HARASSING SPEECH IN THE PUBLIC SCHOOLS: 
THE VALIDITY OF SCHOOLS' REGULATION 
OF FIGHTING WORDS AND THE 
CONSEQUENCES IF THEY DO NOT 

by 

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Tawnya Brady was in 8th grade when several boys began repeatedly mocking her in the halls and on the bus. She alleged that they yelled “Moo moo” and made vulgar references to her breasts and other parts of her body. She gave it a few weeks to die down, but it only got worse and spread into the classrooms. Tawnya and her mother sued, and the school district paid $20,000 to settle the claim.2

Katy Lyle brought a complaint with the state Human Rights Commission after a friend told her about a bathroom stall at her high school filled with obscene graffiti about her. “The mild ones were ‘Katy Lyle is a slut’ or ‘Katy Lyle is a whore,’” she said.3 Despite more than a dozen complaints, the graffiti remained for 18 months until her brother finally scrubbed everything away except the words chipped into the paint. The Human Rights Commission found in her favor and the school settled the suit for $15,000.4

Cheltzie Hentz told her mother that she was troubled by the foul language and lewd behavior of a group of rowdy boys on her school bus. The boys allegedly repeatedly used profanity, called her obscene names, referred to her genitalia, and suggested that she perform oral sex on her father. Both the U.S. Department of Education’s Office for Civil Rights and the Minnesota Department of Human Rights ruled that her school district had failed to take appropriate action to stop this behavior. Cheltzie Hentz was 6 years old.5

Isolated incidents? Unfortunately not. A survey of 1,600 8-11th graders commissioned by the American Association of University Women and

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3. LEWIS, supra note 1, at 25; See also LILLARD, supra note 1.

4. LEWIS, supra note 1, at 25.

5. Id. at 26; See also LEIGHTY, supra note 1; Amy Saltzman, It's Not Just Teasing, U.S. NEWS & WORLD REP., Dec. 6, 1993, at 73.
conducted in 79 classrooms across the country in February and March, 1993, found that four out of every five teenagers suffer sexual harassment in school. Overall, 76% of the girls and 56% of the boys reported that they had been the targets of sexual comments, jokes, gestures or looks, and 53% of the students—2/3rds of the girls and 42% of the boys—said they had been touched, grabbed or pinched in a sexual way.

What can – and should – schools do about the harassment which their students are suffering? While the issues of hateful and harassing speech and political correctness on college campuses have received a great deal of attention in both the mass media and legal journals, the very real problem of student-to-student harassment in grammar and high schools has only recently been given attention in either forum. More specifically, there has been little attention paid to the questions of whether (1) the First Amendment permits grammar and high schools to control harassing speech by students, (2) schools violate civil rights statutes meant to protect women, minorities and the handicapped if they fail to stop peer harassment, and (3) schools can be held civilly liable for such a failure.


7. Yost, supra note 5; See also Saltzman, supra note 4, at 73; Carin Rubenstein, Fighting Sexual Harassment in Schools, N.Y. TIMES, June 10, 1993, at C8.

8. See, e.g., Michael Hinds, A Campus Case: Speech or Harassment?, N.Y. TIMES, May 15, 1993, at A4. Michael Hinds, Blacks at Penn Drop Charge of Harassment, N.Y. TIMES, May 25, 1993, at A10 (both discussing disciplinary proceedings against University of Pennsylvania student who yelled “Shut up you water buffalo!” at several black sorority women who were making noise outside his dormitory window); Michael Hinds, Semester Starts at Swarthmore on Stormy Note, N.Y. TIMES, January 18, 1994, at A14 (discussing Swarthmore College’s suspension of male freshman for allegedly sexually harassing a fellow freshman who repeatedly said “she did not want to go out with him”).


10. There are several notable exceptions to this in the legal journals. See Karen Mellencamp Davis, Note, Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse, 69 IND. L. J. 1123 (1994); Elizabeth J. Gant, Comment, Applying Title VII “Hostile Environment” Analysis to Title IX of the Education Amendments of 1972 – An Avenue of Relief for Victims of Student-to-Student Sexual Harassment...
Each of these questions will be discussed in the following pages. Section I will discuss the "fighting words" doctrine and the Supreme Court's application of the First Amendment's guarantee of free speech in the schools and conclude that grade and high schools may regulate student speech as long as the speech codes adopted are directed at fighting words generally, and are not content-based. Section II will cover the relevant civil rights statutes and their interpretation and application by the Department of Education's Office of Civil Rights. Finally, Section III will address the issue of whether schools can be held civilly liable for failing to stop peer harassment.

