

Sexual Harassment Law

***615** A TYPOLOGY AND CRITIQUE OF TITLE IX SEXUAL HARASSMENT LAW AFTER GEBSER
AND DAVIS [FN1]

William A. Kaplin [FNaa1]

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I. INTRODUCTION

Sexual harassment is not a new phenomenon. It has long been with us in our workplaces, in our educational institutions, and in other sectors of society, but the public awareness of sexual harassment, and its acknowledgement as an endemic problem, is relatively new. Only since the mid-1970's has sexual harassment been emerging from private shadows into the public light. As one commentator recently summed up, "[W]e finally have acknowledged the problem, but we are a considerable distance from solving it." [FN1]

This article addresses the recent history and current status of the sexual harassment problem in colleges and universities, focusing particularly on the harassment of students by their teachers or by their peers. Special attention will be given to whether and how students may hold colleges and universities liable in court for money damages for a failure to protect them from harassment. Then, using such private causes of action by students as the centerpiece, this article will develop a typology of Title IX sexual harassment claims and of the variable contexts in which they may arise. Following the typology, the article will consider the implications for colleges and universities and offer some recommendations for managing them.

Various surveys and studies have confirmed the prevalence of sexual harassment in the nation's educational institutions. A 1993 study by the American Association of University Women (AAUW), for instance, found that 81% of students in grades eight through eleven had been the target of some form of sexual harassment in school. Of these students, 25% reported being harassed "often." The harassers were both school employees and other students, with 79% of the harassers being students. [FN2] In another study four years later, the National Coalition for Women and Girls in Education relied on the AAUW data and other studies to conclude that "sexual harassment in school is a barrier of imposing proportions to girls and women trying to move ahead, affecting female students in educational institutions ranging from elementary ***616** schools to post-graduate schools." [FN3] This study went beyond the AAUW study to cover higher education as well as elementary/secondary education. The higher education statistics, according to the National Coalition, "indicate that ... approximately 30 percent of undergraduates and 40 percent of graduate students had experienced some form of sexual harassment, with student-to-student sexual harassment being the most common occurrence by far -- about 90% of students [reporting harassment] experienced this form of harassment." [FN4] The National Coalition's study also included a "report card" grading the nation's efforts, over the prior twenty-five years, to establish "gender equity in education in nine key areas." [FN5] Sexual harassment, as one of the nine areas, was assigned the lowest grade of any area, a "Dk."

Why have our society and our courts become concerned with sexual harassment? The data tell part of the story. The gradual realization that sexual harassment is indeed a form of sex discrimination, and that it deserves the same attention and

disapproval, tells part of the story. The difficulties of resolving the problem, as demonstrated by the slow and limited progress thus far, tell another part. Yet another part is the delicate balance of the victim's rights with both the accused harasser's and the institution's interests in privacy and academic freedom. [FN6] Perhaps most basic, we have come to recognize the serious harm that can befall the victims of harassment. As one study summarized, sexual harassment "devastates one's physical well-being, emotional health, and vocational development." [FN7]

For many years, it was unclear whether students suffering such harm could ever hold their institutions liable for failing to take reasonable steps to protect them from harassment. In 1964, using its commerce power, [FN8] Congress enacted Title VII of the Civil Rights Act of 1964, [FN9] prohibiting employers from discriminating against employees based on sex. When enacted, however, Title VII neither applied to students nor expressly recognized sexual harassment as a form of sex discrimination. In 1972, using its spending *617 power, [FN10] Congress enacted Title IX of the Education Amendments of 1972, [FN11] making non-discrimination by sex a condition of participation in federally funded education programs. Although Title IX did apply to discrimination against students, like Title VII, it did not by its terms recognize sexual harassment as a form of sex discrimination.

In the mid-1970's, courts began to recognize sexual harassment claims under Title VII, but these precedents were limited to the workplace. In 1977, in the case of *Alexander v. Yale University*, [FN12] one court did acknowledge that students' harassment claims could be actionable under Title IX, but this acknowledgment was limited to quid pro quo harassment, the narrower form of harassment that occurs when education benefits are conditioned on the student's submission to sexual demands. While sexual harassment law continued to grow through the 1980's, almost all the developments -- except for some administrative activity within the U.S. Department of Education's Office for Civil Rights -- were in the arena of workplace harassment.

Finally, in 1992, the U.S. Supreme Court decided *Franklin v. Gwinnett County Public Schools*, [FN13] holding that a student who was harassed by a teacher could sue the school district for money damages under Title IX. *Franklin* clearly established that sexual harassment--even the broader type, hostile environment harassment--constituted sex discrimination under Title IX, but the case did not definitively establish a standard of liability for determining when a school district or other educational institution would be liable in money damages for harassment perpetrated by its teachers and other employees. Moreover, since *Franklin* was a case regarding harassment by a teacher, it did not address issues concerning an educational institution's potential liability for peer harassment-- one student's sexual harassment of another student. [FN14]

Both types of liability questions, however, were extensively discussed in the lower courts after the *Franklin* case. No pattern emerged; different courts took vastly different approaches in determining when liability would accrue to an educational institution for the actions of its teachers, employees, or students. At one extreme, some courts determined that an educational institution could be vicariously liable on the basis of common law agency principles of respondeat superior. [FN15] At the other extreme, some courts determined *618 that an educational institution could be liable only if it treated complaints of female students differently from those of male students [FN16] or that it should not be liable at all. [FN17] In between the extremes, other courts held that an educational institution could be liable under a constructive notice, or "knew or should have known," standard [FN18] or that an institution could be liable only in certain narrow circumstances where it had knowledge of the harassment and failed to respond. [FN19]

The U.S. Department of Education also addressed these liability issues in the wake of *Franklin*. In 1997, the Department's Office for Civil Rights (OCR) published its *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. [FN20] The Guidance provides that liability for harassment by teachers or other school employees of a school or college is governed by agency principles:

A school will ... be liable for hostile environment sexual harassment by its

employees ... if the employee-- (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution. [FN21]

For example, if the school employee had the authority to discipline a student or to evaluate the student's academic performance, a student might believe that the employee was acting under the school's authority, and the school could be liable for the harassment even if it had not been reported to school officials.

Regarding peer sexual harassment, the Guidance takes a somewhat different approach based upon a "knew or should have known" standard:

[A] school will be liable under Title IX if its students sexually harass other students, if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action. [FN22]

***619** The Guidance also addresses how a school or college may avoid Title IX liability for peer harassment:

[I]f, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice. [FN23]

The U.S. Supreme Court has now resolved the disagreements among the courts on liability principles for Title IX sexual harassment cases and, in the process, has declined to adopt the standards in the Department of Education's Guidance. In *Gebser v. Lago Vista Independent School District*, [FN24] the Court considered an educational institution's liability for a faculty member's harassment of a student. One year later, in *Davis v. Monroe County Board of Education*, [FN25] the Court addressed an educational institution's liability for peer sexual harassment.

The student in the *Gebser* case, Alida Star Gebser, was beginning the ninth grade when the harassment began that led to her lawsuit. The teacher, Mr. W., led a book discussion group that Star joined. During group sessions, Mr. W. often made sexually suggestive comments to the students. Gebser was then assigned to a class taught by this same teacher and discovered that he made sexual comments in his classes as well. During the fall, Mr. W. began directing these comments specifically to Gebser. In the spring, he initiated sexual contact with her, including kissing and fondling, and eventually had sexual intercourse with her on numerous occasions over the next year. Gebser did not report the teacher's behavior to school officials. She claimed in the lawsuit that she realized the conduct was improper but was confused about how to react to Mr. W's advances; she also wanted to keep him as her teacher. The relationship continued until a police officer observed the two engaging in sexual intercourse and arrested Mr. W. [FN26]

The student in the *Davis* case, LaShonda D., was in the fifth grade when her alleged harassment began. She was not harassed by a teacher but by a peer -- a male fifth grader known by his initials, G.F. According to the allegations later made in the lawsuit, G.F. sat next to LaShonda in class. She complained that he frequently tried to grab her breasts and genital area and that he made sexual comments to her such as "I want to get in bed with you." LaShonda reported these incidents, and similar occurrences in physical education class, to her mother and to her teachers. LaShonda's mother also complained to the teachers and the principal. The school took no corrective action. G.F.'s behavior continued over the course of five months, while LaShonda's previously high grades dropped and she became suicidal. The ***620** conduct did not stop until G.F. was charged with and pled guilty to sexual battery. [FN27]

Both *Gebser* and *Davis* proceeded through the courts as implied private causes of action in which the plaintiffs sought money damages against the school districts. In *Gebser*, the Supreme Court eventually rejected the student's claim, holding that the

school district was not liable for damages under the facts of the case. In Davis, the Supreme Court eventually remanded the student's claim to the district court for trial, holding that the allegations, if proven, would subject the school district to money damages liability.

