

# ELIMINATING PEER-ON-PEER SEXUAL HARASSMENT: WHY STATE STATUTES ARE NOT THE ANSWER

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## I. INTRODUCTION

Peer-on-peer sexual harassment is an unfortunate reality in many students' day-to-day lives. A study from the American Association of University Women reported that nearly half of all students in grades seven through twelve were sexually harassed by a peer at school during the 2010–2011 school year.<sup>1</sup> Eighty-seven percent of those students said it negatively affected them.<sup>2</sup> The Office of Civil Rights (“OCR”) defines sexual harassment as “unwelcome conduct of a sexual nature,” including sexual violence such as “rape, sexual assault, sexual battery, and sexual coercion.”<sup>3</sup> Though the majority of sexual harassment in grades seven through twelve was not physical but rather occurred in verbal and written forms, students still reported that it caused them emotional harms such as difficulty concentrating at school, absenteeism, and poor academic performance.<sup>4</sup> Several victims surveyed said they experienced physical effects such as feeling sick to their stomach and being unable to sleep.<sup>5</sup> Girls were victims of sexual harassment more than boys and were more likely to experience negative effects.<sup>6</sup> These numbers are likely surprising to school officials because students reported far fewer incidents of sexual harassment during the 2010–2011 school year.<sup>7</sup> More recent data seems to indicate that reporting to school officials has not increased since then.<sup>8</sup>

In recent years, increased awareness of Title IX on college campuses as well as the #MeToo movement have ignited a national conversation

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<sup>1</sup> Catherine Hill & Holly Kearn, *Crossing the Line: Sexual Harassment at School*, AM. ASS'N OF U. WOMEN 2 (Nov. 2011), <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Russlynn Ali, *2011 Dear Colleague Letter: Sexual Violence*, U.S. DEP'T OF EDUC., OFF. OF C.R., 1–3 (Apr. 4, 2011), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>4</sup> Hill & Kearn, *supra* note 1, at 20.

<sup>5</sup> *Id.* at 22.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.* at 2–3 (only 9 percent of victims reported the incident to an adult at school, 27 percent reported to a parent or other family member, including siblings, and 23 percent reported to a friend).

<sup>8</sup> See Amy Becker, *Newly Released Data Shed Light on Sexual Harassment in U.S. Public Education*, AM. ASS'N OF U. WOMEN (July 13, 2016), <https://www.aauw.org/article/data-on-sexual-harassment-in-public-education/>. The American Association of University Women reviewed the U.S. Department of Education's Civil Rights Data Collection for the 2013–2014 school year and concluded that, even though 63 percent of local education agencies reported zero allegations of sexual harassment or bullying that year, it does not accurately reflect the number of incidents of sexual harassment that occurred in schools. *Id.* In fact, where zero allegations were reported, it most likely indicates that schools have either not educated their communities about how to respond or that their procedures are not effective at encouraging students to be able and willing to report incidents of sexual harassment. *Id.*

“emphasizing the credibility of victims and highlighting the impunity that many powerful white men have experienced.”<sup>9</sup> It is natural to hope that this shift in the national conversation will positively impact primary and secondary students by helping them identify sexual harassment and, most importantly, feel more comfortable reporting it. But we cannot hope too soon. The Trump administration, through Betsy DeVos as the head of the United States Department of Education (“DOE”), proposed new Title IX regulations which withdraw Obama-era guidelines for how schools and universities should respond to allegations brought under Title IX.<sup>10</sup> These proposed regulations reduce schools’ obligations to investigate complaints of sexual harassment and sexual violence and raise concerns from opponents that they will allow colleges to favor the accused when investigations do take place.<sup>11</sup> In the proposal,

[DeVos] identified problems with the current state of Title IX’s application in schools and colleges, including overly broad definitions of sexual harassment, lack of notice to the parties, lack of consistency regarding both parties’ right to know the evidence relied on by the school investigator and right to cross-examine parties and witnesses, and adjudications reached by school administrators operating . . . to apply the lowest possible standard of evidence.<sup>12</sup>

However, the current Obama-era guidelines already provide the accused with many important protections, such as equal rights to bring evidence and witnesses and equal rights to appeal.<sup>13</sup> This calls into question whether this new proposal is in fact motivated by what is best for both victims and the accused (as DeVos claims) or, as Professor Katherine Baker points out, is merely an effort to “[remove] protections that were designed to address the gross underreporting of sexual harassment on college campuses.”<sup>14</sup>

<sup>9</sup> Ruth Lawlor, *How the Trump Administration’s Title IX Proposals Threaten to Undo #MeToo*, WASH. POST (Feb. 4, 2019), [https://www.washingtonpost.com/outlook/2019/02/04/how-trump-administrations-title-ix-proposals-threaten-undo-metoo/?utm\\_term=.f3b98bf75e77](https://www.washingtonpost.com/outlook/2019/02/04/how-trump-administrations-title-ix-proposals-threaten-undo-metoo/?utm_term=.f3b98bf75e77).

<sup>10</sup> See Nick Anderson, *Trump Administration Rescinds Obama-era Guidance on Campus Sexual Assault*, WASH. POST (Sept. 22, 2017), [https://link.gale.com/apps/doc/A505996837/STND?u=usocal\\_main&sid=STND&xid=53fb5a03](https://link.gale.com/apps/doc/A505996837/STND?u=usocal_main&sid=STND&xid=53fb5a03).

<sup>11</sup> *Id.* (note that in the video embedded in this article that DeVos equates the harm from a possible violation of due process with the harm experienced by victims of sexual violence; she then criticizes the current definitions of sexual harassment stating, “if everything is harassment, nothing is”); Andrew Kreighbaum, *Sharp Divide Over Trump Administration’s Title IX Overhaul*, INSIDE HIGHER ED (Nov. 19, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/11/19/devos-sexual-misconduct-rule-criticized-survivor-advocates>.

<sup>12</sup> Title IX of the Education Amendments of 1972, (proposed Nov. 16, 2018) (to be codified at 34 C.F.R. pt. 106).

<sup>13</sup> Lawlor, *supra* note 9.

<sup>14</sup> Anderson, *supra* note 10 (demonstrating via video Betsy DeVos claiming that the Obama-era guidelines were not serving victims by emphasizing how the system fails the accused, stating “survivors aren’t well served when they are retraumatized with appeal after appeal because the failed system *failed the accused*” (emphasis added) and adding that the accused are also not being served because “no student should be forced to sue their way to due process”); Michael Kujawa & Jonathan Sommerfeld, *Title IX Compliance*, 32 CBA RECORD: YOUNGL. J. 42, 43 (2018); see Janet Napolitano, *Janet Napolitano: Don’t Let the Trump Administration Undermine Title IX*, WASH. POST (Dec. 4, 2018), [https://www.washingtonpost.com/opinions/janet-napolitano-dont-let-the-trump-administration-undermine-title-ix/2018/12/04/6c91f316-f7fc-11e8-863c-9e2f864d47e7\\_story.html?utm\\_term=.20ba7631592e](https://www.washingtonpost.com/opinions/janet-napolitano-dont-let-the-trump-administration-undermine-title-ix/2018/12/04/6c91f316-f7fc-11e8-863c-9e2f864d47e7_story.html?utm_term=.20ba7631592e) (“under the guise of providing due process, [the proposed regulations] represent yet another effort to erode important civil rights protections”).

