# A Roadmap to Defending School Districts in Title IX Disputes

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# A Roadmap to Defending School Districts in Title IX Disputes Based on Sexual Harassment/Assault and Recent Trends

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Title IX lawsuits based on claims of sexual harassment/assault have received heightened attention over the past several years, largely in the context of college sexual assault cases. However, Title IX liability for public school districts for student claims of sexual harassment/assault has been and continue to be a hotly litigated area of education law. With the focus being given to these issues by the media, school district attorneys will see more Title IX lawsuits by students alleging student-on-student and staff-on-student sexual harassment and violence. Further, with recent attention given to whether transgender students are protected under Title IX's prohibition of sex discrimination and the attention given to cyberbullying, school district attorneys should be prepared to see an increase in Title IX litigation. With recent trends in Title IX lawsuits and the election of President Trump, schools may begin to increasingly see a new type of plaintiff: male students and teachers accused of and disciplined for sexual harassment/assault alleging reverse discrimination under Title IX.

This paper and session will provide a roadmap for defending Title IX disputes, specifically related to claims for sexual harassment/assault. Discussion will include Title IX history, legal framework, litigation strategy, liability when harassment is based on sexual orientation or transgender status, and recent trends.

## I. The Scope of Sexual Harassment in Public Schools.

In the 2010/11 school year, 48 percent of 7th through 12th grade students reported experiencing some form of sexual harassment, with 87 percent of those students reporting that the harassment had a negative effect on them.[1] Gay, lesbian, bisexual and transgender ("LGBT") students report harassment at a higher rate with 85 percent of 6th through 12th grade LGBT students reporting being verbally harassed and 40 percent reporting being physically harassed because of their sexual orientation.[2] Thirty-two percent of students reporting having experienced harassment do not want to continue going to school.[3] The problem is not just in high schools. Twenty-seven percent of middle school girls and 25 percent of middle school boys report verbal or physical sexual harassment or violence.[4] Additionally, while reports show sexual harassment to be prevalent in middle and high schools, school districts may be underreporting, with a recent

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[1] NAT'L WOMEN'S LAW CTR., THE NEXT GENERATION OF TITLE IX: HARASSMENT AND BULLYING BASED ON SEX, FACT SHEET, June 2012, https://nwlc.org/wp-content/uploads/2015/08/nwlcharassbullying_titleixfactsheet.pdf.
[2] *Id*.
[3] *Id*.
[4] Study: Sexual Harassment Frequent Among Middle School Students, U.S. NEWS & WORLD REPORT, Apr. 6, 2014, http://www.usnews.com/news/articles/2014/04/06/study-sexual-harassment-frequent-among-middle-school-students.

study indicating that more than two-thirds (67 percent) of school districts in the United States reported zero allegations of sexual harassment or bullying during the 2013/14 school year.[5]

Sexual harassment in public schools is fundamentally different than sexual harassment in the workplace given that the school-age children involved often have a still-developing sense of sexuality and boundaries, and because the sexual harassment (usually peer-on-peer harassment) often happens in full view of other students, in hallways, lunchrooms, school buses, gyms, playgrounds and classrooms, where the public nature of the harassment could have more serious ramifications for the victim.[6] Also, with the rise of cyberbullying, the problem is likely to get worse because the offending student is not face-to-face with the victim and may go further with the severity of the harassment. Further, the cyberbullying victim may experience more harm than with face-to-face harassment because the online forum allows many students to attack the victim in one online location and the internet facilitates widespread distribution of the harassment.[7]

As indicated above, sexual harassment/assault is very much a K-12 issue even though most of the attention has been focused on colleges and universities. While sexual harassment/assault "has largely remained a hidden issue in elementary, middle and high schools, … there are signs that the problem is receiving more attention, including a sharp rise in the number of federal civil rights complaints alleging that K-12 schools have mishandled reports of sexual violence."[8] While colleges have felt the pressure due to media attention and OCR investigations and have responded by handling complaints of sexual harassment/assault more carefully and under the requirements of Title IX, K-12 schools may be behind in understanding how to handle complaints of sexual harassment/assault within the guidelines of Title IX and the law.[9] It is likely that school districts will continue to see an uptick in Title IX sexual harassment/assault lawsuits.

Against this backdrop, the courts have developed a fairly uniform approach to liability for school districts for student claims of sexual harassment/assault by teachers and students. Before addressing the legal framework and litigation strategies, the next section describes recent school district settlements and verdicts in Title IX sexual harassment cases to illustrate the types of claims school districts are facing.

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[5] AM. ASS'N OF UNIV. WOMEN, *Newly Released Data Shed Light on Sexual Harassment in U.S. Public Education*, July 13, 2016, http://www.aauw.org/article/data-on-sexual-harassment-in-public-education/.
[6] Susan P. Stuart, *Jack and Jill Go to Court: Litigating A Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243, 287 (Fall 2005).
[7] Gabrielle Fromer, Brittany Mosi, and Allison Nelson, *Sexual Harassment in Education*, 17 GEO. J. GENDER & L. 451, 465 (2016).
[8] Emma Brown, *Sexual Violence Isn't Just a College Problem. It Happens in K-12 Schools, Too*, THE WASH. POST (Jan. 17, 2016).
[9] *Id.*

## II. Recent School District Settlements and Verdicts for Title IX Sexual Harassment Claims.[10]

- *Walsh v. Tehachapi Unified School District*, No. 11-cv-1489 (E.D. Cal. 2014): Settlement for $750,000 and injunctive relief.
  - Facts: Plaintiff was a thirteen-year-old gay middle school student who experienced daily taunts and physical harassment because of his sexual orientation. The names included "fag," "faggot," and "homo"; the physical harassment included pushes and shoves, and inappropriate sexual touching. The harassment allegedly caused plaintiff to commit suicide.
  - Claims: Title IX peer-on-peer sex-based harassment; Section 1983 equal protection violation; state law civil rights.
  - Title IX claim was alive at time of settlement.

- *Stewart v. Board of Trustees for Colorado School for Deaf and Blind*, No. 1:12-cv-02664-RM-KLM (D. Colo. 2015): Settlement for $1.4 million.
  - Facts: Two blind boys, one of whom was also developmentally disabled, were sexually abused by another student at a residential state school for the deaf and blind. Sexual assaults were repeatedly reported to school staff, including the principal, who documented the incidents, but took little action and did not report the abuse to state authorities. Sexual assaults were reported to police two years later. Student accused of assaulting the boys admitted he had sexually assaulted five students in a two-year period.
  - Claims: Title IX peer-on-peer sexual harassment; Section 1983 due process violations; ADA and Section 504 disability discrimination.
  - Title IX claim survived defendants' motion for summary judgment.