The Court decided both cases by a narrow five to four vote. Justice O'Connor authored both majority opinions. The Justices that joined her in Gebser, however, dissented in Davis, and those that had dissented in Gebser joined her in Davis. Both cases adopt variants of the actual notice approach to liability. Although both cases involved elementary/secondary education, the Title IX principles developed in the majority opinions apply to higher education as well.

II. The Gebser Case: Faculty/Student Sexual Harassment

In the Gebser case, Court determined the extent to which "a school district may be held liable in damages in an implied right of action under Title IX ... for the sexual harassment of a student by one of the district's teachers." [FN28] In a five to four decision, the Court majority held that Title IX damages liability is based neither on common law agency principles of respondeat superior nor upon principles of constructive notice. Distinguishing Title IX from Title VII of the Civil Rights Act of 1964, [FN29] which does utilize such principles, the Court insisted that "it would 'frustrate the purpose' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official." [FN30] Instead, the Court held that students may not recover damages from a school district under Title IX for teacher-student sexual harassment "unless an official [of the district] who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf has actual knowledge of discrimination ... and fails adequately to respond." [FN31] Moreover:

[The official's response] must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. *621 Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions. [FN32]

Putting aside the U.S. Department of Education's Sexual Harassment Guidance that had applied agency principles to teacher-student sexual harassment, [FN33] the Court made clear that it would listen only to Congress, and not to the Department of Education, on these questions: "[u]ntil Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference." [FN34] In so doing, and in contrast with its methodology in other situations, the Court refused to accord any deference to the decisions of the administrative agency authorized to implement the statute. [FN35]

Applying its new liability principles to the student's claim, the Supreme Court determined that the student had not met the standards. The Court, therefore, affirmed the lower court's award of summary judgment to the school district. Remarkably, the Court reached this decision even though it acknowledged that the school district had not implemented any sexual harassment policy or grievance procedure:

Petitioners focus primarily on Lago Vista's asserted failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims. They point to Department of Education regulations requiring each funding recipient to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints, 34 C.F.R. § 106.8(b) (1997) Lago Vista's alleged failure to comply with the regulations, however, does not establish the requisite actual notice and deliberate indifference. And in any event, the failure to promulgate a grievance procedure does not itself constitute

"discrimination" under Title IX. [FN36]

In effect, the Court has insisted on a standard of actual notice, while at the same time tacitly admitting that the school district had not provided students directions or channels for giving that notice, and has insisted on a standard of ***622** deliberate indifference, while at the same time declining to consider lack of a harassment policy and grievance procedure as evidence of that indifference.

Four justices vigorously dissented from the majority's holdings in Gebser. Point by point, the dissenting justices rebutted the majority's reasons for rejecting the application of agency principles under Title IX and for concluding that Title IX is based upon a different model of liability than Title VII. In addition, the dissenting justices provided an extended argument to the effect that the refusal to provide meaningful protection for students subjected to harassment files in the face of the purpose and meaning of Title IX. According to Justice Stevens:

Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have "authority to institute corrective measures on the district's behalf."...

...

... As a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students ... Because those students are members of the class for whose special benefit Congress enacted Title IX, that policy choice is not faithful to the intent of the policymaking branch of our Government. [FN37]

The Gebser case establishes a three-part standard for determining institutional liability in damages for a teacher's sexual harassment of a student: (1) an official of the school district must have had "actual knowledge" of the harassment; (2) this official must have authority to "institute corrective measures" to resolve the harassment problem; and (3) this official must have "fail[ed] to adequately respond" to the harassment and, in failing to respond, must have acted with "deliberate indifference." [FN38]

This Gebser liability standard will be difficult for potential plaintiffs to meet and, in practice, will provide scant opportunity for successful Title IX damages actions against educational institutions. The first element of the standard, actual notice, will be very difficult to meet in many cases since institutions will be able to "insulate themselves" from this knowledge in various ways.

***623** The second element will present difficulties in determining which officials or employees of educational institutions have authority to take corrective action. In Liu v. Striuli, [FN39] for example, the court determined that neither the director of financial and nor the director of the graduate history department was an official with authority to correct the alleged harassment of a graduate student because neither official had "supervisory authority" over the alleged harasser. Such difficulties will be substantially compounded by the Gebser decision's addition of the third "deliberate indifference" element to the other two elements. In Wills v. Brown University, [FN40] for instance, the court upheld the inadmissibility of evidence concerning the university's responses to incidents of harassment, perpetrated by the same professor, both before and after the plaintiff- student's harassment, thus leaving the plaintiff no basis for proving deliberate difference.

In these respects, the Gebser test stands in stark contrast to the liability standards under Title VII of the Civil Rights Act of 1964. In two recent cases decided in the same term as the Gebser case, Faragher v. City of Boca Raton [FN41] and Burlington Industries, Inc. v. Ellerth, [FN42] the U.S. Supreme Court determined that liability for sexual harassment under Title VII is based upon agency principles and a respondeat superior model of liability. Thus, under Title VII but not under

Title IX, an employer may be liable in damages for a supervisor's acts of harassment even though the employer did not have actual knowledge, or constructive notice, of the harassment. To put the matter another way, employees have much more protection against harassment under Title VII than students have under Title IX.

From the standpoint of public policy and Congressional purpose, it is not clear why there should be such divergent outcomes under the two statutes or why supervisor-employee relationship should be treated so differently from teacher-student relationships. Students, in general, are younger than employees and have less worldly experience; therefore, they may be even more vulnerable to harassment than employees. The academic environment may encourage students to place more trust in their teachers than employees place in their supervisors in the work environment. [FN43] Moreover teachers may exercise "even greater authority and control over [their] students than ... supervisors exercise over their employees." [FN44]

***624** The Court justified these divergent outcomes under Title IX and Title VII on the basis of conceptual and structural differences between the two statutes. [FN45] Title IX, as a conditional spending statute, is based on a different legislative model than Title VII, a regulatory statute. [FN46] The two statutes therefore have different statutory phraseology, different enforcement mechanisms, and different legislative histories. Courts interpreting and applying Title IX need not be bound by Title VII judicial precedents and administrative guidelines.

It does not follow from these differences, however, that there must be a drastic difference in liability standards under the two statutes. [FN47] In particular, nothing about these acknowledged differences between Title IX and Title VII undermines the basic point made above--that in terms of public policy and statutory purposes (and, it might be added, common sense) it is unlikely that Congress would have contemplated or intentionally provided for such a divergence between the protections for students and the protections for employees. Even the Court itself, in the Franklin case [FN48] that preceded Gebser, recognized a clear parallel between Title IX and Title VII with respect to sexual harassment. Relying on its Title VII decision in Meritor, [FN49] the Court in Franklin asserted that:

Unquestionably, Title IX placed on [school districts] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." Meritor Sav. Bank, FSB v. Vinson, ***625** 477 U.S. [at 64]. We believe the same rule should apply when a teacher sexually harasses and abuses a student. [FN50]

III The Davis Case: Student/Student Sexual Harassment

In Davis, the Court determined the extent to which a school district may be held liable in damages under Title IX for the sexual harassment of a student when the perpetrator is another student rather than a teacher. In another five to four decision, a different majority held that Title IX damages liability for peer harassment is based upon the same actual notice and deliberate indifference standard that governs liability for teacher harassment under Gebser:

We consider here whether the misconduct identified in Gebser--deliberate indifference to known acts of harassment--amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does. [FN51]

In light of the arguments that had been made in the lower courts, and in light of the Court's prior decision in Gebser, there were only two alternatives available to the Davis court: (1) recognize a peer harassment cause of action under Title IX parallel to the student/teacher cause of action recognized in Gebser, or (2) reject any possible Title IX cause of action for peer harassment. The Court was split between these two alternatives, and the former prevailed by only one vote. Had there been a one-vote shift, there would have been no judicial recourse at all under Title IX for students subjected to peer harassment on school grounds during the school day, no matter how severe the harassment and no matter how clear the knowledge of

school officials.

The Court took considerable pains to develop the "limited circumstances" that must exist before a school district or other educational institution will be liable for peer sexual harassment. First, the institution, the fund recipient, must have "substantial control over both the harasser and the context in which the known harassment occurs." [FN52] According to the Court, this requirement arises from a close reading of the statute's terms:

[B]ecause the harassment must occur "under" "the operations of" a funding recipient, see 20 U.S.C. § 1681(a); § 1687 (defining "program or activity"), the harassment must take place in a context subject to the school district's control
....