First, the opportunity for the accused to cross-examine a complainant is unnecessary to fulfill their due process right because many universities already use a less intimidating process in which “the accused [can] question the complainant and witnesses through a neutral intermediary . . . .”<sup>15</sup> Second, allowing schools to apply a “clear and convincing evidence” standard when judging sexual violence cases increases the burden on victims beyond the standard that is most common in civil law.<sup>16</sup> The Obama-era regulations require schools to apply a “preponderance of the evidence” standard, meaning the victim would have to bring enough evidence to show that his or her claim is more likely than not true.<sup>17</sup> Finally, the more narrow definition of sexual harassment in the proposed regulations attempts to fix a problem that does not exist.<sup>18</sup> Schools already know that the current definition includes a “spectrum of behavior” and that Title IX requires they remedy misconduct only when it limits a student’s participation in its educational offerings.<sup>19</sup> The proposed definition may be especially problematic for victims if schools adopt the higher evidentiary standard.<sup>20</sup> The most significant impact of this narrow definition is the requirement that schools have “actual knowledge” of the misconduct.<sup>21</sup> This means complaints need to be made to the proper officials on campus before an institution is obligated to investigate.<sup>22</sup> This requirement adds yet another burden to victims and is a major departure from the Obama-era guidelines, which required schools to follow up on any and all reports of misconduct of which employees became aware.<sup>23</sup> Altogether, under the guise of protecting due process, the Trump administration is decreasing the importance of combating sexual harassment by decreasing the federal government’s role under Title IX protections.<sup>24</sup>

While the national conversation surrounding this proposal has put colleges and universities at the center, the proposed regulations address primary and secondary schools as well. Even before the Trump administration proposed these changes to Title IX regulations, some states had been attempting, through state anti-discrimination statutes, to address the shortcomings of Title IX to remedy sex discrimination in the form of peer-on-peer sexual harassment. If the proposed regulations are adopted, state statutes may be more important than ever because individuals seeking recovery may have to rely on them primarily. In addition, even though the proposed regulations reduce schools’ liability, they still allow schools to maintain the standards imposed by the Obama-era guidelines.<sup>25</sup> It is more likely schools will maintain the old standard in states that already have

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<sup>15</sup> Napolitano, *supra* note 14.

<sup>16</sup> Anderson, *supra* note 10.

<sup>17</sup> *Id.*

<sup>18</sup> Napolitano, *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> *See id.*

<sup>21</sup> Title IX of the Education Amendments of 1972, *supra* note 12, at 18; *see* Kreighbaum, *supra* note 11.

<sup>22</sup> Kreighbaum, *supra* note 11.

<sup>23</sup> *Id.*

<sup>24</sup> Napolitano, *supra* note 14 (stating that the federal government’s role will be decreased because these proposed regulations weaken the authority of the Office of Civil Rights).

<sup>25</sup> Kreighbaum, *supra* note 11.

protective statutes.<sup>26</sup> However, the existence of state statutes does not guarantee better outcomes for victims or that awareness of the issue of sexual harassment in our culture will continue to increase. This Note will address the extent to which state statutes can provide remedies for victims of sexual harassment in educational institutions by looking at the diversity of statutes that state legislatures have created and the variety of standards that state courts have applied under those statutes. This raises the most important question: in light of the recent #MeToo movement and the Trump administration's proposed revisions to Title IX, what role, if any, do state statutes play in preventing and reducing incidents of sexual harassment in the day-to-day lives of students?

This Note explores whether students' claims against school districts for peer-on-peer sexual harassment will cause schools to implement effective policies and procedures to reduce and prevent future incidents of sexual harassment. It will look at claims brought under Title IX of the Education Amendments of 1972 ("Title IX"), focusing on the actual notice standard, and compare them to students' claims brought under state anti-discrimination laws, where courts have often applied a different knowledge standard for liability. Though this Note will discuss students' ability to file individual claims under these statutes, the focus of the analysis will be whether the knowledge standards set by states will lead to reduced incidents of sexual harassment in schools by incentivizing schools to implement effective policies and procedures to prevent peer-on-peer sexual harassment.

With that end in mind, Part II will explore the history of these claims under Title IX and discuss how actual notice became the standard for liability. It will then explain how the actual notice standard has disincentivized schools from implementing effective preventative policies and procedures because if schools can avoid learning about incidents of sexual harassment, they can avoid liability for them. Next, Part III will look at claims against schools for peer-on-peer sexual harassment brought under particular states' anti-discrimination statutes. The analysis will look at the knowledge standard set in four states where courts have heard these kinds of cases and discuss whether these statutes will lead to reduced incidents of sexual harassment. It will conclude that a constructive notice standard is more likely than actual notice to incentivize schools to implement effective policies and procedures to prevent sexual harassment in schools. Finally, Part IV will recommend a new federal statute that applies to all educational institutions, not just to those dependent on federal funding, and therefore will be able to apply a constructive notice standard. In addition, with the help of the OCR, the statute will hold schools liable for not taking the necessary steps that may reduce and prevent incidents of sexual harassment. A key shift will be that the OCR's suggested policies will emphasize prevention and education, moving away from the current focus which is overwhelmingly on schools' responses to reports after sexual harassment has occurred. Even though this kind of solution may seem idealistic under the current administration, it is important to look beyond that. Sexual harassment has

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<sup>26</sup> See Kujawa & Sommerfeld, *supra* note 14 (pointing out that institutions in Illinois will likely maintain Obama-era standards because Illinois's Preventing Sexual Violence in Higher Education Act "may fill in some of the gaps that were created by the Trump administration's rescission[s] . . .").

been harming its mostly female victims for generations and requires a long-lasting solution. The sooner schools educate students about what is and what is not appropriate behavior, the sooner the culture surrounding sexual harassment can shift, allowing women to engage with and benefit from education equally.

## II. TITLE IX CLAIMS FOR SEXUAL HARASSMENT AND THE ACTUAL KNOWLEDGE STANDARD

Even though the Supreme Court has recognized that harassment is too common in students' educational experience and that they suffer tremendous harm as a result, the Court has been hesitant to hold schools liable for such incidents.<sup>27</sup> The Court has assessed a school's liability based on its contractual obligation to not discriminate against students based on sex in exchange for federal funds.<sup>28</sup> This has led to a very narrow standard through which schools can be found liable for peer-on-peer sexual harassment.<sup>29</sup> Even after decades of evolution, claims brought against schools under federal law do not incentivize them to implement effective preventative policies to avoid peer-on-peer sexual harassment. Instead, they focus on how schools respond to reports of sexual harassment, essentially requiring that students are harmed before the school take any responsibility.

### A. THE EVOLUTION OF ACTIONABLE CLAIMS FOR PEER-ON-PEER SEXUAL HARASSMENT UNDER TITLE IX

From its inception, many have sought to expand the right of recovery for victims of sexual harassment under Title IX. Title IX says “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>30</sup> In 1979 in *Cannon v. University of Chicago*, the Supreme Court established that plaintiffs could bring an individual cause of action under Title IX.<sup>31</sup> A year later in *Alexander v. Yale University*, the Second Circuit recognized sexual harassment as a form of prohibited sex discrimination.<sup>32</sup> This was confirmed twelve years later by the Supreme Court in *Franklin v. Gwinnett County Public Schools* when a student who had been subjected to sexual harassment by a teacher filed an action for damages against the school district, and the Court held that a damages remedy is available for an action brought to enforce Title IX.<sup>33</sup>

Once the Court established a right of recovery for victims of sexual harassment, it needed to set the standard for damages. In 1998, *Gebser v. Lago Vista Independent School District* was the first case to establish a

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<sup>27</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292–93 (1998).

<sup>28</sup> *Id.* at 286.

<sup>29</sup> Adele Kimmel, *Title IX and Enforcement for K-12 Sexual Assault Survivors*, PUB. JUST., P.C. 4 <https://www.publicjustice.net/wp-content/uploads/2016/05/Title-IX-and-K-12-Sexual-Assault.pdf>.

<sup>30</sup> 20 U.S.C.A. § 1681 (2019).

<sup>31</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

<sup>32</sup> See generally *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980).