- *Doe v. Charter Schools USA, Inc.*, No. 12-25666 CA 08 (Cir. Ct. Miami-Dade Cnty. 2014): Jury verdict of $5.25 million.
  - Facts: Eleven-year-old student raped a seven-year-old student in the back of a van on the way to school, and two more times in school bathroom. The seven-year-old boy plaintiff allegedly tried to kill himself and told his therapist he wanted to die.
  - Claims: Title IX peer-on-peer sexual harassment; tort.
  - It appears the defendants voluntarily dismissed their appeal.

- *Mathis v. Wayne County Board of Education*, No. 09-cv-0034 (M.D. Tenn. 2009): Jury verdict of $200,000.
  - Facts: Eighth-grade boy sexually assaulted two seventh grade boys in the locker room. One plaintiff was held down by three students while another sodomized him with a marker. The other plaintiff was tricked into doing a blindfolded sit-up while a boy stood above his face with his pants down.

[10] Much of the information contained in this section comes directly from Public Justice's "Jury Verdicts and Settlements in Bullying Cases" (June 2016 ed.), *available at* http://www.publicjustice.net/wp-content/uploads/2016/07/2016.07.15-Summer-Edition-Bullying-Verdicts-and-Settlements-Final.pdf.

- Claims: Title IX peer-on-peer harassment; Section 1983 due process and equal protection.
- 6th Circuit upheld Title IX verdict.

- *Galloway v. Chesapeake Union Exempted Village Schools Bd. of Educ.* (S.D. Ohio 2014): Settlement of $322,500.
  - Facts: Plaintiff was diagnosed with Asperger's, ADHD, and seizure disorder. Students and teachers at two separate schools taunted, abused, and discriminated against him because of his disabilities. Teasing included questioning his sexual orientation and culminated in several sexual assaults by classmates. Teachers and administrators did nothing to stop harassment.
  - Claims: Title IX for gender and sexual orientation-based discrimination; ADA disability discrimination; Section 1983 failure to train; tort.
  - Title IX claim survived motion to dismiss.

- *Doe v. State of Hawaii*, No. 11-cv-0550-KSC (D. Haw. 2013): Settlement of $5.75 million.
  - Facts: Gang at public school for the deaf and blind sexually assaulted and terrorized classmates. The assaults included robberies, gang rapes and other forms of sexual assault. School officials knew about the assaults for more than a decade and covered up the acts.
  - Claims: Title IX peer-on-peer sexual harassment; ADA, Section 504 and IDEA disability discrimination; state constitution violations.

- *Doe v. Anoka-Hennepin School District No. 11*, Nos. 11-cv-01999-JNE-SER and 11-cv-02282-JNESER (D. Minn. 2011): Settlement of $270,000.
  - Facts: Six students were subjected to a torrent of harassment based on their actual or perceived sexual orientation that included physical assaults and threats, and anti-gay name-calling. In some cases, students were strangled, shoved, urinated on, and even stabbed with a pencil. The harassment was exacerbated by a gag policy that prevented teachers from discussing issues related to sexual orientation and required teachers to remain neutral when students discussed the issue. Although none of the plaintiffs committed suicide, four students in the school district committed suicide within nine months of one another because of anti-gay harassment.
  - Claims: Title IX peer-on-peer sexual harassment; Section 1983 equal protection; state civil rights.

- *Nugent v. Carl Junction R-1 School District*, No. 3:13-cv-05089-MJW (W.D. Mo. 2015): Settlement of $300,000.
  - Facts: Parents alleged their 14-year-old son committed suicide after his school failed to protect him from ongoing bullying. The harassment started in seventh grade when Luke came out as bisexual. Students taunted him with slurs about his sexual orientation, suggested that he kill himself, physically threatened him, and stole and destroyed his belongings.

- Claims: Title IX for "gender-based" harassment; tort; Section 1983 substantive due process.

## III. Title IX Introduction and History.

Title IX protects against sex discrimination in education: "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."[11] Title IX was passed in 1972 and was patterned after Title VI of the Civil Rights Act of 1964.[12] "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."[13] Regarding the former, Title IX provides for termination of federal financial support for institutions that are found to have engaged in sex discrimination practices based on administrative complaints and investigations. This is a drastic remedy and has never been levied against any educational institution.[14] With regard to the latter, in 1979, in *Cannon v. University of Chicago*, the United States Supreme Court established that Title IX provides a private right of action for individuals against educational institutions for sex discrimination.[15] The Supreme Court reasoned that the "award of individual relief to a private litigant … is fully consistent with — and in some cases even necessary to — the orderly enforcement of" Title IX.[16]

In 1977, a Yale University law student, Catherine MacKinnon, is credited with originating the idea that Title IX's prohibition of sex discrimination included a prohibition of sexual harassment.[17] MacKinnon's theory was that Title IX is intended to ensure equal access to education, sexual harassment interfered with a female student's ability to attend school, and sexual harassment was therefore a form of sexual discrimination.[18] MacKinnon devised the theory while advising a group of female undergraduate students at Yale University on their lawsuit against male professors for sexual harassment, *Alexander v. Yale University.*[19] Although unsuccessful, the *Alexander* case is credited with being the first one where a court recognized sexual harassment as a form of sexual discrimination prohibited under Title IX.[20]

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[11] 20 U.S.C.A. § 1681(a).
[12] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 684 (1979).
[13] *Id*. at 704.
[14] Kathleen Mary Elaine Mayer, *Schools are Employers Too: Rethinking the Institutional Liability Standard in Title IX Teacher-On-Student Sexual Harassment Suits*, 50 G. LA. REV. 909, 913 (Spring 2016).
[15] *Cannon*, 441 U.S. at 717.
[16] *Id*.
[17] Mayer, *supra* note 14 at 919.
[18] *Id*. at 920; Tyler Kingkade, *How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today's Sexual Assault Activism*, June 10, 2014, http://www.huffingtonpost.com/2014/06/10/title-ix-yale-catherine-mackinnon_n_5462140.html.
[19] 459 F. Supp. 1 (D. Conn. 1977).
[20] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2061-62 (May 2016).

Since the 1970s, the courts have fashioned a nearly uniform standard of liability for school districts for claims of sexual harassment in violation of Title IX. The standard is favorable to school districts.