....
Where, as here, the misconduct occurs during school hours and on school grounds -- the bulk of [the harasser's] misconduct, in fact, took *626 place in the classroom -- the misconduct is taking place "under" an "operation" of the funding recipient In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser. We have observed, for example, "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." [FN53]

Second, the sexual harassment must be "severe, pervasive, and objectively offensive" to a degree that "it denies its victims the equal access to education that Title IX is designed to protect." [FN54] Thus:

[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. (citation omitted) ...

Moreover, the [statutory] provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, 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. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored. [FN55]

The Court consistently uses "and" rather than "or" as the connector between the phrases "severe, pervasive" and the phrase "objectively offensive," thus suggesting that actionable harassment must meet all three conditions. The Court also underscores this point by noting that "a single instance of sufficiently severe one-on-one peer harassment," standing alone, is unlikely to meet the test. In contrast, the standard for Title VII cases is "severe or pervasive." [FN56] The OCR's Sexual Harassment Guidance also uses the standard "severe ... or pervasive" and makes clear that "a single or isolated incident *627 of sexual harassment may, if sufficiently severe, create a hostile environment." [FN57]

Speaking for the four dissenters in Davis, Justice Kennedy issued a sharply worded and lengthy dissent. In somewhat overblown language, he emphasized the same legal policy considerations--primarily federalism considerations--that influenced the Gebser majority to narrow the cause of action it recognized:

The only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them The Federal Government will have insinuated itself not only into one

of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs. This federal control of the discipline of our Nation's schoolchildren is contrary to our traditions and inconsistent with the sensible administration of our schools

... I can conceive of few interventions more intrusive upon the delicate and vital relations between teacher and student, between student and student, and between the State and its citizens than the one the Court creates today by its own hand. Trusted principles of federalism are superseded by a more contemporary imperative ...

... Today's decision mandates to teachers instructing and supervising their students the dubious assistance of federal court plaintiffs and their lawyers and makes the federal courts the final arbiters of school policy and of almost every disagreement between students. Enforcement of the federal right recognized by the majority means that federal influence will permeate everything from curriculum decisions to day-to-day classroom logistics and interactions. [FN58]

The Davis majority, by highlighting the "limiting circumstances that shape the private cause of action," and adding them to the requirements already articulated in Gebser, creates a four-part standard for determining when an educational institution would be liable in damages for peer sexual harassment of another student. The four elements are: (1) The institution must have "actual knowledge" of the harassment. (2) The institution must have responded (or failed to respond) to the harassment with "deliberate indifference," which the Davis Court defines as a response that is "clearly unreasonable in light of the known circumstances." (3) The institution must have had "substantial control" over the student harasser and the context of the harassment. (4) The harassment must be "severe, pervasive, and objectively offensive," and "systemic," to an extent that the victim of the harassment is deprived of educational opportunities or services. This standard does not include*628 one of the factors considered in Gebser. identifying the individuals within the institution who must have received notice of the harassment and determining whether this individual had authority to initiate corrective action. There seems to be no reason, however, why such a factor would not transfer from the teacher harassment to the peer harassment context. It may be, however, that different or lower-level functionaries would be suitable recipients of notice when a student rather than a teacher is the harasser or that a more flexible understanding of "authority to initiate corrective action" would pertain. Some such requirement will thus likely become a fifth element of the Davis standard, insertable between elements (1) and (2) listed above.

The Davis standard of liability, therefore, is based on the Gebser standard but is not identical to it. The Court has included additional considerations in the Davis analysis, most of which tend to make it more difficult for a harassment victim to establish a claim of peer harassment than a claim of teacher harassment. As the majority noted near the end of its Davis opinion:

The fact that it was a teacher who engaged in harassment in ... Gebser is relevant. 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 and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment. [FN59]

IV. HIGHER EDUCATION VERSUS ELEMENTARY/SECONDARY EDUCATION

Although both Gebser and Davis are elementary/secondary education cases, the statute being interpreted, Title IX, applies to all educational institutions receiving federal funds, elementary/secondary and higher education alike. The Court makes no attempt in either case to limit the force of its opinion to elementary/secondary education. It thus follows that the liability standards crafted in these cases will apply to higher education cases as well, but it does not follow that the standards will be applied in exactly the same way, or with respect to the same considerations, at one level compared to the other.

Elementary/secondary education and higher education differ substantially from one another in structure and mission. The ages and maturity levels of students can also vary dramatically from one level to the other, leading to differences in perspective on questions about when conduct is sexual and when sexual conduct is consensual. [FN60] Inevitably, therefore, there will be some differences in the reasoning and results of the cases at the two levels, especially with respect to peer harassment.

The Davis majority is quite clear on this point. By its emphasis on control, it suggests that peer harassment claims will be even more difficult to establish *629 in the higher education setting than in the elementary/secondary setting. Any court that follows Davis must give close attention to this issue of control since Davis indicates that institutional control over the harasser and the context of the harassment is a key to liability. Although the Court's reasoning about control is crafted to fit the elementary/secondary education context, as indicated by its reference to the "custodial and tutelary" authority over "public school children," the Court does acknowledge that the control element of the liability standard "is sufficiently flexible to account ... for the level of disciplinary authority available to the school." [FN61] Moreover, it pointedly asserts that "[a] university might not, for example, be expected to exercise the same degree of control over its students" as would elementary schools. [FN62] It should follow that colleges and universities, in general, will have less risk exposure for peer harassment under Title IX because, in general, they exert less control over students and over the educational environment than do elementary and secondary schools.

There is another potential difference in risk exposure between the two levels of education, which, if recognized, would have critical consequences. Public school boards for elementary/secondary education, as "political subdivisions" of the state, do not enjoy sovereign immunity from suit in federal court; public colleges and universities, on the other hand, are usually "arms of the state" sharing in the state's immunity. [FN63] Moreover, under *Seminole Tribe of Florida v. Florida* [FN64] and later cases, public colleges and universities are substantially protected from congressional attempts to abrogate their sovereign immunity. [FN65]

Thus far, however, the case law indicates that public institutions' sovereign immunity claims are not likely to succeed under Title IX. In *Crawford v. Davis*, [FN66] for example, a university student had charged one of her instructors with sexual harassment. Although the university discharged the instructor, the student sued the university under Title IX. The university contended that the *Seminole Tribe* decision prevented the court from hearing the student's claim. The university asserted that Congress had no power under the spending clause to abrogate the university's immunity. The university argued that, on the contrary, Title IX was within the scope of section five of the Fourteenth Amendment, given the fact that the courts have often used the Fourteenth Amendment's equal protection clause to proscribe gender discrimination. The court was not concerned with whether Congress "had the specific intent to legislate pursuant" to section five of the Fourteenth Amendment, but only with whether Congress "could have enacted [Title IX] pursuant to" section five. Since Congress therefore did have the power to *630 abrogate, and since the Civil Rights Remedies Equalization Act of 1986 [FN67] clearly indicates a congressional intent to abrogate, the court rejected the university's *Seminole Tribe* defense.

Even if a court were to determine that Congress had not validly used its section five power to abrogate state immunity under Title IX, it is likely that sexual harassment suits against public institutions could proceed on an alternative basis. In *Doe v. University of Illinois*, [FN68] the court identified the alternative "that the University affirmatively waived its Eleventh Amendment immunity by choosing to accept federal funds under Title IX." [FN69] The *Doe* court did not rule on this waiver argument--a spending power argument--because it determined that Congress had validly abrogated immunity under its Fourteenth Amendment, section five, power. The U.S. Supreme Court, however, has been receptive to the waiver argument, [FN70] and some lower courts have accepted it. [FN71]

V. A TYPOLOGY OF TITLE IX SEXUAL HARASSMENT CASES

Using Gebser and Davis as the starting points, and examining these cases in the context of other recent legal developments, it is now possible to construct a typology of Title IX claims involving the sexual harassment of students. [FN72] Through this typology, various types of Title IX claims may be identified and compared. Insights on formulating and processing these claims may also be drawn, and, for colleges and universities, suggestions on preventing or resolving such claims may be developed.