<sup>33</sup> *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 60 (1992).

standard for teacher-on-student sexual harassment.<sup>34</sup> The Court held that if a school has shown deliberate indifference to known acts of sexual harassment then it can be liable.<sup>35</sup> The standard required that students report incidents to an “appropriate person,” meaning to a school employee with the authority to take action that would end the discrimination.<sup>36</sup> Just one year later, the Court applied the same standard for claims of peer-on-peer sexual harassment in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.<sup>37</sup> The Court implied that claims for peer-on-peer sexual harassment would be even less frequent when it concluded that in “certain limited circumstances” a school can be found to have intentionally violated Title IX when the harasser is a student, not just a school employee.<sup>38</sup> According to the Court, those limited circumstances are when the harassment is “so severe, pervasive, and objectively offensive, [that it] so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.”<sup>39</sup> The Court was careful not to hold schools liable for the conduct of a student who has sexually harassed another student, but for a school’s own inadequate response to such harassment and only when the school had actual notice of the conduct.<sup>40</sup>

It seemed possible that *Davis* had expanded who can be an appropriate person to receive notice in claims for peer-on-peer sexual harassment. The Court seemed to suggest that notice to any school staff member at or above the level of teacher would be sufficient because such employees have custodial control over students, giving them the authority to take corrective action.<sup>41</sup> However, courts have ruled that individuals who seem to have similar custodial control, such as “bus drivers, coaches, and school ‘paraprofessionals,’” were not appropriate people. So, in practice the appropriate person standard set out in *Davis* likely did not expand the standard set in *Gebser*.<sup>42</sup> If anything, the standard for recovery in peer-on-peer sexual harassment cases is narrower because of concerns, voiced by the dissent in *Davis*, that schools might become liable for “immature, childish behavior.”<sup>43</sup>

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<sup>34</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 274 (1998).

<sup>35</sup> *Id.* at 287–90.

<sup>36</sup> *Id.* The Court did not provide examples of appropriate people, allowing some courts to make this requirement burdensome for plaintiffs. Fatima Goss Graves & Adaku Onyeka-Crawford, *Restoring Students’ Protections Against Sexual Harassment in Schools*, 41 HUM. RTS. 20, 21 (2015) (citing *Santiago v. Puerto Rico*, 655 F.3d 61 (1st Cir. 2011) (noting that even notice to the principal would not have been enough because the sexual harassment was by a bus driver and the principal had no control over the bus driver)).

<sup>37</sup> *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 631.

<sup>40</sup> Kimmel, *supra* note 29, at 4.

<sup>41</sup> See, e.g., Brent Case & Jon Fero, *A Roadmap to Defending School Districts in Title IX Disputes*, NAT’L SCH. BOARDS ASS’N 6 (Mar. 6, 2017), <https://cdn-files.nsba.org/s3fs-public/11.%20Case%20Fero%20Title%20IX.pdf>; Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 227–28 (2011).

<sup>42</sup> Cantalupo, *supra* note 41, at 228.

<sup>43</sup> *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 673 (1999).

## B. THE ACTUAL NOTICE STANDARD

### 1. How “Actual Notice” Became the Standard

Prior to the Supreme Court’s ruling in *Gebser*, lower courts applied up to seven different standards for liability.<sup>44</sup> These standards fell on a spectrum, which included strict liability, the easiest standard for plaintiffs to prove, followed by agency and negligence principles, or some combination of the two.<sup>45</sup> Actual knowledge was one of the hardest standards for plaintiffs to meet, followed only by a “reasonable avenue of complaint.”<sup>46</sup> Under strict liability, the plaintiff needed to show only that the harassment occurred between teacher and student or between two students for liability to be imputed; whereas for “reasonable avenue of complaint,” the institution was protected from liability as long as it provided a reasonable means for victims to notify appropriate officials.<sup>47</sup> Many commentators favored a negligence standard, similar to the standard set for Title VII of the Civil Rights Act of 1964 (“Title VII”) workplace harassment claims, which would hold employers liable if they knew or should have known that an employee was the victim of sexual harassment.<sup>48</sup>

In *Franklin*, when the Court established an individual right to recovery for damages, it relied on Title VII standards without explicitly adopting the same knowledge standard used when employers were held liable.<sup>49</sup> Title VII case law has established two kinds of sexual harassment in the workplace: quid pro quo harassment and hostile work environment harassment.<sup>50</sup> The *Franklin* Court looked to *Meritor Savings Bank v. Vinson* for its Title VII framework, which defined hostile work environment harassment as when “. . . conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>51</sup> Under Title IX, sexual harassment claims are almost always for a “hostile learning environment.”<sup>52</sup> As in a hostile work environment claim, where the plaintiff must show the conduct interfered with his or her work performance, for peer-on-peer sexual harassment, the plaintiff must show the harassment deprived the victim of opportunities or benefits provided by the school.<sup>53</sup> A key difference, however, is that the standard in a Title VII claim is negligence, regardless of whether the employer had actual or constructive notice of the conduct, yet the *Gebser* Court explicitly rejected this standard in favor of actual notice.<sup>54</sup>

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<sup>44</sup> Justin F. Paget, *Did Gebser Cause the Metastasis of the Sexual Harassment Epidemic In Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1258–59 (2008).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 42 U.S.C.A. § 2000e-2 (2019).

<sup>49</sup> See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 60–64 (1992).

<sup>50</sup> Julie Shaflucas, *Sexual Harassment Between Students: Whether to Turn a Blind or Watchful Eye; Legislative Reform*, 23 J. LEGIS. 317, 318 (2015).

<sup>51</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

<sup>52</sup> Shaflucas, *supra* note 50, at 318.

<sup>53</sup> *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999).

<sup>54</sup> Paget, *supra* note 44, at 1269, 1278.

*Gebser* distinguished sexual harassment claims under Title IX from those under Title VII by looking at Congress's intent when drafting the statute.<sup>55</sup> The Court believed the statute most closely paralleled Title VI of the Civil Rights Act of 1964 ("Title VI")<sup>56</sup> "except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs."<sup>57</sup> It found these statutes establish a contractual relationship between the recipient of federal funds and the government.<sup>58</sup> This reasoning allowed the Court to distinguish it from Title VII because Title VII is an outright prohibition of certain conduct and is not dependent on a condition.<sup>59</sup> So, the Court did not apply a negligence standard and instead looked at Title VI case law.<sup>60</sup> The Court determined Congress did not intend for a recipient of federal funds to be liable when it was unaware it was administering the federally funded program in violation of the statute.<sup>61</sup> Therefore, actual notice was required to be liable for a monetary award.<sup>62</sup> Finally, because Title IX is enforced through administrative agencies, the Court determined that a recipient can only be held liable for failure to voluntarily remedy a violation of the statute.<sup>63</sup> Without actual notice of a violation, the recipient cannot implement corrective measures, so the Court held that a negligence standard is at odds with Congress's basic objective in Title IX.<sup>64</sup>

## 2. The Impact of "Actual Notice" on Plaintiffs

In recent years, increased awareness of Title IX's protection has led to a record number of complaints in the DOE,<sup>65</sup> which has raised concerns that plaintiffs are limited by nearly insurmountable standards to hold their schools liable.<sup>66</sup> The actual notice standard frustrates Title IX's key purposes: (1) to avoid the use of federal funds to support sex discrimination; and (2) to provide effective protection for student victims of those discriminatory practices.<sup>67</sup> Instead of requiring schools to avoid discriminatory behavior amongst students, actual notice promotes a reactive attitude by allowing schools to wait until incidents occur, and harm is already done before they respond. Not holding schools liable unless they have actual notice disincentivizes them from implementing effective, preventative policies that

<sup>55</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284–85 (1998).

<sup>56</sup> 42 U.S.C.A. § 2000d (2000).

<sup>57</sup> *Gebser*, 524 U.S. at 286.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 287.

<sup>61</sup> *Id.* at 287–88.

<sup>62</sup> *Id.* at 288.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Graves & Onyeka-Crawford, *supra* note 36, at 20.

<sup>66</sup> See, e.g., *id.* at 21; Anne D. Byrne, *School District Liability Under Title IX for Sexual Abuse of a Student by a Teacher: Why Has The Supreme Court Allowed Schools to Put Their Heads in the Sand? Gebser v. Lago Vista Independent School District*, 118 S.Ct. 1989 (1998), 22 HAMLINE L. REV. 587, 614 (1999); Paget, *supra* note 44, at 1295 (quoting Kristen L. Safier, *Comment, A Request for Congressional Action: Deconstructing the Supreme Court's (In)Activism in Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998) and *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999), 68 U. CIN. L. REV. 1309, 1328 (2000)).