## IV. The Legal Framework for School District Liability for Sexual Harassment/Assault Under Title IX.

The Supreme Court established the standard of liability for teacher-on-student sexual harassment in *Gebser v. Lago Vista Independent School District* in 1998.[21] In *Gebser*, the court held that when a teacher has allegedly sexually harassed a student, "damages may not be recovered … unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[22] In addition, to establish a *prima facie* case, a plaintiff must also prove they were subject to either *quid pro quo* sexual harassment or a sexually hostile educational environment.[23] The Supreme Court held that a school district's liability for teacher-on-student sexual harassment is not based on *respondeat superior* or vicarious liability, but rather is based on the district's own intentional conduct in remaining idle after receiving actual notice of sexual harassment.[24]

One year later, in *Davis Next Friend LaShonda D. v. Monroe County Board of Education*,[25] the Supreme Court extended the standard of liability announced in *Gebser* to incidents of peer-on-peer sexual harassment. The Supreme Court adopted a similar standard as in *Gebser*, holding that school districts "may be liable for 'subject[ing]' their students to discrimination where the [district] is deliberately indifferent to known acts of student-on-student sexual harassment" and the district "exercises substantial control over both the harasser and the context in which the known harassment occurs."[26] Further, a plaintiff must prove that the harassment is so "severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[27]

While *Davis* largely adopts the same standard as in *Gebser*, there are two important differences. First, for peer-on-peer sexual harassment, the Court did not require that only an "official … who at a minimum has authority to institute corrective measures" have notice of the harassment, but rather suggests that any school staff at the teacher level or above is sufficient.[28] This 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."[29]

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[21] 524 U.S. 274 (1998).
[22] *Id*. at 277.
[23] *Klemencic v. Ohio State Univ.*, 263 F.3d 504, 510 (6th Cir. 2001); *Morse v. Regents of Univ. of Colorado*, 154 F.3d 1124, 1127 (10th Cir. 1998).
[24] *Gebser*, 524 U.S. at 285; *Davis Next Friend LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 641-42 (1999).
[25] 526 U.S. 629.
[26] *Id*. at 645-47.
[27] *Id*. at 650.
[28] *See Gebser*, 524 U.S. at 289-90; *see generally Davis*, 526 U.S. 629.
[29] Stuart, *supra* note 6 at 274.

Second, for peer-on-peer sexual harassment, the harassment must be more severe than for teacher-on-student harassment. The harassment must be more severe because the "relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits…. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment."[30]

As established in *Gebser* and *Davis*, the standard for Title IX liability for school districts for teacher-on-student or peer-on-peer sexual harassment is somewhat favorable to school districts. The next section will lay out strategies for school district attorneys at the motion to dismiss or summary judgment stages based on the legal framework established by *Gebser* and *Davis* and further refined through federal appellate court cases.

## V. Litigation Guidance for School District Attorneys.

### a. Teacher-on-Student Sexual Harassment: Consider Whether You Can Argue that Notice Was Received by Appropriate Official.

When faced with a Title IX sexual harassment complaint, school district attorneys must identify who in the school received actual notice of the harassment and when that notice was received. Often, a plaintiff will suffer sexual harassment from a teacher and other teachers or guidance counselors have been notified or are aware of suspicious conduct, but the notice or suspicions are not communicated to the principal or are not communicated to the principal until after the plaintiff has suffered injury. In these circumstances, even if the notice obtained by the teachers or guidance counselors is sufficient to put them on notice of sexual harassment, it does not make the district liable. For the district to be liable, "an official of the school district who at a minimum has authority to institute corrective measures" must have actual notice.[31]

The Supreme Court has not provided a clear definition of who is an "official" that has "authority to institute corrective measures." In essence, the issue comes down to how much authority a school official must have in order for the official to be considered an appropriate official for Title IX liability purposes.

The Fourth Circuit takes a strict (and minority) approach and requires that the official (including principals) have the express authority to transfer, suspend or fire teachers and other employees in order to be an appropriate official.[32] In *Baynard v. Malone*, the court held that the principal was not an appropriate official because he had not been delegated the authority to make

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[30] *Davis*, 526 U.S. at 653.

[31] *Gebser*, 524 U.S. at 277.

[32] *See Baynard v. Malone*, 268 F.3d 228, 239 (4th Cir. 2001) (Court held that a principal of a school was not an appropriate official because "whether a [principal] may be viewed as the proxy of the school district depends upon whether the district has delegated to [the principal] the traditional powers of an employer, e.g., the authority to hire and terminate employees…. A principal in the Virginia school system possesses substantial authority over the school to which he or she is assigned. For example, a principal must 'provide instructional leadership,' is responsible for the administration of the school, and must supervise its operations and management…. Additionally, the principal is responsible for supervising teachers and evaluating employee performance…. Critically absent from the scope of a principal's authority, however, are the powers that would make a principal the proxy of the school district: the power to hire, fire, transfer, or suspend teachers.").

the final determination on termination of teachers. However, the majority of jurisdictions hold that principals, or whoever is the highest in the chain of command at the school, will generally be appropriate officials even if they do not have final decision-making authority on termination.[33] The reasoning of the majority of jurisdictions is that principals or the highest ranking official usually have authority to supervise teachers, initiate investigations and make recommendations regarding suspension and termination.[34] While there is a divergence of views regarding how much authority a high ranking official like a principal must have, most Courts agree that lower-level employees like teachers and guidance counselors are not appropriate officials.[35]

In sum, for teacher-on-student sexual harassment claims, unless the principal or highest-ranking official of the school has been notified of the sexual harassment and it is the principal or highest-ranking official who is alleged to have failed to respond adequately, the district should not be liable. If the plaintiff only alleges that teachers, guidance counselors or other lower level employees were on notice but failed to act to stop the harassment or failed to report the harassment to the principal, then the claim is subject to dismissal or summary judgment.[36] But,

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[33] *Doe v. Sch. Bd. of Broward Cnty., Fla*., 604 F.3d 1248, 1255 (11th Cir. 2010) (the official with notice of the harassment must be "high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct", and the majority of jurisdictions hold that school principals will generally be appropriate officials, and here, even though the principal did not have final authority to terminate teachers, the principal was the highest ranking official at the school and was an appropriate official for Title IX liability purposes); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009) ("It is apparent from Supreme Court precedent, however, that school principals are considered 'appropriate persons' in the Title IX analysis."); *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 173 (3d Cir. 2002) (a principal of a school is an appropriate official because "[w]hen a principal does not have authority to fire a teacher, but does have authority to "supervise a teacher and to investigate a complaint of misconduct" this "implies the authority to initiate corrective measures such as reporting her findings to her superior or to the appropriate school board official.").

[34] *Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d at 1255.