The first step is to focus the typology clearly on Title IX, distinguishing all other claims that could parallel or be confused with Title IX claims. Thus, we must set aside all harassment claims that are brought under, or can only be brought under, other sources of law -- such as Section 1983, state tort law, and Title VII. [FN73] Prominent among these claims are individual or personal liability claims against college or university officials, faculty members, or other employees who are alleged to have harassed students or failed to protect them. It is now generally accepted that Title IX creates liability only for the educational institution itself. Individual employees are not themselves "education program[s] or activit[ies]," nor do they "receiv[e] Federal financial *631 assistance;" they are therefore outside the scope of Title IX. [FN74] The Davis majority opinion underscores this distinction between individual and institutional liability when it focuses on the "recipient of federal education funding" and emphasizes that the "[g]overnment's enforcement power may only be exercised against the funding recipient, ... and we have not extended damages liability under title [sic] IX to parties outside the scope of this power." [FN75]

The second step is to set aside harassment claims that do not allege harassment that is based on or motivated by the victim's sex. [FN76] Not every harassment of a female by a male (or vice-versa) will connote different treatment based on sex, [FN77] and not every such harassment will have sexual connotations or carry sexual implications. [FN78] Thus, not all harassment of females by males (or vice-versa) is sexual harassment covered by Title IX. Similarly, harassment claims of gay persons may be based on the victim's sexual orientation rather than being based on or motivated by the victim's gender as such. A harasser or the harasser's institution, for instance, may treat male gay persons the same as female gay persons but treat gay persons differently than heterosexuals, being motivated by the orientation and not the gender. Thus, sexual orientation discrimination may not constitute different treatment based on sex and thus may be outside the scope of Title IX. [FN79] On the other hand, it is now recognized that same-sex harassment falls within the scope of Title IX, whether or not the victim is gay, when the victim can show that the harasser's or the institution's actions were based on or motivated by the victim's sex. [FN80]

Harassment claims based on characteristics other than sex -- such as racial harassment or harassment based on disability -- also fall outside the bounds of Title IX and are therefore outside the bounds of the typology developed below. Such claims may be brought under other sources of law, however, and may be resolved using principles similar to those applicable to *632 Title IX sexual harassment claims. [FN81] The typology below may therefore be adaptable to these other types of harassment claims.

The third step is to set aside -- temporarily -- harassment claims that are brought in administrative rather than judicial forums, or that seek injunctive or declaratory relief rather than money damages. Both Gebser and Davis were lawsuits alleging private causes of action for damages. The Court addressed liability questions only in that context. [FN82] The typology begins, therefore, by addressing only Title IX harassment claims filed in court seeking money damages. In Part VII below, the typology will expand to account for differences in forum and remedy.

The fourth step is to set aside the occasional harassment claim alleging that the harassment was a product of the institution's official policy or resulted from some defect in the institution's official policy. In Gebser, the Court stated that the Title IX liability standards it was crafting applied only to "cases like this one that do not involve official policy of the recipient entity." [FN83] If a complaint

were to allege harassment based on the institution's official policy (or, presumably, its customary practice), [FN84] apparently some liability standard other than Gebser-Davis would apply. Any such standard would likely require only that the student plaintiffs demonstrate a causal link between the alleged harassment and an institutional policy or custom.

After putting aside these various types of claims, the remaining types of claims in the typology can be organized into six categories or types of Title IX suits. Each category will be governed by Gebser and Davis but will be analyzed somewhat differently from the other five categories. These are the six pertinent categories:

(1) A student sues an educational institution for acts of a teacher who has allegedly harassed the student. These types of claims will be decided using the elements of the Gebser liability standard set out in Part II above.

(2) A student sues an educational institution for acts of a non-teacher staff member who has allegedly harassed the student. These types of claims will likely be decided using the elements of the Gebser liability standard, but there could be difficult issues concerning whether the standard would be ***633** modified if the staff member does not have supervisory or other authority over the student, as a teacher does. [FN85]

(3) A student sues an educational institution for acts of an officer or administrator who has allegedly harassed the student. These types of claims will likely be decided using the Gebser standard, along with the caveat in category (2) above concerning supervisory authority, but application of the standard will become more complicated when a high-level officer or administrator is alleged to be the perpetrator. In particular, there may be difficulties determining who, within the institution, would have authority to receive notice of such harassment and be authorized to initiate corrective action. Moreover, in some extreme circumstances, harassment by high-level officials could be considered to be part of the institution's "official policy," and institutional liability may be based on the policy itself rather than on the elements of the Gebser standard. [FN86]

(4) A student sues an educational institution for acts of other students who allegedly harassed the student. The Davis standard, a combination of the Gebser standard and the additional elements that Davis added to the Gebser standard, will govern this type of claim. Presumably the second element of the Gebser standard, authority to take corrective action, will apply in a more expansive way to peer harassment claims.

(5) A student sues an educational institution for acts of other students who have allegedly harassed the student (as in category (4) above), but the student perpetrators have some authority over the student victim akin to that which a teacher, staff member, or administrator might have. Such situations might arise, for instance, in an ROTC program, or military school, or in academic programs that use graduate students as teaching or lab assistants. This type of case would likely be decided under the Gebser standard or under a modified version of Davis that gives relatively more emphasis to the first two elements and relatively less emphasis to the latter two elements. In *Morse v. Regents of the University of Colorado*, [FN87] for instance, female ROTC cadets who were allegedly harassed by a higher-ranking male cadet brought a Title IX claim against the university. The court held that the female cadets had stated a valid Title IX claim under the Gebser standards, which applied because "a fellow student acting with authority bestowed by" a "University-sanctioned program" was the alleged harasser. [FN88]

(6) A student sues an educational institution for acts of a third party who has allegedly harassed the student. The third party might be a staff member at a clinical or field placement, [FN89] a student from another school who is in an ***634** externship program with the alleged victim, a patient in a clinic to which the student is assigned, [FN90] a visitor to the campus, [FN91] or even a stranger who comes onto the campus. [FN92] There would be a threshold issue whether the "program or activity" in which the harassment occurred is an "education program or activity" of the institution being sued. [FN93] If it is, and Title IX therefore applies,

[FN94] the applicable standard of liability should depend on whether the harasser's relationship with the institution and victim is like that of a teacher/staffer (in which case some form of the Gebser standard should apply), is like that of a student (in which case some form of the Davis standard should apply), or is more remote than these relationships (in which case it is questionable whether there would be any institutional liability at all).

VI. HOSTILE ENVIRONMENT HARASSMENT VS. QUID PRO QUO HARASSMENT

The typology in Part V does not take into account the commonly drawn distinction between hostile environment harassment and quid pro quo harassment. It does not, for instance, subdivide the first three categories into separate types of claims for each of the two types of harassment. Yet the OCR's Sexual Harassment Guidance makes this distinction, [FN95] and courts in Title IX cases have often done so both before and after Gebser and Davis. [FN96]

In recent years, however, courts have been relying less on the quid pro quo/hostile environment distinction, and that distinction has begun to have less control over the results in specific cases. [FN97] OCR's Sexual Harassment Guidance also acknowledges that "in many cases the line between quid pro quo and hostile environment discrimination will be blurred." [FN98] Moreover, in Gebser and Davis, the U.S. Supreme Court did not address the distinction between quid pro quo harassment and hostile environment harassment. The Gebser and Davis liability standards clearly apply to hostile environment claims, but it is not entirely clear whether they apply in the same way to quid pro quo harassment -- or, as courts increasingly put it, to harassment that involves a "tangible" adverse action against the victim. [FN99]

This issue was squarely presented in Liu v. Striuli. [FN100] Liu, a female graduate student, brought a Title IX claim against her college based on her alleged harassment by a professor. The college argued that the plaintiff's case did not meet the Gebser liability standards. The plaintiff, characterizing the harassment as being in the quid pro quo category, argued that the Gebser standard did not apply to this type of claim:

[Liu] posits that vicarious liability should be imposed on an employer automatically if the plaintiff can prove a case of quid pro quo harassment Liu maintains that Gebser did not affect this rule because in that case the Court addressed only hostile environment claims, while her allegation is based on quid pro quo harassment. Therefore, she argues, a holding of vicarious liability against the College is compelled by resort to the rules commonly applied to quid pro quo harassment cases. [FN101]

Citing several earlier cases, the court flatly rejected Liu's argument:

The gaping hole in plaintiff's argument ... is that the Gebser opinion makes no distinction between the two types of sexual harassment claims in the Title IX context. In fact, neither term is mentioned in the opinion. The Court's broad language ... applies to both types of harassment in Title IX cases (citation omitted). This conclusion has been reached by several federal courts that have ruled on Title IX sexual harassment claims since the Court issued the Gebser decision (citations omitted). Liu has failed to cite, and this Court has been unable to identify, any case holding to the contrary. [FN102]

Thus far, therefore, courts have provided a negative answer to the question whether different liability standards apply to quid pro quo claims under Title IX. The typology above, therefore, does not account for any such difference. The Liu court perhaps read too much into the Gebser opinion's silence on the hostile environment/quid pro quo distinction, and most lower courts have yet to rule on this point. At least in situations of a teacher's or administrator's quid pro quo harassment of a student, where the opportunity for and effectiveness of such harassment is so dependent on the perpetrator's official duties and consequent power over students, good legal and policy arguments could be made for a separate liability standard. Any such standard would increase the school's or college's potential liability beyond what it is under the Gebser standard, in recognition of

the increased significance of *636 the perpetrator's official power. Until the courts have ruled more definitively on this point, some room should be left in the typology for a possible subdivision of categories one to three, and possibly five, [FN103] into hostile environment claims and quid pro quo claims.