<sup>67</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 684 (1979); Byrne, *supra* note 66, at 615–18. The *Gebser* Court plainly states that Title IX's focus is to protect individuals from discriminatory practice, yet the actual knowledge standard frustrates that purpose by requiring previous incidents of sexual harassment before a school can be held liable. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

will avoid such harm.<sup>68</sup> In addition, this standard promotes a view of sexual harassment, especially between students, as acceptable behavior as long as no one is “actually complaining.”<sup>69</sup> Further, the actual notice standard incentivizes schools to turn a blind eye or even actively avoid knowing about incidents of sexual harassment because the less it knows, the more likely it will be insulated from liability.<sup>70</sup> This is exacerbated by the OCR’s policy that requires schools to have the opportunity to voluntarily come into compliance after an abuse occurs before they lose federal funding.<sup>71</sup>

The case *Hill v. Cundiff* is an especially egregious example, highlighting how a lack of effective policies and the inadequate training of employees can lead to the very harm Title IX is supposed to prevent.<sup>72</sup> In *Hill*, an eighth-grade girl reported to a teacher’s aide that a much older seventh-grade boy had propositioned her multiple times to have sex with him in a bathroom.<sup>73</sup> The teacher’s aide was already aware that this male student had propositioned other female students and had reported those incidents to the principal.<sup>74</sup> The principal, who had the responsibility to hear these reports and “take appropriate action,” informed the aide that they needed to catch him in the act to justify any disciplinary action.<sup>75</sup> During the same month, another female student reported that this male student had touched her inappropriately.<sup>76</sup> Despite these reports and the student’s history of violence and sexual misconduct, the principal found no reason to discipline him, claiming these reports were just one student’s word against another’s.<sup>77</sup>

Largely due to inadequate training, the principal had established his own policy for addressing reports of sexual harassment.<sup>78</sup> Before he would discipline a student accused of sexual harassment, he required either: (1) the student be “caught and proven” performing a sexual act or; (2) there be physical evidence of sexual harassment or; (3) the student admit guilt.<sup>79</sup> As a result of this policy and the principal’s response to her report, the teacher’s aide devised a sting operation in which the eighth-grade student would tell the male student that she “would do it” in order to “set him up.”<sup>80</sup> She ended up meeting the accused male student in a different bathroom than the one the teacher’s aide intended.<sup>81</sup> The student was raped before the aide or any other school employee intervened.<sup>82</sup> The Eleventh Circuit held that there was a dispute of material fact as to whether the school had actual knowledge, even

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<sup>68</sup> Byrne, *supra* note 66, at 618; see *Delgado v. Stegall*, 367 F.3d 668, 670, 672 (7th Cir. 2004) (holding that actual knowledge of the *risk* of misconduct is not actual knowledge. Even though the teacher had made advances to three other students because they had never complained, the school was not put on notice) (emphasis added).

<sup>69</sup> Shaflucas, *supra* note 50, at 325.

<sup>70</sup> See, e.g., Byrne, *supra* note 66, at 618; Cantalupo, *supra* note 41, at 227.

<sup>71</sup> Byrne, *supra* note 66, at 618.

<sup>72</sup> See generally *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015).

<sup>73</sup> *Id.* at 956–58.

<sup>74</sup> *Id.* at 960.

<sup>75</sup> *Id.* at 957, 960.

<sup>76</sup> *Id.* at 960.

<sup>77</sup> *Id.* at 958.

<sup>78</sup> *Id.* at 956–58.

<sup>79</sup> *Id.* at 958.

<sup>80</sup> *Id.* at 962.

<sup>81</sup> *Id.* at 963.

<sup>82</sup> *Id.*

though the girl was used in a sting operation.<sup>83</sup> Because the teacher's aide was not an "appropriate person," the case was remanded for a jury to determine whether the principal or any other appropriate school official knew enough to establish the school had actual notice.<sup>84</sup> In this case, the school's failure to properly train administrators and employees led to the principal's abominable policy that required harm to students before any disciplinary actions would be taken. Even with such a policy in place, Title IX could not guarantee the school would be held liable, highlighting how the actual notice standard falls dramatically short in protecting students from traumatic and avoidable harm.

In addition to failing to incentivize schools to implement effective preventative policies, the actual notice standard leaves plaintiffs with a nearly insurmountable burden of proof. First, many courts have held that even if a school knows there is a possibility of sexual harassment, it does not constitute actual notice.<sup>85</sup> Second, the courts are split as to whether the actual notice has to be of sexual harassment experienced by that victim or if incidents of a particular perpetrator towards other students are sufficient.<sup>86</sup> In cases where the school must have notice of incidents towards that plaintiff, the standard is especially ineffective. It requires that the plaintiff be a victim multiple times before they have a cause of action and protects schools that foster a culture in which sexual harassment is tolerated, as long as the harassers have multiple victims. Third, requiring students to inform an "appropriate person" is often unrealistic. Courts' holdings as to who qualifies as an appropriate person have been inconsistent.<sup>87</sup> That combined with students' heightened vulnerability and immaturity make it difficult for them to know who to tell, unless the school has a clear policy that has been directly communicated to students.<sup>88</sup>

In addition, even when a student has reported previous incidents of sexual harassment to an appropriate person, that student still has to produce a long list of evidence to prove notice in court. The list of evidence from the American Jurisprudence Proof of Facts includes: "the date(s) and time(s) of the actual sexual harassment incidents"; "the presence and identities of any school district personnel at the incident(s)"; "the date(s), recipient(s), and contents of reports concerning the incident(s) made to district personnel by the student victim"; "the date(s), recipient(s), and contents of reports

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<sup>83</sup> *Id.* at 985.

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g.,* Delgado v. Stegall, 367 F.3d 668, 670 (7th Cir. 2004) (holding that knowledge of risk of misconduct is not actual knowledge where a music teacher made unwanted advances to a student who also worked as his office assistant); *see also* Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 357–58, 361 (3rd Cir. 2005) (A track coach engaged in a sexual relationship with a student. He was seen talking to her late at night in a car and standing close to her frequently in the hallways. The relationship became a topic of discussion amongst students and the principal and vice principal were made aware of it by several parents. The court held that actual notice could not be based on the possibility of an inappropriate relationship.); Baynard v. Malone, 268 F.3d 228, 238 (4th Cir. 2001) (holding that being aware of the potential for abuse could not lead to a conclusion that a principal was in fact aware of the abuse where the principal was informed by multiple people that a sixth-grade teacher had previously sexually abused students and did not take action to prevent the abuse of the plaintiff).

<sup>86</sup> Cantalupo, *supra* note 41, at 228.

<sup>87</sup> *Id.* at 227; *see Baynard*, 268 F.3d at 239. (holding that even though a principal supervised and evaluated a teacher, she only had the authority to make recommendations regarding hiring, firing, transferring, or suspending teachers, and thus the principal was not an appropriate person who could have taken corrective authority).

<sup>88</sup> Byrne, *supra* note 66, at 618.

concerning the incident(s) made to the district by district personnel”; “the date(s), recipient(s), and contents of reports concerning the incident(s) made to the district by the student victim's parents”; “whether any of the reports were in writing”; “whether any of the reports were made orally”; “whether the student victim and/or his or her parents met with district personnel concerning any of the incident(s), and if so, the date(s) and locations of such meetings, and the name(s) of persons present at the meeting”; and “the content of any meeting or conversation by the student or the student victim's parents with district personnel regarding the incident(s) or reports of the incident(s).”<sup>89</sup> Many parents and students do not know what steps to take to report an incident, and even if they do talk to school officials, they may not properly document those interactions as evidence that the school had actual notice.<sup>90</sup> Even if a student can prove the school had actual notice, more evidence is needed to prove a school's deliberate indifference to the known acts of sexual harassment.<sup>91</sup> With such high hurdles to overcome, courts have fashioned a standard for liability clearly favoring school districts.

With a standard so favorable to school districts and because administrative remedies require a school be able to voluntarily comply after sexual harassment has occurred, the actual notice standard requires students be harmed before schools have to take action. This undermines the key purposes of Title IX and leaves students looking for other solutions to the pervasive problem of sexual harassment in schools.

