable-student standard. Title VII standards

\textsuperscript{268} One must be careful not to blur the lines between bullying and sexual harassment. See, e.g., Stein, supra note 96, at 783. However, given the difficulty in proving a sexual harassment claim, it may serve plaintiff's interest to also explore state court claims under anti-bullying or anti-harassment legislation.
of the reasonable woman are going to involve a different analysis than for public schoolchildren of nearly any age. Although some students have become somewhat inured to sexual harassment under circumstances that might reflect adult reactions, nearly half are not. Instead, they experience embarrassment, self-consciousness, fear, loss of confidence, confusion, and doubts about whether they can succeed in school. The victim should exploit data that counsels that younger victims of rape suffer greater psychological pain from the attack than do older victims. Therefore, the victim should tap into expert witnesses who could actually attest to something that might not otherwise be within the expertise of the trier of fact, like the subjective and objective realities of a hostile educational environment.

Those psychological feelings must then be appended to actual alienation, or exclusion, from the educational program, or at least from the sense of safety the children should feel in school. According to the National School Safety Center,

[i]n an attempt to escape the harassment, the victim plans activities around an avoidance schedule. Her inability to stop the harassment results in anger, humiliation, and shame. A sense of betrayal and stigmatization often results in isolation and withdrawal from others. Even those few who stand up and fight often lose the battle, thereby reinforcing the feelings of helplessness generated by the abuse.

Children who have been harassed think differently about themselves, their school experience, and their classmates, regardless of adult percep-

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269 2001 HOSTILE HALLWAYS, supra note 163, at 27.
270 Id. at 32-36.
271 THORNHILL & PALMER, supra note 261, at 89-90.
273 SHOOP & HAYHOW, supra note 263, at 56.
274 Id.; Tianna McClure, Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of Davis v. Monroe County Board of Education, 12 HASTINGS WOMEN’S L.J. 95, 103-05 (2001).
tions, for student access to the educational opportunity has been altered. At a vulnerable time in their lives when they are supposed to see schools as safe havens and adults as their protectors, these students experience conduct that alters both their outlook on education and their own emotional wellbeing. Thus, a plaintiff’s lawyer is well-advised to seek deeper roots of exclusion than just the physical aspects.

Developing a couple, if not all, of these themes would put counsel on more even footing with the school district and would create a source of education to the court.

For its part, the theme that a school district will and must follow will draw to its strong suit: its officials did not act with deliberate indifference because they know schools are the custodial repository for children, and they take their responsibilities seriously. As discussed earlier, this specific element has proved to be most nettlesome for plaintiffs, especially when schools follow an investigative procedure and mete out at least some palliative remedy. Schools and teachers are in a tough spot these days, with all the new legal and social duties imposed upon them for accountability, student behavior, social work, and sometimes even education gets attention. Therefore, the theme schools will always fall back on—if they have done these two things—is that the courts should continue to defer to schools in matters of discipline and not second-guess the measures that have been taken in this specialized environment.

A plaintiff must always respond with a two-pronged plan of attack, both of which are inherent in the themes discussed above. First, the plaintiff must emphasize there is still lawyer-like context in the plaintiff’s cause of action so that the court cannot abdicate its judicial function in a misplaced effort to defer to the school district’s wisdom. Second, the plaintiff must also stress that the review of the school district’s responses

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275 Is such fluff the stuff of a plaintiff’s case? Perhaps not entirely, but putting more emphasis on what parents expect and what children actually experience at least creates the theme of how children are treated in their own workplace under circumstances that sometimes would seem daunting even to adults.

276 Plaintiff’s counsel must similarly develop a list of expert witnesses to counterbalance the school district’s witnesses. Of particular use would be education and psychology professors, child psychologists, other child advocates, retired teachers and administrators, and the like. The school district has its own, ready-made stable of expert witnesses at its disposal. Plaintiff’s counsel does well to keep that in mind.
and remedial measures to peer harassment are not outside the court's expertise. A court can clearly interpret whether a school is keeping its children safe with the appropriate atmosphere and whether a school's remedy has any meaningful chance of preventing or otherwise ameliorating further harassment. If a court cannot make that type of judgment call, then a school district's responses have no boundaries. Courts can discern on a case-by-case basis what constitutes sexual harassment and what is not a school district's clearly unreasonable response. Specialized environment or not, schools are the workplace for children. If a victim's counsel takes the time to educate the court about that environment, perhaps Title IX cases will become more successful.

**Conclusion**

Trying an education case should not be as difficult as it sometimes is, but the fear imbued in courts that school districts are more knowledgeable than they have made courts exercise a greater amount of deference than some cases warrant. Some cases really are outside the expertise of the courts, but Title IX litigation is not really one of those kinds of cases. Instead, Title IX more closely resembles the tort-like, legal types of cases that courts have tried for decades and in countless courthouses, especially its direct analog, Title VII. However, given the constraints created by Davis and Gebser, plaintiffs' counsel will be forced to educate themselves better about that specialized educational environment. Those efforts will, of course, be most successful when both sides can work on equal footing and open up to the courts themselves the secrets of school districts at least to a small extent to protect both boys and girls from a gendered violence that is becoming, sadly, more prevalent and just as sadly unresolved.

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277 Davies, supra note 32, at 429-30.