VII. THE EFFECTS OF CHOICE OF REMEDY AND DISPUTE-RESOLUTION FORUM ON TITLE IX LIABILITY STANDARDS

There are three basic ways in which student victims of harassment may assert Title IX sexual harassment claims against the institution: (1) by suing the institution in court and seeking money damages; (2) by suing the institution in court and seeking injunctive or declaratory relief; and (3) by filing an administrative complaint, in lieu of or in addition to suit, against the institution through an internal grievance system or with the U.S. Department of Education, seeking administrative compliance. The Gebser-Davis liability standards apply with certainty only to the first of these three enforcement avenues, and the typology in Part V focuses only on this first enforcement avenue. [FN104] The typology can now be expanded to include the other two avenues. Each of the six categories of claims outlined in the typology can be further divided into three subcategories: judicial claims for money damages ((1) above); judicial claims for injunctive and/or declaratory relief ((2) above); and administrative claims for fund-termination or other compliance remedies ((3) above). Thus, for example, the first category in the typology -- claims based on harassment by a teacher -- can be subdivided into: (1) the student's judicial claims against the institution for monetary damages, (2) the student's judicial claims against the institution for injunctive and/or declaratory relief, and (3) the student's administrative claims against the institution. The same can be done with each of the other five types of claims in the typology, resulting in a typology of eighteen categories. A graphic of this typology is set out below as an illustration.

Across the three avenues of enforcement, and the eighteen categories of claims, the standards of liability will vary depending on both the type of claim filed (Part V) and the type of enforcement selected (this Part). The following summary focuses primarily on the latter variable.

***637 Illustration: Typology of Title IX Claims**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

(1) Judicial claims for damages. Either the Gebser or the Davis liability standard (or, in some cases, a combination of the two) will apply. As developed in Parts IV and V, above, the exact elements of the standard and the nuances of its application will vary depending upon the identity of the alleged harasser, and also upon whether the case is an elementary/secondary case or a higher education case.

(2) Judicial claims for injunctive and/or declaratory relief. Title IX private causes of action for injunctive and declaratory relief are authorized by Cannon *638 v. University of Chicago. [FN105] Since money damages are not sought, this type of claim is apparently not directly governed by the Gebser and Davis cases -- whose factual context is limited to monetary liability and whose legal rationale seems largely dependent on the negative impact of monetary damage awards upon educational institutions. [FN106] It is therefore not clear what liability standard would apply to a Title IX harassment claim against an institution seeking only injunctive or declaratory relief. Although Gebser and Davis establish that subjection to harassment can constitute discrimination under Title IX, and that the institution can be liable when it exercises sufficient control over the harasser and the context, the Court's actual notice and deliberate indifference requirements are likely too stringent for institutional liability for injunctive and declaratory relief. Even if the actual knowledge standard did apply, it would apparently be easily met, since injunctive relief is generally prospective and the educational institution would therefore have actual notice and time to respond to the problem and voluntarily comply with the law before it was bound by the court order.

(3) Administrative claims. The third enforcement avenue -- the administrative

complaint seeking administrative relief -- is expressly provided by the Title IX statute and regulations. The alleged victim may initiate a grievance under the institution's own grievance process, [\[FN107\]](#) or may complain to the U.S. Department of Education and ask for an investigation and for a compliance agreement with the institution or a fund cut-off. [\[FN108\]](#) For these processes, the U.S. Department of Education is apparently free to prescribe standards of institutional liability that differ from the Gebser- Davis standards, so long as the Department's own standards are consistent with the basic nondiscrimination prohibitions in the Title IX statute.

Since the institution would always receive notice of its non-compliance and the opportunity to make appropriate adjustments before any administrative penalty is imposed, and since an administrative proceeding would not result in a monetary damages award against the institution, [\[FN109\]](#) it appears that the U.S. Department of Education may continue to apply its own Sexual Harassment Guidance [\[FN110\]](#) to administrative complaints, compliance investigations, and fund cut-off hearings. Indeed, in the aftermath of Gebser, the U.S. Secretary of Education issued a statement to this effect. [\[FN111\]](#)

***639 VIII. CONTRASTING TYPES OF SEXUAL HARASSMENT CLAIMS IN HIGHER EDUCATION**

The typology of student Title IX claims developed in Parts V and VII above can be better understood by distinguishing these claims from, and relating them to, other types of sexual harassment claims that arise in the higher education context. There are two broad categories of these contrasting claims to consider: (1) claims that students bring against institutions using sources of law other than Title IX in order to avoid the minimalist institutional liability standards of Gebser and Davis; and (2) claims that students bring against individual teachers, staff members, administrators, students, or third parties, using sources of law other than Title IX, to avoid Title IX's lack of individual liability. [\[FN112\]](#)

Probably the most likely claims to fall into these contrasting categories are § 1983 claims, [\[FN113\]](#) which are used to assert the harassment victim's rights under the Fourteenth Amendment's equal protection clause. [\[FN114\]](#) Unlike Title IX claims, § 1983 claims may be brought only against public institutions and their employees. Also unlike Title IX, § 1983 claims are frequently brought against the individuals who were involved in the harassment or the failure to protect the student from it. While such claims are impermissible under Title IX, they may proceed under § 1983 so long as the individual does not have a qualified immunity from suit. [\[FN115\]](#) In *Oona v. McCaffrey*, [\[FN116\]](#) for instance, a student who was allegedly harassed by a student teacher used § 1983 to sue school officials who were allegedly responsible for permitting the harassment. The court held that the student had stated a valid equal protection claim for gender discrimination and rejected the officials' qualified immunity defense.

Section 1983 harassment claims against public higher education institutions seldom succeed because the institution is usually immune from suit as an "arm of the state." [\[FN117\]](#) Even if the institution can be sued, a § 1983 claim against it can succeed only if the challenged actions were taken pursuant to an established institutional policy or custom. In *Murrell v. School District No. 1*, [\[FN118\]](#) for instance, a mother filed a § 1983 claim on her daughter's behalf against a school district, alleging that the district's failure to protect her daughter from a fellow student's sexual assaults violated the Equal Protection Clause. The court rejected the mother's claim because she did not allege that the school district was acting pursuant to an official policy or custom.

***640** When courts do reach the merits of a § 1983 harassment claim, there is an emerging tendency, in the aftermath of Gebser and Davis, for them to use a "deliberate indifference" standard of liability similar to that in the Title IX cases. [\[FN119\]](#)

Students may also use state tort and contract law to bring harassment claims against both institutions and individual employees. Public or private institutions

and individuals may be sued, but public institutions and their officials will sometimes be immune from suit. The types of claims that could cover harassment include breach of contract, intentional or negligent infliction of emotional distress, assault, battery, negligent hiring, negligent supervision, and negligent retention. In *Chontos v. Rhea*, [FN120] for example, the court allowed a student to proceed with a negligent retention claim against a university based on the university's awareness of a professor's prior harassment of students. In contrast, in *Wills v. Brown University*, [FN121] the court determined that a student complaining of a professor's harassment had not established viable claims of intentional infliction or negligent hiring against the university.

A third and narrower type of contrasting claim is the Title VII employment discrimination claim brought by a student who is also an employee of the institution. Students bring these claims against the institution as the employer. These claims would have the advantage of the Title VII liability standards that are more favorable to plaintiffs than the Title IX standards. [FN122] In *Karibian v. Columbia University*, [FN123] for example, the plaintiff was a student at Columbia who was also employed by Columbia in its fund-raising office. Since the plaintiff was harassed in her role as employee rather than her role as student, the case proceeded as a Title VII case. In addition, in *Crandell v. New York College of Osteopathic Medicine*, [FN124] the court ruled that a sexual harassment complainant's position, a paid post-graduate internship, constituted employment rather than participation in an "educational program or activity." The claim therefore fit within Title VII rather than Title IX.