### III. STATE ANTI-DISCRIMINATION STATUTES AND DIFFERENT STANDARDS OF LIABILITY

In light of Title IX's inability to address the detrimental impact that peer-on-peer sexual harassment has on students, activists have looked to state anti-discrimination laws for relief.<sup>92</sup> These laws often directly bar discrimination either “in all places of public accommodation or in educational programs,”<sup>93</sup> regardless of their funding source. This gives courts the opportunity to apply a different knowledge standard and in turn require that schools implement preventative programs. But we should not rest on state statutes to solve this problem. As of now, only a few states have heard cases against schools for peer-on-peer sexual harassment, and those that have, have applied a variety of knowledge standards. This Section will look at four states—New Jersey, Missouri, Vermont, and California—that have heard these kinds of cases and

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<sup>89</sup> Anne M. Payne, *Proof of Public School District Liability for Student Peer-on-Peer Sexual Harassment or Harassment on the Basis of Gender or Sexual Orientation*, 106 AM. JUR. PROOF OF FACTS 3d 437 § 29 (Nov. 2018) (originally published 2009).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Asaf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN'S RTS. L. REP. 117, 119 (2007–2008).

<sup>93</sup> Graves & Onyeka-Crawford, *supra* note 36, at 24; *see, e.g.*, ALASKA STAT. § 14.18.010 (2019); ARK. CODE ANN. § 6-18-514 (2019); CAL. EDUC. CODE § 220 (West 2019); FLA. STAT. ANN. § 1000.05 (LexisNexis 2019); IDAHO CODE § 67-5909 (2019); ME. REV. STAT. ANN. tit. 5, § 4602 (2019); MASS. GEN. LAWS ch. 151C § 2 (2019); MINN. STAT. § 363A.13 (2018); MO. REV. STAT. § 213.065 (2019); N.H. REV. STAT. ANN. § 193-F:3 (2019); N.J. STAT. ANN. § 10:5-4v (West 2019); 42 R.I. GEN. LAWS § 42-112-1 (1956); TENN. CODE ANN. § 4-21-101 (2019); VT. STAT. ANN. tit. 9, § 4502(a) (2019) (examples of state statutes that prohibit discrimination in schools or public accommodations).

examine the standard those courts have set. Ultimately, because these standards are too disparate and because so few states have weighed in, they will not provide the nationwide shift necessary to reduce and prevent incidents of sexual harassment in schools.

A. CONSTRUCTIVE NOTICE STANDARD: NEW JERSEY AND MISSOURI

While the exact standard of liability under these statutes varies from state to state, some follow the Supreme Court's precedent for hostile work environment claims under Title VII.<sup>94</sup> In hostile work environment cases, the Court applies a constructive notice standard and looks at whether the employer reasonably responded.<sup>95</sup> In addition, plaintiffs can prevail by showing the hostile work environment was either severe *or* pervasive, rather than having to show it was severe, pervasive, *and* objectively offensive.<sup>96</sup> Finally, the Court has held that hostile work environments can be established through the totality of the circumstances, allowing plaintiffs to show evidence that other employees were harassed in order to show the environment was severe or pervasive and to establish the employer had constructive notice.<sup>97</sup> A constructive notice standard is the most likely to incentivize schools to adopt preventative actions to eliminate sexual harassment in schools. Because a school is liable if it knew or should have known the harassment would occur, constructive notice allows students to argue that when a school does not properly educate employees and students, and does not provide effective channels for reporting, it should know that students will harass other students.

1. New Jersey's Law Against Discrimination in *L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education*

New Jersey was the first state to draft an anti-discrimination statute, when it enacted the Law Against Discrimination ("LAD") in 1945.<sup>98</sup> The LAD says, "[a]ll persons shall have the opportunity to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sex, gender identity or expression . . ." <sup>99</sup>In *L.W.*, the New Jersey Supreme Court held that the LAD recognizes a cause of action against a school district for peer-on-peer sexual harassment.<sup>100</sup> Due to his perceived sexual orientation, *L.W.* endured over five years of intensifying abuse.<sup>101</sup> It started in fourth grade as verbal slurs but by high school escalated into physical attacks and molestation, causing him to eventually transfer schools.<sup>102</sup>

The court concluded that the LAD allowed an individual right of action for peer-on-peer sexual harassment and noted that "the overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of

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<sup>94</sup> Orr, *supra* note 92, at 141–42.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 399 (2007).

<sup>99</sup> N.J. STAT. ANN. § 10:5-4 (West 2019).

<sup>100</sup> *L.W.*, 189 N.J. at 475–81.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

discrimination.”<sup>103</sup> It further noted that the legislature “declared that ‘discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State . . . [and] that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm.’”<sup>104</sup> With such strong legislative underpinnings the court found that the LAD had “broad remedial objectives[,]” and “the more broadly [it] was applied the greater its antidiscriminatory impact.”<sup>105</sup> Finally, applying the LAD broadly, the court concluded that it permits a cause of action against a school district for “failure to reasonably address that harassment has the effect of denying to that student any of a school’s ‘accommodations, advantages, facilities or privileges.’”<sup>106</sup> Here, the court first likened claims for peer-on-peer sexual harassment to hostile work environment claims.<sup>107</sup> The court held that a claim must show that the discriminatory conduct would not have occurred “but for” the student being a part of a protected class, and that a reasonable student similarly situated would consider that discrimination so severe and pervasive that it created an “intimidating, hostile, or offensive school environment,” and that the school district did not reasonably respond to the conduct.<sup>108</sup>

Next the court discussed the circumstances in which a school district can be held liable for peer-on-peer sexual harassment. Continuing to apply the same standard as that for a hostile work environment claim, it held that students are entitled to the same protections from unlawful discrimination in learning environments as adults are in the workplace.<sup>109</sup> Based on this, it determined that a school district is liable when it “knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment.”<sup>110</sup> The court recognized its departure from Title IX’s standard of actual notice and laid out specific distinctions between the two statutes.<sup>111</sup> First, Title IX prohibits discrimination based on sex only, whereas LAD prohibits discrimination against a long list of protected classes.<sup>112</sup> Second, Title IX prohibits only recipients of federal funds from sex discrimination because it was enacted with Congress’ Spending Clause authority, which imposes contract principles between the government and the fund recipient.<sup>113</sup> The LAD, on the other hand, applies to all places of public accommodation, including schools, regardless of their funding.<sup>114</sup> Third, private rights of action under Title IX have been judicially implied, whereas the LAD expressly provides victims of discrimination a private cause of action to seek legal and equitable remedies.<sup>115</sup> Finally, the court noted that this was not a standard of strict liability requiring schools to

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<sup>103</sup> *Id.* at 399 (quoting *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988)).

<sup>104</sup> *Id.* at 400 (quoting N.J. STAT. ANN. § 10:5-3 (West 2019)).

<sup>105</sup> *Id.* (quoting *Ptaszynski v. Unwaneme*, 371 N.J. Super. 333, 345 (2004)).

<sup>106</sup> *Id.* at 402.

<sup>107</sup> *Id.* at 402–03.

<sup>108</sup> *Id.* (citing *Lehman v. Toys R Us, Inc.*, 132 N.J. 587, 603 (1993) (enumerating the standard for damages for hostile work environment claims)).

<sup>109</sup> *Id.* at 406.

<sup>110</sup> *Id.* at 407.

<sup>111</sup> *Id.* at 405.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* 405–06.

eliminate all peer-on-peer harassment but instead requires “school districts to implement effective preventive and remedial measures to curb severe and pervasive discriminatory mistreatment.”<sup>116</sup>

By distinguishing the LAD from Title IX and recognizing its goal is to eliminate discrimination in New Jersey, the court set a strong foundation to hold schools accountable for failing to implement effective policies and procedures to prevent sexual harassment on their campuses. These distinctions from Title IX’s actual notice standard seem to provide students a remedy where the actual notice standard falls short. If every state would analyze these claims in the same way, there may be hope that state statutes will solve the problem. However, not all states are setting a constructive notice standard and among the states that have, only New Jersey has explicitly said that schools are required to use both preventative and remedial procedures in order to avoid liability.