I. DOES THE FIRST AMENDMENT ALLOW SCHOOLS TO REGULATE HATE SPEECH?

The First Amendment's guarantee of freedom of speech is straightforward and contains no qualifications: "Congress shall make no law . . . abridging the freedom of speech . . . ."11 Despite the seeming clarity of this language, it has been, and still is, the source of much controversy. This has been especially true since the Supreme Court held in Gitlow v. New York,12 that the First Amendment applies to the states, including state agencies such as schools, by "incorporation" through the Fourteenth Amendment which provides that states shall not deprive individuals of their constitutional rights without due process of law.13

Sifting through the great body of First Amendment law reveals two key principles supporting a grade or high school's prohibition of hate speech. First, as discussed in part A below, the Supreme Court has held that offensive words which are likely to provoke an immediate violent response by the person addressed are not protected by the First Amendment.14 Second, as discussed in part B below, the Court has held that schools can prohibit speech

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11. U.S. CONST. amend. I.
14. See infra text accompanying notes 15-82.
which materially disrupts class work or involves substantial disorder or invasion of the rights of others.\textsuperscript{15} Taken together, these doctrines allow schools to regulate hateful or harassing speech.

A. The Fighting Words Doctrine

1. Announcement and Subsequent Narrowing of the Doctrine.

The Supreme Court has developed several tests in determining what speech is protected — and not protected — by the First Amendment. One of those tests is the so-called fighting words doctrine first announced in \textit{Chaplinsky v. New Hampshire}.\textsuperscript{16} Chaplinsky was arrested when he was distributing Jehovah's Witness literature on the streets of Rochester, New Hampshire.\textsuperscript{17} He was warned several times that his actions were disrupting the crowd.\textsuperscript{18} After a riot started, a police officer escorted Chaplinsky to the police station and on the way Chaplinsky told the town marshal, "You are a God damned racketeer" and a "Damned Fascist", and described the government of the City of Rochester as "Fascists or agents of fascists."\textsuperscript{19} Chaplinsky was convicted of violating a New Hampshire law which proscribed public insults that were "offensive, derisive or annoying."\textsuperscript{20}

The Supreme Court affirmed Chaplinsky's conviction stating:

\begin{quote}
[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or intend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.\textsuperscript{21}
\end{quote}

The Supreme Court began to narrow the fighting words doctrine begin-

\textsuperscript{15} See infra text accompanying notes 84-143.
\textsuperscript{16} 315 U.S. 568 (1942).
\textsuperscript{17} \textit{Id.} at 569-70.
\textsuperscript{18} \textit{Id.} at 570.
\textsuperscript{19} \textit{Id.} at 569.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 571-72 (emphasis added).
ning with *Cohen v. California.* Cohen was arrested for wearing a jacket bearing the words “Fuck the Draft” while in the Los Angeles County Courthouse. He was convicted of disturbing the peace by offensive conduct. The Supreme Court reversed Cohen’s conviction. It held that to determine if an utterance should be classified as fighting words all the circumstances must be examined, including the personal nature of the insult, the abusive nature of the insult, and the likelihood of immediate retaliation. The Court held that a state could not restrict speech merely because it believed violence would occur. Applying this test, the Court held that the words on Cohen’s jacket were not fighting words because there was no element of personal abuse or immediate likelihood of retaliation and the words were, therefore, constitutionally protected.

The Court further narrowed the fighting words doctrine in *Gooding v. Wilson.* Wilson and a group of people opposing the Vietnam War were arrested when they blocked the door so that recruits could not enter the United States Army Headquarters in Fulton County, Georgia. Wilson was arrested after he said to one of the officers removing the protesters, “White son of a bitch, I’ll kill you. You son of a bitch, I’ll choke you to death.” Wilson was convicted under a Georgia statute which forbid the use of “opprobrious words or abusive language, tending to cause a breach of the peace.”