IX. Ramifications of Gebser and Davis

By separating Title IX from Title VII, the Gebser case increases the need for definitions of sexual harassment and guidelines applicable to Title IX. Prior to Gebser, the legal standards for harassment had been defined and developed primarily under Title VII, and courts in Title IX cases often relied on Title VII precedents. [FN125] Now that Title VII precedents and guidelines are *641 no longer persuasive under Title IX, at least for private causes of action for damages, there is a need for more legal guidance developed specifically to fit the Title IX educational context. It would be beneficial for the U.S. Department of Education, the courts, and individual institutions to move ahead to fill this need [FN126] with guidelines sensitive to differences between the education environment and the work environment, [FN127] to differences between elementary/secondary education and higher education, [FN128] and to the differences among types of claims suggested by the typology in Parts V and VII above.

In developing guidelines for determining what harassment is and when it has occurred, it is likely that courts will develop different guidelines (and standards of liability) than administrative agencies and individual institutions. The Gebser case has already determined that, on the question of monetary liability, the Court's own standards will prevail in court. But it is open to the Department of Education and individual institutions to maintain different standards than the courts for use in administrative processes.

It is imperative, however, that in developing sexual harassment policies, institutions avoid a fixation on the legal aspects of sexual harassment. There is a danger, exacerbated by Gebser and Davis, that the emphasis on the law of sexual harassment will divert institutions from important educational policy issues and ethical issues concerning harassment. If an educational institution were to focus predominantly on the minimalist Gebser and Davis liability standards and on the easiest or surest ways to avoid liability under these standards, the institution could miss many opportunities for developing a supportive learning environment and implementing good educational policy on teacher-student and student-student relationships. As with other contemporary issues of law and policy, avoiding liability should seldom be the highest value. Educational institutions should stand ready to do more for the members of their academic communities than the law requires, when it serves the institutional mission to do so. To operate in this fashion, institutions will need administrators and legal counsel with clear

understandings of the inter-relationships between law and policy and with strong wills to work together as a team to accomplish policy objectives within the context of legal constraints. [\[FN129\]](#)

Thus, the Gebser-Davis liability standards should become a floor for institutions and not a ceiling. What is built upon this legal floor need not be solely, or even primarily, rules, adversary hearings, and punishments. Nor should there be primarily open space above the floor, indicating a hands-off approach. Rather, educational programming, ethical development programming, alternative dispute resolution techniques, and other policy initiatives *642 should be a prominent part of the structure. [\[FN130\]](#) The next part of this Article (Part X) provides some practical examples of what might be included. While the floor/ceiling model calls for colleges and universities to be proactive, it is a far, far cry from a return to in loco parentis. Instead of asking college and universities to be parents, this model calls on them to be "preventive planning" institutions, [\[FN131\]](#) or perhaps "facilitator" institutions. [\[FN132\]](#)

X. Implementing Gebser and Davis on Campus

Part IX above has already suggested that institutions may and should develop much of their student sexual harassment policy apart from the standards of Gebser and Davis. In this light, colleges and universities should review all of their harassment policies concerning students. Among other things, an institution should consider whether its student harassment policies are sufficiently distinct from its employee harassment policies; whether its delegations of authority for reporting, investigating, and correcting sexual harassment of students are sufficiently articulated; whether students are clearly and periodically apprised of what sexual harassment is and to whom it can be reported; and whether the institution has investigation procedures [\[FN133\]](#) and dispute-resolution procedures [\[FN134\]](#) that are in place and working effectively.

Institutions should strive to manage harassment problems in a multi-faceted manner that addresses both legal and policy considerations. There should be ample room for non-adjudicative and non-adversarial means of managing conflict. In this sensitive realm of harassment, sex, and gender relationships, ethical and educational standards are as important as legal standards in guiding institutional planning, [\[FN135\]](#) and non-legal solutions to campus problems can be as viable as legal solutions. This is especially true for peer harassment (versus faculty harassment), which often presents itself in shades of gray rather than in black and white.

As institutions consider their options, they should avoid being enticed by speech codes as a means for reducing the risks of Gebser-Davis liability. In his dissent in Davis, Justice Kennedy predicted that: "[a]t the college level, the majority's holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may *643 infringe students' First Amendment rights." [\[FN136\]](#) Institutions should resist the temptation to re-travel this road. Now, as before, speech codes would encounter serious First Amendment difficulties, as Justice Kennedy suggests, and would still have quite limited efficacy. [\[FN137\]](#) Better than speech codes, by far, would be responses such as mediation programs; education programs for students, faculty, and staff; counseling services for students; the development of clearer internal guidelines on sexual harassment (with examples); [\[FN138\]](#) and the use of grievance procedures. [\[FN139\]](#) Through such institutional responses, institutions can make considerable progress in discouraging sexual harassment problems from arising, in informally and internally handling those that do arise, and in constructing suitable defenses should judicial claims be filed. Once again, good teamwork between administrators and college counsel is a key to effectuating these preventive planning initiatives. [\[FN140\]](#)

XI. CONCLUSION

Franklin, Gebser, and Davis have substantially clarified the Title IX law regarding sexual harassment of students, but these cases have also established new

distinctions and complexities with which to grapple. Since Title VII precedents are no longer a primary guidepost for Title IX law, educational institutions must distinguish more sharply between the two bodies of law and can no longer comfortably fall back on an established body of Title VII law to help resolve Title IX complexities. This article, and the typology of Title IX claims that it develops, provides a road map of this new Title IX terrain and will assist both higher educational institutions and victimized students, and their counsel, to perceive the new distinctions and to manage the new legal and policy complexities spawned by the Gebser and Davis decisions.

[FNal]. Portions of this article are adapted from the author's work on the manuscript for William Kaplin & Barbara Lee, YEAR 2000 SUPPLEMENT TO THE LAW OF HIGHER EDUCATION 3D ED. (Nat'l Ass'n of College & Univ. Attorneys, 2000), and from a public lecture the author presented in February 2000 as part of the Stetson University College of Law's Distinguished Lecture Series.

[FNaa1]. Professor of Law and Special Counsel, The Catholic University of America.

[FN1]. Deborah Rhode, Sex Harassment Remains a Problem in Schools, NAT'L LAW JOURNAL, Oct. 5, 1998, at A25.

[FN2]. AAUW EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993).

[FN3]. NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 25: REPORT CARD ON GENDER EQUITY: A REPORT OF THE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, 31 (1997) [hereinafter REPORT CARD].

[FN4]. Id. at 33. See also Anne Lawton, The Emperor's New Clothes: How the Academy Deals With Sexual Harassment, 11 YALE J.L. & FEMINISM 75, 79 n.18, 82 n.39 (1999).

[FN5]. See REPORT CARD, supra note 3 at 4.

[FN6]. See, e.g., WILLIAM KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION § 3.7.2 (3d ed. Supp. 2000) [hereinafter Supp. 2000].

[FN7]. MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 27 (1991). See also ROBERT SHOOP & DEBRA EDWARDS, HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS: A HANDBOOK AND CURRICULUM GUIDE FOR ADMINISTRATORS AND TEACHERS 53-66 (1994).

[FN8]. See generally WILLIAM KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION § 7.1.3 (3d ed. 1995) [hereinafter LHE 3d].

[FN9]. 42 U.S.C. §§ 2000e to 2000e-17 (1994); see generally Kaplin & Lee, LHE 3d, supra note 8, §§ 3.3.2.1, 3.3.4.3. In 1972, using its Fourteenth Amendment enforcement power along with its commerce power, Congress extended the Title VII prohibition to state and local employers. See Kaplin & Lee, LHE 3d, supra note 8, § 7.1.4.

[FN10]. See generally Kaplin & Lee, LHE 3d, supra note 8, § 7.1.1. In more recent

cases, courts have asserted that Title IX is also based on Congress's power to enforce the Fourteenth Amendment. See, e.g., Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997), discussed in text accompanying notes 66-67, *infra*.

[FN11]. 20 U.S.C. §§ 1681-1688 (1994); see generally Kaplin & Lee, LHE 3d, *supra* note 8, § 7.5.3.

[FN12]. 459 F. Supp. 1 (D. Conn. 1977), *aff'd* 631 F.2d 178 (2d Cir. 1980).

[FN13]. 503 U.S. 60 (1992). See generally Kaplin & Lee, *supra* note 8, §§ 7.5.3, 7.5.9.