[35] *See Plamp*, 565 F.3d at 458-59 ("Title IX does not contemplate a definition of 'corrective measures' so broad as to include the mere ability to report suspicions of discriminatory conduct to someone with the authority to stop the abuse or control the harasser. Such an approach would expand the scope of Title IX liability beyond that which Congress intended and would functionally open all educational institutions to liability based on a theory of *respondeat superior* or constructive notice—a move that the Supreme Court has clearly stated the statute does not contemplate…. After all, each teacher, counselor, administrator, and support-staffer in a school building has the authority, if not the duty, to report to the school administration or school board potentially discriminatory conduct. But that authority does not amount to an authority to take a corrective measure or institute remedial action within the meaning of Title IX."); *Warren*, 278 F.3d at 173 (Guidance counselor whose "job involved dealing with children who have behavioral as well as academic problems, and referrals to networks of agencies that provide assistance to children and families" was not a proper official.); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997) (in Pre-*Gebser* decision that articulated a similar standard as *Gebser* for teacher-on-student sexual harassment, the court held that actual notice of the harassment must be provided to an official that has authority to "supervise the employee and the power to take action that would end such abuse" and such a standard "omit[s] the bulk of employees, such as fellow teachers, coaches, and janitors.").

[36] As noted above, for peer-on-peer sexual harassment, actual knowledge does not have to be possessed by an "official" with authority to "institute corrective measures", but rather under *Davis*, "almost any school official, whether teacher, administrator, or school board member" should be sufficient for possessing actual knowledge because they "ostensibly [have] the power to take corrective action necessary between and among students." Stuart, *supra* note 6 at 274. Thus, for peer-on-peer sexual harassment, challenging a claim based on the notified official not having sufficient authority is less likely to be successful. Although once you get to staff lower than the teacher level, *e.g.*, if only a teacher's aide was notified, school district attorneys should challenge that the notified official did not have authority to take corrective action. *See Hill v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015) (security guards and teacher's aides are not "appropriate persons" for purposes of notice for peer-on-peer harassment because they do not have discipline authority.).

if you are in the Fourth Circuit, not only must the principal be on notice, but the principal must have final decision-making authority on teacher transfers, suspensions and terminations.

b. Teacher-on-Student and Peer-on-Peer Sexual Harassment: Actual Knowledge – Consider Whether You Can Argue Whether the School Official Had Sufficiently Detailed Knowledge.

Knowledge of sexual harassment can come from complaints or reports from students, parents or teachers/staff, or from personal observation. For attorneys representing school districts, the level of knowledge possessed by the school official must be identified. For both teacher-on-student and student-on-student sexual harassment, claims can be challenged when the school official, who allegedly had actual notice, possessed some but not sufficiently detailed knowledge of the sexual harassment.

A common fact pattern in teacher-on-student sexual harassment is that the appropriate school official was not notified of known sexual harassment of the plaintiff, but was notified of some suspicious conduct and also was aware of past wrongful conduct of the harassing teacher. In these circumstances, courts require the prior incidents to be recent enough and of a sufficient severity in order for the district to be on notice that the suspicious reports regarding the plaintiff should be investigated and addressed.

For example, in *P.H. v. School District of Kansas City, Missouri*,[37] a teacher was immediately removed from the classroom after the principal was notified by the plaintiff's parents of a sexual relationship between the teacher and the plaintiff. The plaintiff argued the district was still liable because it had been on notice before the parents' complaint because of previous complaints about the teacher. One such complaint was seventeen years before the incident at issue where the teacher was accused of sexual abusing a student, but was cleared after investigations. The court found this allegation "too remote" to constitute notice that the plaintiff was being sexually abused.[38] The principal also had been notified by teachers that the defendant teacher was spending too much time with the plaintiff, was showing favoritism to the plaintiff, and that one teacher actually walked in on the defendant and plaintiff in the middle of a sex act in the classroom but was unaware of the nature of what was going on due to defendant and plaintiff quickly covering up their actions. The court held that these instances of alleged notice were insufficient because they did not provide the principal with actual notice of sexual harassment and to hold that these instances constituted actual notice of sexual harassment would amount to imposing liability on a school district for sexual harassment "of which it *should have* known," which is not the high standard set in *Davis*.[39]

In *Bostic v. Smyrna School District*, the Eighth Circuit upheld the district court's refusal to instruct the jury that "actual notice" is satisfied by "information sufficient to alert the principal to the *possibility* that a teacher was involved in a sexual relationship with a student."[40] The circuit court held that in *Gebser* and *Davis*, the Supreme Court rejected constructive notice or

[37] 265 F.3d 653 (8th Cir. 2001).
[38] *Id.* at 662.
[39] *Id.* at 663.
[40] 418 F.3d 355, 360 (8th Cir. 2005) (emphasis added).

*respondeat superior* principles under Title IX, and held that "actual notice" of "known acts of" of sexual harassment is required and a "possibility" of sexual harassment does not equate to actual notice of a "known act" of sexual harassment. Thus, unless the proper official has been notified of a "known act" of sexual abuse or harassment, and not just a "possibility" of sexual abuse or harassment, the district should not be liable.[41]

On the other hand, in *Massey v. Akron City Board of Education*, the court found that the district had sufficient notice when the principal was notified that: (1) a teacher was having a sexual relationship with a student, even though the student denied the allegation; (2) the teacher made general comments to other students regarding sexual activity and orientation; and (3) the teacher made efforts to contact a former student in college and such communications were sexual in nature.[42] The court held that notice was sufficient for plaintiff to withstand summary judgment, particularly focusing on the first instance of notice and suggesting that a district should not rely on a victim student's denial because a student victim faces harmful consequences if a sexual relationship with a teacher is confirmed.[43] However, importantly in *Massey*, the principal was notified of a known act of sexual harassment even though the student denied it, unlike in *P.H.* and *Bostic* where only suspicious conduct or a "possibility" of sexual harassment was reported.