The Supreme Court reversed the conviction. In doing so, the Court only briefly mentioned fighting words, stating that the holding in *Chaplinsky* was narrow and only prohibited words which “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” The Court’s main reason for overturning the conviction, however, was that the state statute was vague and overbroad because the definitions of “opprobrious” and “abusive” were broader than the fighting words definition. The Court later used *Gooding* as precedent in reversing convictions.

23. *Id.* at 16.
24. *Id.*
25. *Id.* at 26.
26. *Id.* at 20-21.
27. *Id.* at 24.
28. *Id.* at 25.
30. *Id.* at 519 n.1.
31. *Id.*
32. *Id.* at 519.
33. *Id.*
34. *Id.* at 524.
35. *Id.* at 521-22.
that were based on other overbroad offensive language statutes without reaching the issue of whether the language constituted fighting words.36

2. R.A.V. and the Application of the Fighting Words Doctrine to Hate Speech

The Supreme Court revisited the fighting words doctrine recently in a case involving the criminalization of hate speech. In R.A.V. v. City of St. Paul,37 Robert Viktora and several other St. Paul teenagers had made a cross of broken chair legs and burned it inside the fenced yard of a black family that lived across the street.38 He was convicted under St. Paul's Bias-Motivated Crime Ordinance which states:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.39

The Supreme Court overturned the conviction.40

All of the justices agreed that the ordinance was unconstitutional, but they sharply disagreed on their reasoning. Five members of the Court joined in an opinion written by Justice Scalia finding that the problem with the ordinance was that it prohibited expression solely because of its content:

'specifically, the ordinance prohibited only those fighting words based on "race, color, creed, religion, or gender," while permitting fighting words on other topics. According to Justice Scalia:

In its practical operation . . . the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender – aspersions upon a

36. See Rosenfeld v. New Jersey, 408 U.S. 901, 910 (1972) (defendant used the phrase “motherfuckers” when referring to teachers, the school board, and the town at a school board meeting); Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (defendant yelled “you God damn m.f. police”).
38. Id. at 2541.
39. Id. at 2541.
40. Id.
41. Id. at 2542.
42. Id. at 2541.
person’s mother, for example - would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker’s opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would be insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.43

Justice White agreed that the statute was unconstitutional but strongly disagreed with Justice Scalia’s reasoning.44 He argued that while the ordinance reached unprotected conduct, it also punished expressive activity that “causes only hurt feelings, offense, or resentment.”45 Since this expressive activity is protected by the First Amendment, he held that the ordinance was “fatally overbroad and invalid.”46

Justice Stevens also felt that the ordinance was overbroad, but disagreed with Justice White’s view that all fighting words “are wholly unprotected by the First Amendment.”47 Instead of such a categorical approach, Stevens argued that a number of factors should be considered in determining the validity of a content-based regulation. Among the factors are the “content and context” of the speech,48 the “character”49 of the speech, and the “scope of the restrictions.”50 Utilizing these factors, Stevens found that the St. Paul ordinance would be valid were it not overbroad.51

Finally, Justice Blackman drafted a brief concurrence because of his fear about the harm of the decision and the possible motive of the majority.52

43. Id. at 2547-48 (emphasis in original). Justice Scalia did note that even the prohibition against content discrimination which the majority asserted was not absolute. Instead it applied differently in the context of proscribable speech than in the area of fully protected speech. Id. at 2545. For example, he noted that the federal government can criminalize threats of violence directed against the President and that states could choose to regulate price advertising in one industry but not in others because the risk of fraud is, in its view, greater in that industry. Id. at 2546. He stated, however, that in regulating such speech, the government cannot do so on the basis of content. For example, he stated that the federal government may not criminalize only those threats against the President that mention his policy on aid to inner-cities and that a state may not prohibit “only that commercial advertising that depicts men in a demeaning fashion”. Id.
44. Id. at 2550.
45. Id. at 2560.
46. Id.
47. Id. at 2567.
48. Id. at 2567.
49. Id. at 2568.
50. Id. at 2569.
51. Id. at 2571.
52. See id. at 2560-61.
Specifically, he feared that the majority "manipulated doctrine" because it was "distracted from its proper mission" and decided this issue over "politically correct speech" and "cultural diversity," neither of which was before the Court.\(^5\)