[FN14]. For a more comprehensive version of sexual harassment law's history from 1964 to 1992, see Jan Alan Neiger, Actual Knowledge Under Gebser v. Lago Vista: Evidence of the Court's Deliberate Indifference or an Appropriate Response for Finding Institutional Liability? 26 J.C & U.L. 1, 7-10, 16-17, 18-19 n.114, 21-24 (1999).

[FN15]. See, e.g., Kracunas and Pallett v. Iona College, 119 F.3d 80 (2d Cir. 1997) (faculty harassment).

[FN16]. See, e.g., Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (peer harassment).

[FN17]. See, e.g., Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc) (peer harassment).

[FN18]. See, e.g., Doe v. Petaluma Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996) (peer harassment).

[FN19]. See, e.g., Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997) (faculty harassment); Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998) (peer harassment). For a more extensive discussion of the Title IX sexual harassment cases between Franklin and Gebser, see Neiger, *supra* note 14, at 27-33.

[FN20]. 62 Fed. Reg. 12,039 (1997) available at <http://www.ed.gov/offices/OCR/ocrpubs.html> [hereinafter Sexual Harassment Guidance].

[FN21]. *Id.*

[FN22]. *Id.*

[FN23]. *Id.* at 12,039-40.

[FN24]. 524 U.S. 274 (1998).

[FN25]. 526 U.S. 629 (1999).

[FN26]. See Gebser, 524 U.S. at 278.

[FN27]. These allegations are taken from Davis, 526 U.S. at 632-34.

[FN28]. Gebser, 524 U.S. at 277.

[FN29]. 42 U.S.C. § § 2000e to 2000e-17 (1994).

[FN30]. Gebser, 524 U.S. at 274.

[FN31]. Id. at 290.

[FN32]. Id. at 290-91.

[FN33]. See supra notes 20-21 and accompanying text.

[FN34]. Gebser, 524 U.S. at 292-93.

[FN35]. See id. at 300 (Stevens, J., dissenting). The leading U.S. Supreme Court cases on judicial deference to an administrative agency's interpretation of the statute it administers, and its own regulations, are Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150 (1991), and Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-845 (1984), both of which prescribe considerable deference to agency interpretations. These cases have often been cited in lower courts as the basis for deferring to U.S. Department of Education interpretations of Title IX and the Department's implementing regulations. See, e.g., Neal v. Board of Trustees of the Cal. State Univs., 198 F.3d 763, 770-71 (9th Cir. 1999).

[FN36]. See Gebser, 524 U.S. at 291-92.

[FN37]. See id. at 300, 306 (Stevens, J. dissenting); see also id. at 293-306 (Stevens, J., dissenting).

[FN38]. Id. at 300. The Gebser standards may also be applicable to student-student harassment in certain narrow circumstances where the institution has granted a student some kind of authority over other students. See infra notes 87-88 and accompanying text (category 5).

[FN39]. 36 F. Supp. 2d 452 (D.R.I. 1999).

[FN40]. 184 F.3d 20 (1st Cir. 1999). Compare Chantos v. Rhea, 29 F. Supp. 2d 931, 934-38 (N.D. Ill. 1998).

[FN41]. 524 U.S. 775 (1998).

[FN42]. 524 U.S. 742 (1998). Faragher and Ellerth have been implemented by the EEOC in a comprehensive guidance that covers not only sex harassment but also race, national origin, age, and disability harassment. Available at <http://www.eeoc.gov/docs/harassment.html> (last modified June 21, 1999).

[FN43]. See, e.g., Deborah L. Rhode, Sex Harassment Remains a Problem in Schools, NAT'L L.J., Oct. 5, 1998, at A25; Ronna Schneider, Sexual Harassment and Higher Education, 65 TEX. L. REV. 525, 550-53 (1987).

[FN44]. Gebser, 524 U.S. at 299 (Stevens, J., dissenting).

[FN45]. See Gebser, 524 U.S. at 286-87; see also Neiger, supra note 14, at 39-47. Compare Gebser, 524 U.S. at 297 n.5 and accompanying text and at 298-99 n.9 and accompanying text (Stevens, J., dissenting); compare Catherine Fisk & Erwin Chemerinsky, Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 WM. & MARY BILL RTS J. 755, 778- 81, 791-94 (1999) (analyzing and criticizing the Court's distinction between Title IX and Title VII).

[FN46]. See supra notes 8-11 and accompanying text.

[FN47]. Perhaps the Court had in mind some other difference between the statutes concerning the requirement of discriminatory intent. In a Title IX private cause of action, no money damages can be awarded the plaintiff unless the defendant intentionally discriminated by sex. Cf. Guardians Ass'n v. Civil Service Com'n, 463 U.S. 582 (1983). Some commentators have argued that "actual knowledge" must be the liability standard under Title IX because a school district cannot be said to have a discriminatory intent unless it has actual knowledge of the discrimination and fails to respond appropriately. See, e.g., Neiger, supra note 14, at 46-47. But there is no clear articulation of this argument in Gebser, and it cannot be said that the majority is relying on the Title IX understanding of discriminatory intent. Moreover, this argument would fail anyway, since Title VII also has a discriminatory intent requirement for all disparate treatment (vs. disparate impact) claims. See International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Since sexual harassment claims are disparate treatment claims under Title VII, they are subject to the intent requirement, and this requirement therefore cannot be the basis for distinguishing Title IX liability standards from those under Title VII.

[FN48]. 503 U.S. 60 (1992); see supra text accompanying note 13.

[FN49]. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[FN50]. Franklin, 503 U.S. at 75 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[FN51]. Davis, 526 U.S. at 643.

[FN52]. Id. at 645.

[FN53]. Id. at 645-46 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)).

[FN54]. Id. at 652.

[FN55]. Id. at 651-53.

[FN56]. See, e.g., Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998).

[FN57]. Sexual Harassment Guidance, supra note 20, at 12,041.

[FN58]. Davis, 526 U.S. at 657-58, 685-86 (Kennedy, J., dissenting).

[FN59]. Id. at 653.

[FN60]. See, e.g., Sexual Harassment Guidance, supra note 20, at 12,040.

[FN61]. Davis, 526 U.S. at 649.

[FN62]. Id. at 649.

[FN63]. Kaplin & Lee, LHE 3d, supra note 8, § 2.3.3.; see also Kaplin & Lee, Supp. 2000, supra note 6, § 2.3.3. In Alden v. Maine, 527 U.S. 706 (1999), state sovereign immunity was also extended to suits in state courts.

[FN64]. 517 U.S. 44 (1996).

[FN65]. See Kaplin & Lee, Supp. 2000, supra note 6, § 7.1.5. Compare id. § 7.5.9.

[FN66]. 109 F.3d 1281 (8th Cir. 1997).

[FN67]. 42 U.S.C. § 2000d-7 (1994).

[FN68]. 138 F.3d 653 (7th Cir. 1998), vacated and remanded, 526 U.S. 1142 (1999), reinstated in pertinent part, 200 F.3d 499 (7th Cir. 1999).

[FN69]. 138 F.3d at 660.

[FN70]. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-40, 246- 47 (1985); Alden, 527 U.S. at 267.

[FN71]. See, e.g., Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999).

[FN72]. Claims involving sexual harassment of employees (for example, a supervisor's

harassment of a teacher) are also within the scope of Title IX when they constitute employment discrimination based on sex. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). But such claims were not addressed in either Gebser or Davis. Moreover, it is unclear whether the Title IX implied private cause of action for damages would extend to employment discrimination claims. See, e.g., Duello v. Univ. of Wis., 583 N.W. 2d 863 (Wis. Ct App. 1998). See generally Kaplin & Lee, Supp. 2000, supra note 6, § 3.3.2.3.

[FN73]. See Part VIII, infra.

[FN74]. See, e.g., Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997).

[FN75]. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999).

[FN76]. See generally Bernice Sandler & Robert Shoop, What is Sexual Harassment?, in SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 1 (Bernice Sandler & Robert Shoop eds., 1997); Linda Vaden Gratch, Recognizing Sexual Harassment, in SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 278 (Bernice Sandler & Robert Shoop eds., 1997).

[FN77]. See, e.g., Gallant v. Board of Trustees of Cal. State Univ., 997 F. Supp. 1231 (N.D. Cal. 1998).

[FN78]. See, e.g., Petrone v. Cleveland State Univ., 993 F. Supp. 1119, 1130 (N.D. Ohio 1998); see also Manfredi v. Mount Vernon Bd. of Educ., 94 F. Supp. 2d 447, 454-55 (S.D.N.Y. 2000).