## 2. Missouri Human Rights Act in *Doe v. Kansas City*

Similar to New Jersey’s LAD, the Missouri Human Rights Act (“MHRA”) prohibits discrimination in public accommodations. It states,

[i]t is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation . . . .<sup>117</sup>

Even though the MHRA does not explicitly include public schools in its definition of public accommodations, the Missouri Court of Appeals held in *Doe v. Kansas City* that it does provide individual claims against school districts for peer-on-peer sexual harassment.<sup>118</sup> The court, comparing these cases to claims of peer sexual harassment in the workplace, held that a “school district can be held liable if it knew or should have known of the harassment and failed to take prompt and effective remedial action.”<sup>119</sup> Like in *L.W.*, the court noted that students are entitled to at least as much protection from sexual harassment and discrimination as adults are in the workplace.<sup>120</sup> It justified this standard by pointing out that schools have even more control and influence over students in a classroom than an employer does in a workplace.<sup>121</sup> Again like in *L.W.*, the Court distinguished the MHRA from Title IX by finding it “creates an express cause of action for damages for sex discrimination that is not contingent upon the receipt of federal or state funds.”<sup>122</sup>

<sup>116</sup> *Id.* at 407.

<sup>117</sup> MO. REV. STAT. § 213.065 (2019).

<sup>118</sup> *See, e.g., id.* at § 213.010(16); *Doe v. Kansas City*, 372 S.W.3d 43, at 51 (Mo. Ct. App. 2012) (rejecting the school’s argument that because schools are not open to all members of the public, they are not “open to the public” under the MHRA’s definition of public accommodations; instead the Court held that a facility can be “open to the public” even if it serves only a subset or segment of the public).

<sup>119</sup> *Doe*, 372 S.W.3d at 54.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (citing *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646 (1999)).

<sup>122</sup> *Id.* at 53.

The court in *Doe* considered the legislature's intent when determining that the MHRA's broad remedial goal was to allow all citizens enjoyment of any public accommodation without discrimination.<sup>123</sup> The court did not explicitly say a school district will be held liable for failing to implement effective preventative policies.<sup>124</sup> However, by setting the standard at "knew or should have known" a student can argue that under the MHRA, a school should have known peer-on-peer sexual harassment would take place because it failed to implement effective preventative policies or because it failed to educate students and teachers about what sexual harassment is and that it will not be tolerated.<sup>125</sup> Despite this possible argument, the MHRA and the court's holding in *Doe* are focused on a school's remedial measures. While constructive notice certainly broadens students' abilities to hold schools accountable, any backward-looking standard will fail to incentivize schools to take necessary steps to prevent sexual harassment. Without an incentive, it is unrealistic to think that the harm caused by peer-on-peer sexual harassment will be eliminated.

### 3. The Impact of a Constructive Notice Standard

As the court in *L.W.* stated, "[e]ducators have [no] greater obligation . . . than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others."<sup>126</sup> Holding schools liable if they knew or should have known about acts of peer-on-peer sexual harassment forces schools to consider the foreseeability of harassment.<sup>127</sup> Foreseeability is essential to incentivizing schools to proactively address sexual harassment by shifting the inquiry from whether the school responded to each individual incident to whether the school is developing a culture that does not tolerate harassment. As noted in *L.W.*, whether the school district responded reasonably to a hostile learning environment must be measured in light of the totality of the circumstances.<sup>128</sup> Under this standard, the inquiry can look at whether the school followed regulations suggested by the DOE or other model policies when determining a school's liability.<sup>129</sup>

## B. EXHAUSTING ADMINISTRATIVE REMEDIES STANDARD: VERMONT

### 1. Vermont's Public Accommodations Act in *Washington v. Pierce*

The Vermont Supreme Court decided a completely different standard exists for claims of peer-on-peer sexual harassment under its Vermont Public Accommodations Act ("VPAA"), which says that,

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<sup>123</sup> *Id.* at 52.

<sup>124</sup> *See id.* at 54 (the court explains the fifth element necessary for claims against a school for peer-on-peer sexual harassment, the "school district knew or should have known of the harassment and failed to take prompt and effective remedial action").

<sup>125</sup> *Id.*

<sup>126</sup> *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 406 (2007) (quoting *Frugis v. Bracigliano*, 177 N.J. 250, 268 (2003)).

<sup>127</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 162 (2009).

<sup>128</sup> *L.W.*, 189 N.J. at 408.

<sup>129</sup> Sacks & Salem, *supra* note 127, at 162.

an owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the . . . sex, sexual orientation, or gender identity of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.<sup>130</sup>

In the case *Washington v. Pierce*, the court recognized key differences between the VPAA and Title IX, namely that there are no contractual considerations under the VPAA because it requires all Vermont schools to comply regardless of their funding sources.<sup>131</sup> In light of this, the court held that Title IX's deliberate indifference standard was not appropriate for peer-on-peer sexual harassment cases under the VPAA.<sup>132</sup> However, this did not lead the court to apply a constructive notice standard.<sup>133</sup> Instead, it found that the plaintiff's proposed standard, which finds schools liable if they "knew or should have known there was harassment severe and pervasive enough to deny a student all the privileges and benefits of the school," was too truncated because it did not consider how a school responded to complaints of harassment.<sup>134</sup> Rather than following the standard of hostile work environment cases by adding language that would hold schools liable only for failure to respond to actual or constructive knowledge of sexual harassment, the court abandoned the standard all together.<sup>135</sup>

Instead, it established that to bring an action under the the VPAA for peer-on-peer sexual harassment the student must show: first, that he or she was the victim of "severe, pervasive, and objectively offensive" harassment which deprived him or her of the full benefits provided by the school; and second, that "the plaintiff exhausted the administrative remedies available, or that circumstances existed that relieved the plaintiff of the exhaustion requirement."<sup>136</sup> The court pointed out several advantages of this standard over both Title IX's actual notice standard and the constructive notice standard suggested by the plaintiff.<sup>137</sup> It reasoned that requiring plaintiffs to exhaust all administrative options would allow courts to avoid analyzing whether the school had knowledge of the harassment or whether notice was sufficient by providing an objective criteria for evaluating conduct.<sup>138</sup> In addition, because one exception to exhausting administrative remedies was if "the educational institution [did] not maintain such a policy," the court felt schools would be incentivized to "adopt, publicize, and enforce" anti-harassment policies including procedures for reporting incidents of harassment.<sup>139</sup>

Moving to an objective criterion seems to require schools to implement effective policies that will lead to more consistent outcomes, yet it overlooks

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<sup>130</sup> VT. STAT. ANN., tit. 9, § 4502 (a) (2019).

<sup>131</sup> See *Washington v. Pierce*, 895 A.2d 173, at 184 (Vt. 2005).

<sup>132</sup> *Id.* at 184.

<sup>133</sup> *Id.* at 185.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 186.

<sup>137</sup> *Id.* at 187.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

how easily schools can avoid liability by hiding behind complicated administrative remedies. This standard further disincentivizes schools from clearly communicating to students how to navigate its administrative remedies. This is an example of how far off individual states can be when departing from Title IX's inadequate actual notice standard, further demonstrating that state statutes are not a reliable solution.

## 2. The Impact of the Exhausting Administrative Remedies Standard

The court overstated how much schools would be incentivized to clearly communicate their policies with students; simply having the policies in place will allow schools to avoid liability. This standard puts the burden on students to know all the administrative remedies a school has to offer, including who the school has designated as "appropriate employees" to receive notice.<sup>140</sup> It falls short of the court's expectations on how much schools would educate students on their policies for reporting because not being aware of the policies does not count as a circumstance that relieves a plaintiff from exhausting administrative remedies.<sup>141</sup> In addition, the standard can cause further harm because administrative remedies can be lengthy, and it may foreclose a student from pursuing necessary injunctive relief in a timely manner.<sup>142</sup>

Compared to the constructive notice standard applied in *L.W.* and *Doe*, this standard completely fails to incentivize schools to implement effective preventative policies and procedures, just like the actual notice standard under Title IX. If the goal of these statutes is that no student will experience sexual harassment at school, then claims brought under them must apply a standard that promotes proactive measures including education to curb harassment.<sup>143</sup> Schools should inform students what harassing conduct is and that it is not permitted, and they should clearly communicate what students should do if they are victims of sexual harassment at school.<sup>144</sup> The court's holding in *Pierce* highlights how disparate the notice standards can be under state statutes and why they are not reliable for reducing and preventing peer-on-peer sexual harassment in schools.