Thus, while the Court unanimously overturned the St. Paul ordinance, there is no unanimity of judicial opinion.\(^5\) In fact, as evidenced by the sharp words they hurl at each other in the majority and concurring opinions, the division between the Justices is deep. Justice Scalia, for example, terms White's opinion, "a simplistic, all-or-nothing-at-all approach... at odds with common sense and with our jurisprudence as well."\(^5\) White responds by calling Scalia’s reasoning "transparently wrong,"\(^6\) the examples he uses in his opinion "preposterous,"\(^5\) the distinctions he draws "senseless,"\(^5\) and the decision "mischievous at best."\(^5\) Similarly, Justice Stevens calls Scalia's approach "an adventure in a doctrinal wonderland,"\(^6\) labels his examples "fantastical,"\(^6\) and suggests that "the Court does not in fact mean much of what it says in its opinion"\(^6\) and "wreaks havoc in an area of settled law."\(^6\)


Perhaps because of the deep divisions within the Court in R.A.V., the Court soon heard arguments in a case dealing with a Wisconsin statute which enhanced the sentences for persons who intentionally selected a person against whom a crime is committed because of their race, religion, color, disability, sexual orientation, national origin or ancestry. Wisconsin v. Mitchell.\(^6\) In resolving a split among the states\(^5\) on the constitutionality of

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53. Id. at 2560-2561.
54. Id. at 2541.
55. Id. at 2543 (footnote omitted).
56. Id. at 2551.
57. Id. at 2555.
58. Id. at 2556 n.9.
59. Id. at 2560.
60. Id. at 2562.
61. Id.
62. Id. at 2563 n.1.
63. Id. at 2566.
64. 113 S. Ct. 2194 (1993).
such enhancement statutes, however, the Court distinguished *R.A.V.* and did nothing to resolve its deep divisions on the content-based regulation of speech.

The Wisconsin Supreme Court had struck down the state’s penalty enhancement statute as it was applied to Mitchell. Mitchell, who is black, joined a group of young black men who were discussing a scene from the movie “Mississippi Burning” where a white man beat a young black boy who was praying. Mitchell asked the group: “Do you all feel all hyped up to move on some white people?” A short time later, a 14-year old white male approached the apartment complex. He said nothing to the group and merely walked by and to the other side of the street. Mitchell then said: “You all want to fuck somebody up? There goes a white boy; go get him.” Mitchell then counted to three and pointed the group in the white boy’s direction. The group beat him severely and stole his tennis shoes. The boy remained in a coma for four days and suffered extensive injuries and possibly permanent brain damage.

Relying on *R.A.V.*, the Wisconsin Supreme Court invalidated the penalty-enhancement statute. The court’s decision was based on two lines of reasoning. First, it found that the statute punished thought because it punished the perpetrator for his “motive.” Since the majority in *R.A.V.* had held that content-based laws are unconstitutional, the court reasoned that the penalty-enhancement statute was invalid because it would punish the defendant for the content of his thought. Second, the court reasoned that because speech will often be used to prove the element of bias, the statute would chill speech.

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67. Mitchell at 2197.
68. Id. at 2196.
69. Id.
70. Id.
71. Id.
72. Id. at 2196-2197.
73. Id. at 2197.
74. Id.
75. Id.
76. Id. at 2197-98; See also Wisconsin v. Mitchell, 485 N.W.2d 807, 811 (1992).
78. 485 N.W.2d at 811; see also Mitchell, 113 S. Ct. at 2197 (1993).
79. Id. at 816 (1992); see also Mitchell, 113 S. Ct. at 2198.
The Supreme Court reversed the Wisconsin decision and held that the penalty-enhancement statute passed constitutional muster.\(^8\) In doing so, the Court distinguished \textit{R.A. V.}\(^8\). The Court noted that the ordinance struck down in \textit{R.A. V.} was explicitly directed as expressions, i.e. “speech,” or “messages,”\(^8\) while the statute in \textit{Mitchell} was aimed at enhancing the sentences for conduct, such as assault, which is unprotected by the First Amendment.\(^8\)

The message of the \textit{R.A. V.} majority and \textit{Mitchell}, then, is that states can proscribe both “fighting words” and bigoted conduct so long as the regulation of speech is content neutral. Any attempt to bar only a certain type of speech will be struck down as overbroad.\(^8\)