[FN79]. See Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (distinguishing between gender discrimination and sexual orientation discrimination); compare United States v. Virginia, 518 U.S. 515 (1996) (sex discrimination); see generally Romer v. Evans, 517 U.S. 620 (1996) (sexual orientation).

[FN80]. See, e.g., H.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 (Ala. 1998); Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211 (5th Cir. 1998); see generally Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). See also Sexual Harassment Guidance, supra note 20 at 12,038-39.

[FN81]. See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (1994) (parallels the Department's sexual harassment guidance in various respects); see, e.g., Gant v. Wallingford Bd. of Educ., 195 F.3d 134 (2d Cir. 1999) (disposing of a race discrimination claim using a principle of "deliberate indifference").

[FN82]. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) ("The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX ..."); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) ("[A]t issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX ...").

[FN83]. Gebser, 524 U.S. at 290.

[FN84]. See, e.g., Alexanderv. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977).

[FN85]. This kind of distinction between supervisory and non-supervisory employees is drawn in Title VII cases. See, e.g., Farragher v. City of Boca Raton, 524 U.S. 775, 792-801 (1998).

[FN86]. See supra notes 83-84 and accompanying text.

[FN87]. 154 F.3d 1124 (10th Cir. 1998).

[FN88]. Id.

[FN89]. See, e.g., Petrone v. Cleveland State Univ., 993 F. Supp. 1119 (N.D. Ohio 1998).

[FN90]. See Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995) (pre-Gebser case that uses a different standard of liability but considers similar circumstances).

[FN91]. See Sexual Harassment Guidance, supra note 20 at 12,040 (containing a section on third party harassment that "a visiting speaker or members of a visiting athletic club" as an example of third parties whose actions can sometimes result in institutional liability under Title IX).

[FN92]. Compare Martin v. Howard Univ., No. 99-1175 (TFH), 1999 U.S. Dist. LEXIS 19516 (D.D.C. Dec. 15, 1999).

[FN93]. See Title IX, 20 U.S.C. §§ 1681(a) & 1687; see generally Kaplin & Lee, Supp. 2000, supra note 6, § 7.5.7.4.

[FN94]. See, e.g., Crandell v. New York College of Osteopathic Med., 87 F. Supp. 2d 304, 316-17 (S.D.N.Y. 2000).

[FN95]. See Sexual Harassment Guidance, supra note 20 at 12,038-39.

[FN96]. See, e.g., Wills v. Brown Univ., 184 F.3d 20, 25-26 (1st Cir. 1999); Crandell, 87 F. Supp. 2d 304, 314-21 (S.D.N.Y. 2000).

[FN97]. See Burlington Indus. v. Ellerth, 524 U.S. 742, 753-54 (1998); Liu v. Striuli, 36 F. Supp. 2d 452, 464-65 (D.R.I. 1999).

[FN98]. Sexual Harassment Guidance, supra note 20, at 12,039.

[FN99]. See, e.g., Farragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[FN100]. 36 F. Supp. 2d 452 (1999).

[FN101]. Id. at 465.

[FN102]. Id. (citing Gebser, 524 U.S. at 289; Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998). See also Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 918-21 (S.D. Ohio 1998); Burtner v. Hiram College, 9 F. Supp. 2d 852, 856 (N.D. Ohio 1998)).

[FN103]. Category five in the typology may merit this subdivision if the student perpetrator's authority over the student victim creates the opportunity for, and supports the effectiveness of, quid pro quo harassment.

[FN104]. See supra note 82 and accompanying text.

[FN105]. 441 U.S. 677 (1979).

[FN106]. See supra Parts II-III.

[FN107]. 34 C.F.R. §§ 106.8(b), 106.9 (1999). See also Sexual Harassment Guidance, supra note 20, at 12,044-45.

[FN108]. See 20 U.S.C. § 1682 (1994); 34 C.F.R. § 106.71 (1999).

[FN109]. See Gebser, 524 U.S. at 289.

[FN110]. See Sexual Harassment Guidance, supra note 20.

[FN111]. Statement by U.S. Secretary of Education Richard W. Riley: On the Impact on Title IX of the U.S. Supreme Court's Gebser v. Lago Vista Decision, available at <http://www.ed.gov/pressreleases/07-1998/lago.html> (last visited Sept. 1, 2000).

[FN112]. See supra Part V.

[FN113]. See 42 U.S.C. § 1983 (1994 & Supp. 1998). See Laura Oren, Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It, 72 CHI.-KENT L. REV. 747 (1997); and see generally KAPLIN & LEE, LHE 3d, supra note 8, §§ 2.3.3 & 2.4.3.

[FN114]. See, e.g., Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

[FN115]. See generally KAPLIN & LEE, LHE 3d, supra note 8, § 2.4.3, and KAPLIN & LEE, Supp. 2000., supra note 6, § 2.4.3.

[FN116]. 143 F.3d 473 (9th Cir. 1998).

[FN117]. See supra note 63 and accompanying text; see also KAPLIN & LEE, Supp. 2000., supra note 6, § 2.3.3.

[FN118]. 186 F.3d 1238 (10th Cir. 1999).

[FN119]. See e.g., Murrell v. School Dist. No. 1, 186 F.3d 1238, 1249- 51. See also Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140-46 (2d Cir. 1999) (racial harassment).

[FN120]. 29 F. Supp. 2d 931 (N.D. Ind. 1998).

[FN121]. 184 F.3d 20 (1st Cir. 1999).

[FN122]. See supra notes 41-42 and accompanying text.

[FN123]. 14 F.3d 773 (2d Cir. 1994).

[FN124]. 87 F. Supp. 2d 304 (S.D.N.Y. 2000). See also O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997) (distinguishing between students' Title VII claims and students' Title IX claims).

[FN125]. See, e.g., Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995).

[FN126]. The Department of Education has already made a contribution through its Sexual Harassment Guidance, supra note 20, which remains a valuable guideline for OCR investigations and compliance proceedings and for investigations and grievance proceedings within individual institutions.

[FN127]. See supra notes 41-44 and accompanying text.

[FN128]. See supra Part IV.

[FN129]. See KAPLIN & LEE, LHE 3d, supra note 8, §§ 1.7.2. & 1.4.6.

[FN130]. See, e.g., Student Ethical Development: Part I, 10 SYNTHESIS: L. AND POL'Y IN HIGHER EDUC. 753 (1999).

[FN131]. KAPLIN & LEE, LHE 3d, supra note 8, § 1.7.2.

[FN132]. ROBERT BICKEL & PETER LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999).

[FN133]. See, e.g., Jack Burtch, Risks in Interviewing the Sexual Harassment Client, 19 AM. J. OF TRIAL ADVOC. 563 (1996); SUSAN ERLICH, The Investigation Process, in SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 163

(Bernice Sandler & Robert Shoop, eds., 1997).

[FN134]. See, e.g., Mary P. Rowe, An Effective Integrated Complaint Resolution System 186, in *SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS* (Bernice Sandler & Robert Shoop, eds., 1997; Howard Gadlin, *Mediating Sexual Harassment* 202, in *id.*)

[FN135]. See, e.g., Gary Pavela, Civility and Student Life, 27 *STETSON L. REV.* 161 (1997).

[FN136]. 526 U.S. at 682 (Kennedy, J., dissenting); see also 526 U.S. at 668 (Kennedy, J., dissenting).

[FN137]. See KAPLIN & LEE, LHE 3d, *supra* note 8, § 4.10; KAPLIN & LEE, Supp. 2000, *supra* note 6, § 4.10.

[FN138]. Specific provisions on harassment may also be placed in the student conduct code, so long as the institution is careful to avoid First Amendment issues. See Sax v. State College Area Sch. Dist., 77 F. Supp. 2d 621 (M.D. Pa. 1999) (upholding school district's "Anti-Harassment Policy" as regulation of conduct, not speech). Compare Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (invalidating college's "discriminatory harassment policy" as an overbroad and vague regulation of speech).

[FN139]. See, e.g., JUDITH BRANDENBURG, *CONFRONTING SEXUAL HARASSMENT: WHAT SCHOOLS AND COLLEGES CAN DO* 49-82 (1997); Susan Hippensteele & Thomas C. Pearson, *Responding Effectively to Sexual Harassment: Victim Advocacy, Early Intervention, and Problem Solving*, *CHANGE*, Jan.-Feb. 1999, at 48; *Campus Interventions for Effectively Dealing with Sexual Harassment*, in *SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER* (Michelle A. Paludi, ed., 2d ed. 1996); *SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS* (Bernice Sandler & Robert Shoop, eds., 1997).

[FN140]. See *supra* note 129 and accompanying text.

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