## C. ACTUAL NOTICE: CALIFORNIA

While many states' anti-discrimination statutes prohibit discrimination in schools regardless of their funding source, some only apply to those receiving funding from the state, just as Title IX only applies to those receiving federal funding. These states run into the same contractual limitation as Title IX, leading to a requirement that schools have actual notice

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<sup>140</sup> Emily Montgomery, Note, *Me and Julio Down by the Schoolyard: An Analysis of School Liability for Discriminatory Peer Sexual Harassment Under Vermont Law*, 35 VT. L. REV. 515, 534 (2010).

<sup>141</sup> See generally *Allen v. Univ. of Vt.*, 973 A.2d 1183 (Vt. 2009) (Student reported being raped to appropriate school officials to classify the incident as sexual assault, but her failure to follow the school's precise procedure for sexual harassment precluded her from filing a claim under the Vermont Public Accommodations Act ("VPAA"). Even though she reported to individuals who could have referred her to the appropriate designees for sexual harassment complaints, the school was not liable because she failed to exhaust all administrative remedies).

<sup>142</sup> Montgomery, *supra* note 140, at 534.

<sup>143</sup> See *id.* at 535.

<sup>144</sup> *Id.*

of sexual harassment in order to be held liable. For students in these states there is no hope that schools will be incentivized to proactively prevent incidents of peer-on-peer sexual harassment.

1. California's Education Code § 220 in *Donovan v. Poway Unified School District*

California explicitly prohibits discrimination against students who are members of protected classes in educational institutions.<sup>145</sup> California's Education Code § 220 applies to "any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid."<sup>146</sup> Finding that the California Legislature relied on Title IX when drafting this anti-discrimination law, the California Court of Appeal held that the standard of liability for peer-on-peer sexual harassment is the same as for a claim brought under Title IX: the school must have responded with deliberate indifference to actual knowledge of known harassment.<sup>147</sup> In *Donovan v. Poway Unified School District*, the court noted that, like Title IX, § 220 conditioned the prohibition on the receipt of public funding and has procedures for administrative enforcement. Therefore, it refused to apply a standard similar to one applied to claims under the California Fair Employment and Housing Act ("FEHA") and instead required a more stringent standard of liability.<sup>148</sup>

While rejecting the FEHA standard, the court equated constructive notice to the doctrine of respondeat superior, implying that to hold schools liable for acts of peer-on-peer harassment if they knew or should have known about such acts would be to hold schools responsible for the actions of its students.<sup>149</sup> This conclusion is not supported by the holdings in *L.W.* and *Doe*, which, under a standard of constructive notice, held schools liable for their failure to take effective measures to end the discrimination they knew or should have known about.<sup>150</sup>

2. Impact of Repeating the Title IX Actual Notice Standard

The court rejected the argument that this standard simply duplicates existing federal law because § 220 protects students from "discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation . . ." and not just on the basis of sex.<sup>151</sup> While the statute does protect more students than Title IX, it fails to incentivize schools to proactively reduce incidents of peer-on-peer sexual harassment by repeating the same stringent actual notice standard. On the contrary, just like the standard set in Title IX cases, the standard for claims

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<sup>145</sup> CAL. EDUC. CODE § 220 (West 2019).

<sup>146</sup> *Id.*

<sup>147</sup> *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285, at 308–10 (Ct. App. 2008).

<sup>148</sup> *Id.* at 312.

<sup>149</sup> *Id.* at 313.

<sup>150</sup> See *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 404 (2007) ("When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile.") (quoting *Lehman v. Toys R Us, Inc.*, 132 N.J. 587, 626 (1993)) (emphasis omitted).

<sup>151</sup> CAL. EDUC. CODE § 220 (West 2019); *Donovan*, 84 Cal. Rptr. 3d at 313–14.

brought under § 220 will incentivize schools to avoid knowledge of acts of sexual harassment.

So few states have heard individual claims against schools for peer-on-peer sexual harassment that it is impossible to conclude that these statutes are the solution to preventing future incidents. Recognizing how disparate these statutes are and considering the variety of standards set in state courts so far, it is most likely that even as more states weigh in, it will not lead to a nationwide shift of how schools address and attempt to prevent sexual harassment on their campuses.

#### IV. STATE STATUTES ARE TOO DISPARATE TO SOLVE THE PROBLEM OF PEER-ON-PEER SEXUAL HARASSMENT IN SCHOOLS

While constructive notice is the most likely way to incentivize schools to implement effective policies and procedures to prevent future incidents of peer-on-peer sexual harassment, it is unclear that state statutes will lead to any nationwide reform. These statutes provide protection in different ways, and there is no guarantee every state will apply a standard for claims that will properly incentivize schools. Some directly prohibit sex discrimination in education or public accommodations, others prohibit bullying—which includes forms of harassment, and still others, just as Title IX, prohibit discrimination only for funding recipients.<sup>152</sup> With so many differences and because each statute has a unique legislative history, courts will be left with several options on which knowledge standard to apply. Most state courts have not weighed in on the standard for claims of peer-on-peer sexual harassment. It is too soon to conclude that most will apply a known or should have known standard. Even in New Jersey and Missouri, where it is possible that schools will be liable for failure to implement effective policies and procedures, what constitutes effective is still left to be decided.

##### A. CONSTRUCTIVE NOTICE DOES NOT DO ENOUGH TO PREVENT PEER-ON-PEER SEXUAL HARASSMENT

The constructive notice standard provides the best opportunity to hold schools accountable when they have not implemented effective preventative policies and procedures, but it is not clear that prevention is currently the main goal. If OCR guidelines are the standard for effective policies and procedures, then whether a school can be held liable is based on the school's policies on how to respond to reports. Examples of this kind of inquiry include: if schools have trained their employees to recognize and report sexual harassment, what duties the Title IX coordinator has to oversee

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<sup>152</sup> Statutes that prohibit discrimination in public accommodations: MO. REV. STAT. § 213.065 (West 2019); N.J. STAT. ANN. § 10:5-4 (West 2019); R.I. GEN. LAWS 1956, § 42-112-1 (2019); TENN. CODE ANN. § 4-21-101 (2019); VT. STAT. ANN. tit. 9, § 4502(a). Statutes that prohibit discrimination in education: ALASKA STAT. § 14.18.010 (2019); CAL. EDUC. CODE § 220 (West 2019); FLA. STAT. ANN. § 1000.05 (2019); IDAHO CODE ANN. § 67-5909 (7) (West 2019); ME. REV. STAT. ANN. § 4602 (2019); MASS. GEN. LAWS ch. 151C § 2 (201) (West 2019); MINN. STAT. ANN. § 363A.13 (2018); TENN. CODE ANN. § 4-21-101 (2019). Anti-bullying statutes: ARK. CODE ANN. 6-18-514 (2019); N.H. REV. STAT. ANN. 193-F:3 (2019).

complaints, and whether the school has an adequate grievance procedure.<sup>153</sup> The only proactive measure the OCR suggests is to provide preventative education programs, which usually come in the form of one assembly at the beginning of the school year, if at all.<sup>154</sup>

Even though courts looked at hostile work environment cases when they decided to apply the known or should have known standard, it seems unlikely this standard will have as great an impact in schools as it has in the workplace. “Employers have taken control over gateway behaviors” in an effort to eliminate even mildly inappropriate conduct that might lead to liability, whereas schools are not managing the day-to-day culture of students in the same way.<sup>155</sup> As long as the focus of liability is on how schools respond, there is no incentive to invest resources to manage and change the day-to-day culture.