\textbf{B. The First Amendment in the School}

In \textit{Tinker v. Des Moines Ind. Community Sch. Dist.},\(^8\) the Supreme Court made clear that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^6\) The Court went on to state, “[s]chool officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution.”\(^8\) The Court recognized, however, that schools have a legitimate interest in maintaining order and discipline.\(^8\) Specifically, the Court stated that:

\begin{quote}
conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.\(^8\)
\end{quote}

1. Colleges

The Supreme Court and lower courts generally have held that college students have greater free speech rights than do elementary and high school students. This is perhaps best reflected in \textit{Healy v. James},\(^9\) where the Court

\begin{itemize}
\item \textbf{80.} 113 S. Ct. at 2202.
\item \textbf{81.} \textit{Id.} at 2200-01.
\item \textbf{83.} \textit{Mitchell}, 113 S. Ct. at 2201.
\item \textbf{84.} \textit{See id.; R.A. V.}, 112 S. Ct. 2538.
\item \textbf{85.} 393 U.S. 503 (1969).
\item \textbf{86.} \textit{Id.} at 506.
\item \textbf{87.} \textit{Id.} at 511.
\item \textbf{88.} \textit{Id.} at 513.
\item \textbf{89.} \textit{Id.} at 513.
\item \textbf{90.} 408 U.S. 169 (1972).
\end{itemize}
found that Central Connecticut State College had infringed upon its students' free speech rights when it denied campus recognition to the local chapter of the Students for a Democratic Society ("SDS"), a group associated with militant activities directed at campus communities throughout the country.\(^9\)

The Court stated that:

> [t]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools." \(^9\)

\(Shelton \text{ v. Tucker, } 364 \text{ U.S. } 479, 489 \text{ (1960).} \) The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming the Nation's dedication to safeguarding academic freedoms.\(^9\)

Thus, the Court stated a "'heavy burden' rests on the college to demonstrate the appropriateness of [its] action."\(^9\) It stated that the group must actually "disrupt the work and discipline of the school" or interfere with the rights of others before the speech could be quashed.\(^9\) The Court did note, however, that a college, like other state actors, could impose reasonable regulations with respect to the time, place and manner in which student groups conducted their speech-related activities.\(^9\)

In \(Papish \text{ v. Board of Curators,}\)\(^9\) the Court held that a university could not regulate the content of student speech. In \(Papish,\) a university student had been expelled for distributing a school newspaper that contained an article titled, "Mother Fucker Acquitted,"\(^9\) which discussed an organization called "Up Against the Wall, Mother Fucker."\(^9\) This edition of the newspaper also included a political cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice, with a caption reading "With Liberty and Justice for All."\(^9\)

The Supreme Court held that the student should not be expelled because the university had disapproved of the "content of the newspaper rather than

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91. Id. at 169.
92. 408 U.S. at 180-81 (citation omitted).
93. Id. at 184.
94. Id. at 189 (quoting Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 513 (1969)).
95. 408 U.S. at 192-93.
97. Id. at 667.
98. Id. at 668.
99. Id. at 667.
the time, place, or manner of its distribution."\textsuperscript{100} The Court stated that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."\textsuperscript{101}

2. The Constitutionality of Hate Speech Codes on College Campuses

Despite the tremendous amount of legal scholarship on the issue of hate speech codes on college campuses, there have been very few decisions on the constitutionality of such codes. Given the Supreme Court's statements on the regulation of speech in a university setting, however, it is not surprising that the few decisions which have been handed down have universally held that these codes violate students' First Amendment freedoms.

The University of Michigan's policy stated that students would be subject to discipline for "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."\textsuperscript{102} The University's Office of Affirmative Action issued an interpretive guide for the policy entitled \textit{What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment}.\textsuperscript{103} Among the examples of sanctionable conduct were:

\begin{itemize}
\item A flyer containing racist threats distributed in a residence hall.
\item A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
\item Male students leave pornographic literature and jokes on the desk of a female graduate student.
\item Two men demand that their roommate in the residence hall move out and be tested for AIDS.\textsuperscript{104}
\item The district court struck down the policy, relying on the cases following \textit{Chaplinsky} which had found statutes to be overbroad which punished speech which did not rise to the level of "fighting words."\textsuperscript{105}
\end{itemize}

\textsuperscript{100} \textit{Id.} at 670 (emphasis in original).
\textsuperscript{101} \textit{Id.} at 671.
\textsuperscript{103} \textit{Id.} at 857.
\textsuperscript{104} \textit{Id.} at 858.
\textsuperscript{105} \textit{Id.} at 864 (citing Gooding v. Wilson, 405 U.S. 518 (1972) & Lewis v. New Orleans,
A hate speech policy at the University of Wisconsin provided that the University could discipline a student:

[for racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and

2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.]