School district attorneys should identify exactly what constitutes the "notice" to the school official of sexual harassment. If the notice merely transmits concerns to the proper school official that suspicious conduct may be occurring or even that there is a "possibility" that sexual abuse or harassment has occurred, but there is no express complaint that known sexual abuse or harassment has occurred, then the district should move for dismissal or summary judgment regarding the sufficiency of the notice that was received. Further, if the plaintiff attempts to use past incidents or complaints of sexual abuse or harassment regarding the teacher, this should not constitute sufficient notice unless the past complaints or reports are recent in time, involve sufficiently severe allegations, and are coupled with other forms of notice regarding the plaintiff and allegations of known sexual abuse or harassment.

c. <u>Peer-on-Peer Sexual Harassment: Consider Whether to Argue Whether the Harassment was Sufficiently Severe, Pervasive and Objectively Offensive to Deprive the Victim of Access to Educational Opportunities or Benefits.</u>

A plaintiff "must show harassment that is severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."[44] This standard "is far more rigorous than a claim for teacher-on-student harassment."[45] This high standard was imposed "to guard against the imposition of 'sweeping liability'…. Unlike an adult in the workplace, children 'may regularly interact in a manner that would be unacceptable among adults…. Due to their immaturity, children at various ages will invariably engage in some forms

[41] *Id*. at 361.
[42] 82 F. Supp. 2d 735, 744-45 (N.D. Ohio 2000).
[43] *Id*. at 744.
[44] *Davis*, 526 U.S. at 631.
[45] *Hill*, 797 F.3d at 968.

of teasing, shoving, and name-calling that 'target differences in gender'…. Some risk of sexual harassment is inherent to the enterprise of public education, in particular, because public schools must educate even the most troublesome and defiant students."[46]

There are two ways school districts can challenge this element at the motion to dismiss or summary judgment stage. First, by arguing that the complained of harassment was not sufficiently severe or pervasive, and second, that the plaintiff was not deprived of access to educational opportunities or benefits.

Regarding whether the sexual harassment is severe and pervasive, the age of the students involved should be considered. As noted above, courts take into consideration the age of the perpetrator and victim when determining whether sexual harassment is sufficiently severe and objectively offensive to meet the high Title IX standard for peer-on-peer sexual harassment.[47] For example, in *Gabrielle M. v. Park Forest-Chicago Heights, Illinois School District 163*, the plaintiff was a five-year-old girl who accused a five-year-old boy of peer-on-peer sexual harassment based on the ongoing conduct of the boy, which included jumping on her back, leaning on her with his hand on his crotch, telling her he wanted to play with her in funny ways, and inappropriately touching her private parts.[48] The Seventh Circuit initially noted that "[t]here is a threshold question, altogether reasonable and rational, whether a five or six year old kindergartner can ever engage in conduct constituting 'sexual harassment' or 'gender discrimination under Title IX."[49] Thus, the younger the parties involved in the alleged sexual harassment, the stronger the basis the defendant school district has to argue that the sexual harassment was not severe, pervasive and objectively offensive. If a school district faces a Title IX peer-on-peer sexual harassment lawsuit involving elementary school students, it may be worth moving for summary judgment on grounds that the severe, pervasive and objectively offensive element is not met, using as support the ages of the plaintiff and perpetrator. This may be an area where school district attorneys may consider retaining an expert witness to opine on the students' ages and ability to engage in "sexual harassment."

Further, in general, whether sexual harassment is sufficiently severe or pervasive involves factual issues which may preclude summary judgment. However, there are cases where the conduct is clearly insufficient to meet the severe and pervasive standard and summary judgment should be awarded to the school district. For example, under Title IX, one incident of sexual harassment should not meet the Title IX standard for peer-on-peer harassment unless it is an egregious incident.[50] Further, if the conduct is merely verbal and can be characterized as

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[46] *Id*. at 969 (citing *Davis*, 526 U.S. at 651-52).
[47] *See also Davis*, 526 U.S. at 651 ("age of the harasser and the victim" are part of the "constellation of surrounding circumstances" to be considered when determining whether the harassing conduct "rises to the level of actionable" harassment.).
[48] 315 F.3d 817,818-22.
[49] *Id*. at 821.
[50] *See Davis*, 526 U.S. at 652-53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said" to meet the Title IX standard, "we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

teasing and name-calling, even if it is pervasive and based on sex, such conduct should not subject a school district to Title IX liability as a matter of law.[51]

The second way to challenge the severe and pervasive element on summary judgment is to argue that the alleged harassment did not deny the plaintiff access to educational opportunities and benefits. School district attorneys should identify whether the plaintiff suffered any decline in grades during the relevant time period, had an unusually high number of absences, or avoided the bus, school events or extra-curricular activities. If grades did not decline and the plaintiff did not miss school or avoid events or activities, the school district should move for summary judgment. For example, in *Hawkins v. Sarasota County School Board*, the Eleventh Circuit upheld summary judgment in favor of the school district, in part because the "record in th[e] case reflects no concrete, negative effect on either the ability to receive an education or the enjoyment of equal access to educational programs or opportunities. None of the girls suffered a decline in grades and none of their teachers observed any change in their demeanor or classroom participation. The girls simply testify that they were upset about the harassment…. This falls short of demonstrating a systemic effect of denying equal access to an educational program or activity."[52] However, where there is proof that the plaintiff avoided school, school activities, or experienced a sufficiently severe adverse psychological reaction, summary judgment may be out of reach on this element.[53] Thus, where plaintiff has no proof of declining grades, absences or avoidance of educational activities, school districts should move for summary judgment because the harassment did not deprive the plaintiff of access to educational opportunities.

d. Teacher-on-Student and Peer-on-Peer Sexual Harassment: Consider Whether to Argue the Plaintiff Cannot Establish Deliberate Indifference.

For both peer-on-peer and teacher-on-student Title IX sexual harassment claims, plaintiffs face a high hurdle to avoid summary judgment because deliberate indifference is difficult to establish. To establish deliberate indifference, a plaintiff must show that the school district's response to the harassment "was clearly unreasonable in light of known circumstances" and "at a minimum, 'cause[d] [students] to undergo' harassment or 'make them liable or

[51] *Id*. at 652 ("Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender."); *Burwell v. Pekin Cmty. High Sch. Dist. 303*, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002) (Title IX severe, pervasive and objectively offensive element not met as a matter of law when the harassment was only verbal and "Plaintiff … was called sexual names, such as bitch, pussy, and slut … on a 'daily' basis."); *see also Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 454 (S.D.N.Y. 2000) (incidents of generalized teasing and name-calling and one incident where male student put his hand between a female student's legs insufficient as a matter of law to constitute severe, pervasive and objectively offensive sexual harassment).

[52] 322 F.3d 1279, 1289 (11th Cir. 2003); *see also Manfredi*, 94 F. Supp. 2d at 455 (school district entitled to summary judgment in part because Plaintiff "was not denied equal access to education" as she "missed only one day of school" and her grades did not suffer and she did not require any medical treatment).