Besides schools’ poor management of such gateway behaviors, it seems students do not trust that school officials will respond effectively to actual sexual harassment given that only a fraction of students are willing to report incidents.<sup>156</sup> According to the American Association of University Women report, *Crossing the Line*, half of all students who experienced sexual harassment in school did not tell anyone about it, and only 9 percent informed a school official.<sup>157</sup> Several students reported that when sexual harassment occurred in front of a teacher, very few did anything about it.<sup>158</sup> This creates a catch-22 in which schools are not aware of the pervasiveness of sexual harassment and are not motivated to take action, while students are not willing to inform them for lack of an effective response. The report also showed that the majority of sexual harassment comes in the form of unwelcome sexual comments, jokes, and gestures, indicating a need for education about what sexual harassment is and “that trying to be funny or acting stupid are not excuses for sexual harassment.”<sup>159</sup>

Perhaps a statutory framework is not the best solution, as it puts too much emphasis on the individual victims. Instead, we might look at sexual harassment in schools as a public policy issue and address it with public policy solutions. In the American Association of University Women study, students gave several suggestions for reducing sexual harassment in their schools “including designating a person they can talk to, providing online resources, and holding in-class discussions[,]” as well as “[a]llowing students to anonymously report problems . . . ,” and enforcing policies and punishing perpetrators.<sup>160</sup> In addition, the Centers for Disease Control and Prevention (“CDC”) examined public policy solutions and found two effective programs that were developed with middle and high school

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<sup>153</sup> See, e.g., Ali, *supra* note 3, at 5 -6; Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1066 (2015) (pointing out that the OCR’s guidelines devote less than one page to suggesting schools take preventive measures against sexual assault and devote at least fifteen pages to suggesting how schools respond to sexual assault).

<sup>154</sup> Silbaugh, *supra* note 153, at 1066–67.

<sup>155</sup> *Id.* at 1067.

<sup>156</sup> Hill & Kearl, *supra* note 1, at 2–3.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 32.

<sup>159</sup> *Id.* at 11, 33.

<sup>160</sup> *Id.* at 4 (citations omitted).

students: *Safe Dates* and *Shifting Boundaries*.<sup>161</sup> *Safe Dates* is a “10-session curriculum addressing attitudes, social norms, and healthy relationship skills, a 45-minute student play about dating violence, and a poster contest.<sup>162</sup>” *Shifting Boundaries* is a six to ten week dating violence prevention program that uses “temporary building-based restraining orders, a poster campaign to increase awareness of dating violence, and ‘hotspot’ mapping to identify unsafe areas of the school for increased monitoring.”<sup>163</sup> In addition to pointing out two effective programs, the CDC noted that one-session educational programs aimed at educating students are not effective.<sup>164</sup> While they may increase awareness of the problem, research shows they have not been effective in changing behaviors that are developed and reinforced throughout a student’s life.<sup>165</sup>

Beyond just educating students, a public policy approach uses multiple strategies to address the problem and reinforce positive behavioral norms across multiple environments.<sup>166</sup> This includes bystander training, which empowers observers to speak up against sexist language and rape myths and to step in when they see unacceptable behavior.<sup>167</sup> This kind of training reinforces “positive norms about gender, sexuality, and violence.”<sup>168</sup> Finally, this comprehensive approach pays special attention to environments within the school that are more likely to foster negative norms regarding gender, sex, and violence.<sup>169</sup> For example, one program, directed at male athletes, has coaches engage in several targeted conversations that reinforce respectful relationships and directly address dating violence.<sup>170</sup>

If peer-on-peer sexual harassment can be avoided, that is certainly the best way to ensure that all students have equal access to education—which is the main goal of both Title IX and states anti-discrimination statutes. Unfortunately, even when courts have applied a known or should have known standard to claims brought under state statutes, it established a backward-looking remedy for victims of sexual harassment. Ultimately, the current legislative solutions have failed to incentivize schools to focus on prevention and are not effectively eliminating sexual harassment from schools.

#### B. A NEW FEDERAL STATUTE THAT CAN INCENTIVIZE SCHOOLS TO PREVENT PEER-ON-PEER SEXUAL HARASSMENT

Moving forward, the best solution is to draft a federal statute that prohibits sex discrimination in educational institutions, regardless of their funding source, and provides an individual cause of action for victims. By

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<sup>161</sup> CTRS FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE CAMPUSES: LESSONS FROM RESEARCH AND PRACTICE, 6 (2014), <https://www.notalone.gov/schools/> [<https://perma.cc/2LVC-VF5K>].

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> *Id.* at 8.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 4.

<sup>167</sup> *Id.* at 8.

<sup>168</sup> *Id.* at 4.

<sup>169</sup> *Id.* at 7–8.

<sup>170</sup> *Id.*

eliminating the condition of funding, courts will be able to set a standard that schools are liable if they knew or should have known that peer-on-peer sexual harassment would occur, like the standard applied in claims brought under Title VII. Under this statute, whether a school should have known about incidents of peer-on-peer sexual harassment will include an inquiry into whether that school has followed the OCR's recommendations regarding what school policies and procedures should be in place. This will allow the statute to be successful where previous legislation (both Title IX and state anti-discrimination statutes) has fallen short by focusing on public policy in the OCR's recommendations. The recommendations should focus on prevention as much as on schools' responses. Using the CDC's recommendations as guidelines, the OCR should recommend that schools have educational programs that continue throughout the school year which teach faculty, staff, and students what sexual harassment is and that it will not be tolerated. The education should include bystander training and training for coaches and any other adults that lead extra-curricular activities. If a school shows it followed all the guidelines recommended by the OCR, it can be an affirmative defense to individual claims brought under the new statute.

In addition to recommendations focused on prevention, the OCR will still provide guidance on how schools should respond to incidents of sexual harassment. Its recommendations should focus on instilling trust in students so that they will actually report. Students should be told regularly how to report incidents, including the name and contact information of appropriate school officials, and this contact information should be posted throughout the school. Also, students should be aware of the disciplinary actions the school will take if they are found harassing another student. Finally, the OCR will recommend that schools provide online resources to students, including a way to anonymously report incidents of sexual harassment.

While anonymous reporting raises concerns about due process for those being accused, it is necessary to increase the percentage of students who are willing to report so that schools are fully informed about how pervasive the problem is on their campuses. The OCR can provide specific help and guidance in these cases. It should recommend that the school recognize that anonymous reports may preclude a fair investigation, and therefore, a single anonymous report about a particular alleged perpetrator should not result in disciplinary action. However, when multiple anonymous reports are raised accusing a particular alleged perpetrator, the school should consider it as notice. In addition, if multiple anonymous reports are submitted, accusing different alleged perpetrators, it should trigger the school to address the issue with the entire student body, plus faculty and staff, in an effort to change the culture at the school.

There is no denying that, in light of the Trump administration's proposed regulations and the way they reduce the OCR's role in reducing and preventing sexual harassment, this solution is farfetched, for now. However, administrations come and go, and sexual harassment has been a pervasive problem in our culture for generations. It demands a solution. The purpose of this note is not to look at the issue in a short-sighted manner but to address the bigger problem and present a long-term solution—a solution that not only provides recovery for victims but educates the public and reduces the number

of future incidents of sexual harassment. If anything, this analysis shows the extent to which the Trump administration's proposed changes will be a step backwards in protecting the civil rights of the mostly female victims, who have missed out on education and employment opportunities because of sexual harassment.

## V. CONCLUSION

In light of the #MeToo movement and the growing awareness of how many women in the United States have been negatively impacted by sexual harassment, it is especially important to redefine norms about gender, sex, and violence in schools. Redefining these norms at an early age can have a lasting impact. Having equal access to education will provide victims with better opportunities in higher education and employment. In addition, educating all students and shifting the culture in primary and secondary schools can have an institutional impact, possibly leading to fewer incidents of sexual violence on college campuses and fewer incidents of sexual harassment in the workplace, as these students move through life and become adults. The sooner that legislation and public policy intervene to shift the culture of sexual harassment in our schools, the more far-reaching its impact will be.