The court found that this policy was overbroad and did not fit within the fighting words doctrine.

More recently in Dambrot v. Central Michigan Univ., the court struck down the university’s speech code in a case involving a basketball coach who had been fired after he used the word “nigger” in a locker room talk he gave to his players, many of whom were black and who joined him as plaintiffs seeking his reinstatement. The policy there prohibited:

any intentional, unintentional, physical, verbal, or non-verbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, epitaphs [sic] or slogans that infer negative connotations about an individual’s racial or ethnic affiliation.

Citing R.A.V., the court found the policy to be invalid, and stated that “[t]he expanse of the suppression of speech made possible by this CMU policy is as remarkable as it is illegal.”

3. Grade and High Schools

The Supreme Court’s treatment of student free speech rights in high schools and grammar schools differs sharply from that given to the rights of college students. Despite Tinker’s statement that those rights are not shed at
the school house gate, the Court has been willing to allow high schools and grammar schools to regulate speech so long as they can show it will disrupt school activities.

a. Substantial Disruption Test

The holding in Tinker has been referred to as the "substantial disruption test." In Tinker, the Court found no substantial disruption where the students merely wore black arm bands in protest of the Vietnam War and there was no evidence that they either interrupted school activities or caused any disorder in the classroom.

In Bethel Sch. Dist. No. 403 v. Fraser, however, the Court upheld a school's disciplining a student for giving a "lewd" speech at a school assembly. In doing so, the Court did not rely on the substantial disruption test announced in Tinker, but did extensively discuss the role of public schools in society and their ability to sanction student speech.

In Fraser, a student gave the following speech at a high school assembly in support of a candidate for a student government office:

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.

Jeff is a man who will go to the very end — even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president — he'll never come between you and the best our high school can be.

During Fraser's delivery of this speech, some students hooted and yelled, and some by gestures graphically simulated the sexual activities alluded to in the speech. Other students appeared to be bewildered and embarrassed by the

113. 393 U.S. at 506.
114. Id.
116. Id. at 678.
117. Id. at 681-83.
118. Id. at 687 (Brennan J., dissenting).
119. Id. at 678.
speech. One teacher reported that on the day following the speech it was necessary to forego a portion of the scheduled class lesson to discuss the speech. Fraser was suspended for three days and his name was removed from the list of candidates for graduation speaker. Fraser sued, alleging that the school sanctions violated his freedom of speech, and was awarded $278 in damages and $12,750 in litigation costs and attorneys fees. The Supreme Court reversed this decision.

According to the Court, the role and purpose of public schools is to “prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” Based on this, the Court stated:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the “fundamental values necessary to the maintenance of a democratic political system” disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the “work of the schools.” The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

Thus, the Court held that the school district acted entirely within its authority in sanctioning Fraser in response to his lewd and indecent speech.

b. Public Forum Test

In Hazelwood Sch. Dist. v. Kuhlmeier, the Supreme Court declined to apply the Tinker substantial disruption test to a school speech controversy. Instead, the Court for the first time applied public forum analysis to a student speech case.

120. Id.
121. Id.
122. Id.
123. Id. at 679.
124. Id. at 680.
125. Id. at 681.
126. Id. at 683 (citation omitted) (emphasis added).
127. Id. at 685.
129. Id. at 272-73.
130. Id. at 267-70, 273.
In *Hazelwood*, a school principal directed the advisor of a school-sponsored student newspaper to delete two pages containing stories on divorce and pregnancy. In upholding the principal’s action, the Court relied not on the substantial disruption test but looked to whether or not the newspaper was a “public forum.”

The Court first decided that schools were not a public forum.

The public schools do not possess all the attributes of streets, parks, and other traditional public forums that “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Hence, school facilities may be deemed to be public forums only if school officials have “by policy or by practice” opened those facilities “for indiscriminate use by the general public” or by some segment of the public, such as student organizations.