[53] *See, e.g.*, *Murrell v. Sch. Dist. 1*, 186 F.3d 1238, 1248-49 (10th Cir. 1999) (plaintiff survived summary judgment when she was deprived of access to educational opportunities because she "had to leave school to be hospitalized" and became unable to attend school and was homebound); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000) (plaintiff survived summary judgment where "Plaintiff … alleged that throughout high school and most of his junior high school years he was afraid to use the school's restroom, and avoided eating in the cafeteria, riding the school bus, or participating in intramural sports" even though his grades remained consistent, because "grades are not the sole benefit to be derived by a student from an educational experience.").

vulnerable' to it."[54] The analysis of whether a school district was deliberately indifferent "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?"[55]

If the school district did investigate and performed some form of response or remediation to the sexual harassment (even if the response was ineffective), the first line of defense for school district attorneys is the well-known deference that courts give schools in matters of discipline. As noted by the Supreme Court in *Davis*, when discussing deliberate indifference under Title IX, "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[56] This general principle of education law plays out in Title IX cases and school districts are provided with a great deal of deference in responding to sexual harassment before being found to have been deliberately indifferent.

For example, in *Fitzgerald v. Barnstable School Committee*, the First Circuit held that "Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective—whether the institution's response, evaluated in light of the known circumstances, is so deficient as to be clearly unreasonable."[57] In *Barnstable*, the court held that a female student that was forced to lift her skirt and pull her underpants down and spread her legs two to three times a week by an older male student on the bus constituted severe, pervasive and objectively offensive sexual harassment.[58] However, after being notified of the sexual harassment, the school launched an investigation that included multiple interviews, and offered to change the plaintiff's bus assignment so she could ride the bus without being forced to interact with the perpetrator, or separating the two students on the same bus. The court held that these "actions may not have constituted an ideal response to the complaint of harassment," but it was not clearly unreasonable even though the two students continued to have interactions.[59] Thus, the school district was granted summary judgment on the Title IX claim.[60]

In *Porto v. Town of Tewksbury*, the First Circuit vacated a jury verdict in favor of a plaintiff on grounds that the evidence was insufficient to sustain a finding that the school district was deliberately indifferent.[61] In *Porto*, from first to fifth grade, a male student continuously reported sexually charged incidents about another male student including oral sex, and the school responded by putting the students on different buses and instructing teachers to monitor the two and keep them separated.[62] The conduct stopped until the seventh grade, when there were three incidents of inappropriate touching, after which the offending student was talked to and teachers were told to continue to monitor the two and separate them. There was another break in the

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[54] *Davis*, 526 U.S. at 644-45; *see also Sauls v. Pierce Cnty. Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005) (adopting *Davis* deliberate indifference standard for teacher-on-student sexual harassment); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001) (same).
[55] Stuart, *supra* note 6 at 278.
[56] 526 U.S. at 648 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985)).
[57] 504 F.3d 165, 174 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).
[58] *Id*. at 172.
[59] *Id*. at 174-75.
[60] *Id*. at 175.
[61] 488 F.3d 67, 69 (1st Cir. 2007).
[62] *Id*. at 70.

conduct, until later in seventh grade when the two were found in a bathroom where the offending student told a teacher the two students had sexual intercourse.[63] The victim student did not return to school and was home schooled, was hospitalized for behavioral problems, and attempted suicide.[64] A jury found in favor of the plaintiff, but the First Circuit overruled the jury verdict because the evidence established that after each intervention of talking to the offending student and instructing teachers to monitor and separate the two, the school "reasonably believed that it had been successful in stopping" the offending student's inappropriate behavior.[65] The court found this evidence established that the school was not deliberately indifferent as a matter of law because "the fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by [the school] at the time. The test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight."[66]

On the other hand, if a school district affirmatively refuses to investigate a reported incident of sexual harassment or if its only response are verbal reprimands that are shown to be ineffective, the school district will likely not obtain summary judgment. For example, in the following cases, the plaintiff was able to survive summary judgment on the deliberate indifference element:

- *Davis:*[67] A male student fondled a female student's breasts; spoke in vulgar language to her; engaged in sexually suggestive behavior toward her; told her "I want to get into bed with you" and "I want to feel your boobs"; and placed a door stop in his pants and acted in a suggestive manner. When plaintiff's mother asked the principal what disciplinary action he planned to take, he responded "I guess I'll have to threaten him a little bit harder." Although both plaintiff and her mother informed plaintiff's teacher about the incidents, the school took none of the following action: disciplining the student, separating plaintiff from the student, or establishing a sexual harassment policy or procedure. The Supreme Court stated that this lack of response could suggest "deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment."
- *Murrell:*[68] A male student sexually assaulted a female physically impaired special education student on several occasions. On one occasion, upon discovering the two students, a janitor told them to clean up and returned them to class. Although the teachers allegedly knew about the assault, they did not inform plaintiff's parent. After another sexual assault, plaintiff's teachers allegedly told her not to tell her mother and to forget that it happened. At no time did the school ever inform law enforcement, investigate, or discipline the offending student.
- *Vance v. Spencer County Public School District*:[69] Plaintiff was a female who was continuously verbally harassed regarding her gender, propositioned for sexual favors,

[63] *Id*. at 71.
[64] *Id*.
[65] *Id*. at 75.
[66] *Id*. at 74.
[67] 526 U.S. at 633-34, 654.
[68] 186 F.3d at 1243-44, 1248.
[69] 231 F.3d 253, 253-54, 261 (6th Cir. 2000).

> sexually assaulted by being grabbed on the chest and buttocks, and had other students try to rip her shirt off repeatedly from sixth grade to ninth grade.[70] Plaintiff repeatedly told the school about the incidents and each time the only response from the school was to talk with the perpetrators. The Sixth Circuit held that a fact finder could find the school was deliberately indifferent because it "responded to … [plaintiff's] complaints by 'talking' to the offenders[, but], the harassing conduct not only continued but also increased as a result" and thus, the school "continued to use the same … methods" that the school knew were ineffective.

In sum, it will be difficult for a plaintiff to survive summary judgment on the deliberate indifference element of a Title IX sexual harassment claim. To survive summary judgment, a plaintiff must proffer evidence that the school district affirmatively refused to conduct an investigation, failed to discipline the offenders (in cases of more severe harassment), failed to separate the plaintiff from the offender, only responded by talking to the offenders, and the district knew the verbal reprimands were ineffective. If a school district, at a minimum, performed some form of investigation and implemented some form of remediation, it is likely a good idea to move for summary judgment based on a plaintiff's inability to prove deliberate indifference.