The Court then drew a distinction between school-sponsored speech, such as the newspaper and plays, and held that the school could exercise control over it as long as such control was reasonable.

4. The Constitutionality of Hate Speech Codes in Public High Schools and Grade Schools

No matter what test is used, it is clear that public grade and high schools have a greater power to limit speech than do colleges or society in general. Excellent discussions of some of the reasons for and problems created by this are found in recent articles by Gordon Danning and Alison G. Myhra.

Myhra’s article in particular provides an excellent defense for the use of hate speech codes in the public schools. She first notes that hate messages

131. *Id.* at 264.
132. *Id.* at 267. Because the Court did not rely on the *Tinker* standard in resolving the issue presented, it did “not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid ‘invasion of the rights of others,’ . . . except where the speech could result in tort liability to the school.” *Hazelwood*, 484 U.S. at 273 n.5 (citation omitted). Some have suggested that the “invasion of the rights of others” prong of *Tinker* requires the commission of a tortious act by one student against another, such as a battery or libel, resulting in a potential liability for the school. *Hazelwood*, at 289 (Brennan J., dissenting); *See also* Note, Administrative Regulation of the High School Press, 83 MICH. L. REV. 625 (1984).
133. *Hazelwood* at 267 (citations omitted).
134. *Id.* at 569.
and their stigmatization can cause long-term psychological harm and that the Supreme Court has restricted children’s free speech rights in other contexts to protect them from these harms.\textsuperscript{137} For example, in \textit{Ginsberg v. New York},\textsuperscript{138} the Court upheld New York’s criminal obscenity statute prohibiting the sale to children under the age of 17 of materials deemed to be obscene to children but not necessarily to adults.\textsuperscript{139} Similarly, in \textit{FCC v. Pacifica Foundation},\textsuperscript{140} the Court held that the Federal Communication Commission had the power to proscribe the broadcast during day time hours of material that is indecent but not obscene.\textsuperscript{141}

Myhra also notes that the lower courts, applying \textit{Tinker} have held that certain expressive symbols, school songs, and team names (such as the Confederate flag, the song “Dixie,” and the name “Rebels”) may be proscribed because their racially charged history may have a potentially disruptive presence in the educational setting.\textsuperscript{142} In light of these cases and the discussion in \textit{Tinker, Fraser, and Hazelwood} on the role of public schools, Myhra argues that hate speech codes are not only constitutional but necessary for the well-being of children.\textsuperscript{143}

Other commentators agree with Myhra that speech codes in public schools will be held constitutional. However, in light of the \textit{R.A.V.} majority’s proscription of content-based regulation, they caution against speech codes which only identify certain kinds of speech as impermissible. Instead they suggest that school districts should adopt rules directed against fighting words generally so that the regulations apply to all students.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{137} Id. at 78-85.
\item \textsuperscript{138} 390 U.S. 629 (1968).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} 438 U.S. 726 (1978).
\item \textsuperscript{141} Id.
\item \textsuperscript{142} See e.g., Augustus v. School Board, 507 F.2d 152 (5th Cir. 1975)(holding that public school could bar the use of the Confederate flag as a school symbol and the use of the name “Rebels” for athletic teams and extracurricular activities because of racial tension and potential disruption); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972)(holding that schools could prohibit the use of the Confederate flag as the school flag, “Rebels” as the team name, and “Dixie” as the school pep song and could suspend students for wearing clothing bearing the Confederate flag where necessary to prevent potential danger and disruption due to racial tensions in the school), cert. denied, 411 U.S. 951 (1973).
\item \textsuperscript{143} See Myhra, supra note 135.
\end{itemize}

An interesting case applying the “fighting words” doctrine in the school context was decided early last year. In \textit{Lovell v. Poway Sch. Dist.}, 847 F. Supp. 780 (S.D. Cal. 1994), a
A section of a school dress code which banned clothing which “harasses, threatens, intimidates or demeans” certain individuals or groups was recently struck down for precisely this flaw: It identified a certain kind of speech as impermissible without requiring that it cause a substantial disruption within the school.\textsuperscript{145} \textit{Pyle} arose out of a school’s attempt to regulate clothing emblazoned with objectionable writing and two students’ escalating efforts to test those regulations. The two students were Jeffrey and Jonathan Pyle, the sons of a constitutional law professor at Mount Holyoke College.\textsuperscript{146}