## VI. Harassment Based on Sexual Orientation or Transgender Status – Is It Covered?

Courts and the United States Department of Education's Office for Civil Rights agree that Title IX does not prohibit discrimination or harassment based solely on sexual orientation.[71] However, while discrimination based solely on sexual orientation is not prohibited under Title IX, plaintiffs asserting sexual harassment when the plaintiff is gay and the harassment includes conduct directed towards the plaintiff's sexual orientation are often able to bypass this prohibition and pursue such claims. To do this, plaintiffs argue that the harassment was not based solely on sexual orientation but also on gender, more specifically, on the plaintiff not conforming to gender stereotypes or conformities, which is protected under Title IX. For example, in *Montgomery*, from kindergarten through high school, a male student was continuously harassed by being called "faggot," "princess," "pansy," "gay" and the like. The harassment turned physical in middle school with the student being pushed, punched and knocked down; other male students often grabbed his buttocks and pretended to have intercourse with him.[72] The plaintiff argued that "the students engaged in the offensive conduct … not only because they believed him to be gay, but also because he did not meet their stereotyped

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[70] *Id.* at 256-57.

[71] *U.S. Dep't of Educ., Office for Civil Rights*, Dear Colleague Letter, Oct. 26, 2010 ("Title IX does not prohibit discrimination based solely on sexual orientation"); *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 862, 864-65 (8th Cir. 2011) (where male student was subject to continuous verbal harassment by being called "faggot," "queer", "homo," and other similar names, and was physically assaulted, but students did not perceive the student to be homosexual or to have feminine characteristics, court held that that Title IX did not prohibit such conduct); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000) ("Title IX prohibits only discrimination based on sex and does not extend to any other form of invidious discrimination…. The Court concludes that, to the extent that plaintiff asserts Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation, these are not actionable and must be dismissed.").

[72] 109 F. Supp. 2d at 1084-85.

expectations of masculinity."[73] The court discussed Title VII cases and concluded that plaintiff "stated a cognizable claim under Title IX" because "a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes."[74] Further, in *Wolfe v. Fayetteville, Arkansas School District*, the plaintiff generally alleged discrimination that targeted his sexual orientation, and the court noted that Title IX does not prohibit discrimination based on sexual orientation, but approved a jury instruction that stated that to "constitute sex-based harassment under Title IX, the harasser must be motivated by [plaintiff's] gender or his failure to conform to stereotypical male characteristics."[75]

Regarding transgender students, while many cases address Title IX and transgender status regarding use of school facilities such as bathrooms, there are few cases in the Title IX sexual harassment context. However, the same reasoning from *Montgomery* and *Wolfe* should extend to cases where a sexual harassment claim is based primarily on a student's status as transgender. That is, should the harassment be alleged to be directed to the transgender student's lack of conformity with gender stereotypes, then such harassment would be prohibited under Title IX.

When faced with a Title IX sexual harassment lawsuit that involves harassment directed toward a student's sexual orientation or status as transgender, school district attorneys should be mindful that if the plaintiff does not allege that the harassment was motivated by the plaintiff's gender or lack of conformity with gender stereotypes, then the claim is subject to dismissal or summary judgment.

## VII. Recent Trends/What to Expect from a Trump Presidency.

The focus of this presentation is Title IX lawsuits based on sexual harassment, that is, the legal framework for when a student accuses a teacher or other student of sexual harassment or assault and alleges the school's response was so inadequate as to constitute sexual discrimination. But what happens when the school's response to allegations of sexual harassment or assault is arguably overboard or when a school disciplines a student or teacher based off an arguably defective investigation?

Title IX and sexual harassment in schools has been a focus of the Obama Administration, and significant developments have come out of the OCR during President Obama's term. The OCR is currently investigating more than 400 sexual assault complaints at colleges and schools. Those include complaints at some of America's most prestigious universities and in school districts in some of its largest cities.[76] As of January 2016, 74 K-12 schools and school districts were under investigation by the OCR related to allegations of mishandled responses to sexual harassment/assault, double the number from mid-2015.[77] There have been concerns that the Obama Administration's focus on Title IX and sexual harassment/assault has impacted due

[73] *Id*. at 1090.
[74] *Id*. at 1092; *see also* October 2010 OCR Letter ("The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment.").
[75] 648 F.3d at 864-65.
[76] Travis Waldron, *How Obama Took an Existing Feminist Law and Made It Even Stronger*, HUFFINGTON POST, (Jan. 7, 2017).
[77] Brown.

process rights of accused students or led to overzealous investigations. The recent trend, some argue, has been to err on the side of the accuser, presume guilt of the accused, and discipline the accused out of fear of an OCR investigation and negative publicity.

Very recently, there has been a push from male students accused of sexual harassment alleging reverse Title IX sexual discrimination based on the theory that educational institutions presumptively favor female accusers. This is a very recent trend that has only been tried at the college level and whose first major win was in July last year in *Doe v. Columbia University*.[78] In *Doe*, the plaintiff was a male student that was accused of sexual assault, found responsible, and was suspended for a semester.[79] The accused alleged that a sexual encounter with the accuser was consensual and the accuser alleged it was non-consensual. The accused brought a lawsuit against Columbia University alleging it violated Title IX by acting with sex bias in investigating him and suspending him for the alleged sexual assault.[80] Shortly before the time of the incident, Columbia University had numerous complaints from female students that it did not take sexual harassment complaints seriously, and the controversy reached the press.[81] Further, 23 students had filed complaints with OCR for violations of Title IX alleging the university mishandled sexual assault cases.[82] The plaintiff argued the university's investigation and discipline were "motivated … by pro-female, anti-male bias" noting several alleged deficiencies in the investigative process and weighing of the evidence.[83] The district court disagreed and dismissed the Title IX claim, but the Second Circuit reversed.

The Second Circuit held that "the Complaint alleges that … there was substantial criticism of the University, both in the student body and in the public media, accusing the University of not taking seriously complaints of female students alleging sexual assault by male students. It alleges further that the University's administration was cognizant of, and sensitive to, these criticisms…. Against this factual background, it is entirely plausible that the University's decision-makers … were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault."[84] The court continued that it "is worth noting furthermore that the possible motivations mentioned by the district court as more plausible than sex discrimination, including a fear of negative publicity or of Title IX liability, are not necessarily, as the district court characterized them, lawful motivations distinct from sex bias. A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex."[85]

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[78] Scott Jaschik, *Title IX Victory for Man Suing Over Sex Assault Finding*, INSIDE HIGHER ED (Aug. 1, 2016).
[79] *Doe v. Columbia Univ.*, 831 F.3d 46, 52 (2d Cir. 2016).
[80] *Id*. at 48.
[81] *Id*. at 50-51.
[82] *Id*. at 51.
[83] *Id*. at 53.
[84] *Id*. at 57.
[85] *Id*. at 58 n.11.

The *Doe v. Columbia* case will encourage more male students who are disciplined by schools for sexual harassment to file Title IX claims alleging reverse discrimination because of a pro-female bias.[86] As K-12 school districts are increasingly being investigated by the OCR for allegedly mishandling sexual harassment and assault cases, this may become a K-12 Title IX issue. Further, these lawsuits may increase because with the election of President Trump, the focus will likely no longer be on the accused but may begin to focus more on the rights of the accused.[87] It is expected that President Trump will cut OCR's budget, limiting the amount of investigations it can conduct, and that his DOE will issue guidance dismantling the 2011 guidance that laid the framework for the current emphasis on the rights of the accused.[88] This could lead to more accused students and plaintiff's lawyers being emboldened to bring Title IX lawsuits against educational institutions for reverse discrimination when they are disciplined for sexual harassment/assault and plaintiffs may even have updated DOE guidance that focuses more on the rights of the accused as support.

## VIII. Other Trends and Considerations in Title IX Sexual Harassment Lawsuits.

### a. Cyberbullying.

Cyberbullying sexual harassment is a recent trend that can be worse than sexual harassment done in person. "On the internet, adolescents lose their inhibitions and often go farther with slights than they would if they were face-to-face with their victim" and is online which "allows many children to attack the same target at once … and facilitates widespread distribution of harmful materials."[89] The courts have not addressed cyberbullying in the sexual harassment context, however, given the increasing incidents of cyberbullying, it is only a matter of time before they do.[90] As school district attorneys face this issue, one key defense that may preclude many claims based on cyberbullying is that under *Davis*, for Title IX sexual harassment claims, the school district must "exercise[] substantial control over both the harasser and the context in which the known harassment occurs."[91] In *Davis*, the court found that the sexual harassment took place "during school hours and on school grounds" and thus, the school district "retain[ed] substantial control over the context in which the harassment occur[ed]."[92] It reasons that school districts do not "retain substantial control" over off-campus online activities of its students including posting on Facebook, Twitter, and the like. Thus, school districts may be able to avoid liability for Title IX sexual harassment claims based on cyberbullying where the online activity occurs off campus during students' personal lives.

### b. Plaintiffs Are Not Entitled to Remedial Relief in the Form of Discipline of the Offending Student.

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[86] *See* Jaschik, *supra* note 78 (Doe decision "will encourage many more courts not to dismiss comparable Title IX complaints at early stages. That means more litigation, more discovery and more settlements.").
[87] Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED (Nov. 10, 2016).
[88] *Id.*
[89] Fromer, *supra* note 7 at 465.
[90] *Id*. at 466.
[91] 526 U.S. at 645.
[92] *Id*. at 646.

Often, in Title IX sexual harassment cases, plaintiffs will seek specific remedial relief such as expulsion or other discipline of the student engaged in the sexual harassment, in addition to money damages. However, plaintiffs do not have rights under Title IX to make remedial demands.[93] Thus, school district attorneys should seek to have dismissed any attempt by a plaintiff to seek specific remedial relief from a school district regarding discipline of the offending student.

c. No Individual Liability.

Title IX sexual harassment claims may only be brought against school districts and not individuals.[94] Should individuals be named in a Title IX sexual harassment claim, school district attorneys should seek to have the individuals dismissed.

d. No Liability for Failure to Follow Title IX Administrative Requirements.

Title IX contains many administrative requirements for schools to follow regarding claims for sexual harassment including detailed requirements on how investigations are to be conducted, the standard to be used to determine culpability and how the victim and offender are to be treated. Often plaintiffs will attempt to assert Title IX sexual harassment claims based on a school district's failure to follow Title IX's administrative procedures. However, "the implied private right of action under Title IX" does not allow "recovery in damages for violation" of the "administrative requirements" of Title IX.[95]

e. Retaliation Based on Reporting Sexual Harassment.

School district attorneys should also keep in mind that courts recognize retaliation claims under Title IX for reporting sexual harassment.[96] Like with retaliation claims under Title VII and other anti-discrimination laws, for a *prima facie* case of Title IX retaliation, the plaintiff must show that: (1) he or she engaged in a protected activity, (2) he or she was thereafter subjected to adverse action, (3) a causal link exists between the protected activity and the adverse action, and (4) knowledge by the defendant of the protected activity. The plaintiff is only required to prove that a retaliatory motive played a part in the adverse actions toward him or her, whether or not it was the sole cause."[97]

f. Damages and Attorneys' Fees.

The Supreme Court has not addressed whether punitive damages are available in Title IX cases. However, at least one federal appellate court has recognized that the Supreme Court has prohibited punitive damages in Title VI cases, and Title IX is based on Title VI. As a result,

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[93] *Id*. at 648.
[94] *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) ("Title IX reaches institutions and programs that receive federal funds … which may include nonpublic institutions … but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals"); *Hill*, 797 F.3d at 976-77 (Title IX does not authorize suits against individuals).
[95] *Gebser*, 524 U.S. at 292.
[96] *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 170 (5th Cir. 2011).
[97] *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011).

punitive damages are unavailable in Title IX lawsuits. Thus, there is a strong argument that punitive damages are not available in Title IX sexual harassment lawsuits.[98] Attorneys' fees are available to the prevailing party in Title IX sexual harassment lawsuits. "Congress has authorized the award of reasonable attorney's fees to prevailing parties in certain civil rights cases, including actions brought under Title IX."[99] As to available damages, Plaintiffs "may be awarded all available compensatory damages for a violation of Title IX 'to make good the wrong done.'"[100]

## IX. Conclusion.

Title IX sexual harassment lawsuits are receiving heightened attention in the college and university setting, but public school districts often face these types of lawsuits. While the standard for a plaintiff to get past summary judgment is high, a creative and prepared plaintiff's attorney will be able to get past summary judgment unless the school district attorney is well versed in the nuances of the Title IX legal framework. There are many elements in the Title IX sexual harassment legal framework that school district attorneys can use to can seek dismissal or summary judgment even in cases that elicit great sympathy for the plaintiff. In general, unless the fact pattern is egregious, where the sexual harassment is severe and persistent and the school affirmatively failed to respond in any manner when notified of the harassment, a well-prepared school district attorney should stand a reasonable chance of having a case disposed of at the motion to dismiss or summary judgment stage.

[98] *Mercer v. Duke Univ.*, 50 F. App'x 643, 644 (4th Cir. 2002) ("the Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX. We therefore vacate the award of punitive damages.") (citing *Barnes v. Gorman*, 536 U.S. 181 (2002)).
[99] *Mercer v. Duke Univ.*, 401 F.3d 199, 202-03 (4th Cir. 2005) (citing 42 U.S.C. § 1988(b)).
[100] *Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, 187 F. Supp. 2d 1099, 1119 (N.D. Iowa 2002) (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66 (1992)).