In March 1993, Jeffrey wore a T-shirt to his gym class bearing the slogan “Coed Naked Bank; Do It To The Rhythm.”\textsuperscript{147} Jeffrey’s gym teacher found the shirt objectionable and warned him not to return to her class wearing it. In response, Jeffrey wrote a letter to the acting principal stating that he felt his constitutional right to freedom of expression was being violated and that he intended to wear the shirt again. Jeffrey did, in fact, wear the shirt again to his next gym class. His gym teacher asked Jeffrey to change it. When he refused, he was given three detentions for insubordination and sent to the office. The acting principal, unsure of whether the T-shirt was permissible under the dress code then in effect, put Jeffrey’s detentions on hold until he could get guidance from members of the school committee at its next scheduled meeting.\textsuperscript{148} At the meeting, Jeffrey presented his views regarding censorship and the boundaries of a student’s First Amendment rights, and the

high school student challenged a suspension imposed after she told a school counselor following a long, frustrating day of trying to get her schedule changed either: “If you don’t change the schedule, I’m going to shoot you,” or “I’m so angry, I could just shoot someone.” \textit{Id.} at 783. The court found the student’s statement to be “inappropriate and impatient” but reversed her three-day suspension from school. \textit{Id.} The court based its decision on its findings that the student
did not make the requisite “threat” required by law, under either contention as to the exact words spoken, to allow infringement on her right of free speech as guaranteed by the Education Code and the United States Constitution. The Court simply did not feel that there was the gravity of purpose and likelihood of execution, nor the intent to harm or assault to allow the imposition of discipline by way of suspension in this case.

\textit{Id.} at 785.


146. \textit{Id.} at 160.

147. \textit{Id.} at 161. This shirt was a Christmas gift given to Jeffrey by his mother celebrating Jeffrey’s involvement in the school band. \textit{Id.}

148. The dress code then in effect was set out in a folder given to each student at the beginning of the school year. A section entitled “Personal Appearance” stated:

Personal appearance should not disrupt the educational process, call individual attention to the individual, violate federal, state, or local health and obscenity laws, or affect the welfare and safety of the students, teachers, or classmates. Students will be asked to change inappropriate attire.

\textit{Id.} at 160.
school committee agreed not to enforce the three detentions given to him.

At the meeting, and in a subsequent letter, Jeffrey also asked the mem-
bers of the school committee to adopt a new, formal dress code. The commit-
tee did so less than a month later. The policy provided:

Students . . . are not to wear clothing that:

1. Has comments or designs that are obscene, lewd or vulgar.

2. Is directed toward or intended to harass, threaten, intimidate, or de-
mean an individual or group of individuals because of sex, color, race, re-
ligion, handicap, national origin, or sexual orientation.

3. Advertises alcoholic beverages, tobacco products, or illegal drugs.

If such clothing is worn to school, students will be required to change
or will be sent home to do so.

Clothing expressing political views is allowed as long as the views are
not expressed in a lewd, obscene or vulgar manner.149

On the day the code was to take effect, Jeffrey wore a T-shirt to school
with the slogan “Coed Naked Civil Liberties: Do It To The Amendments” to
show his opposition to the new dress code.150 Jeffrey’s younger brother,

In the days prior to the school committee’s meeting, Jeffrey deliberately continued to
test the rules by wearing two new shirts to gym class. One depicted two men in naval
uniform kissing each other, with the tag line “Read My Lips.” The second depicted a marijuana
leaf and stated “Legalize It.” Neither shirt prompted an objection. Id. at 161.

149. Id. at 162. This was subsequently amended. For the 1993-94 school year, South
Hadley’s dress code read, in pertinent part:

e. Students are not to wear clothing (including hats) which causes a disruption to
the educational process or to the orderly operation of the school. This includes
clothing that:

1. Has comments, pictures, slogans, or designs that are obscene, profane, lewd or
vulgar.

2. Harasses, threatens, intimidates or demeans an individual or group of individuals
because of sex, color, race, religion, handicap, national origin or sexual orientation.

If such clothing is worn to school, students will be required to change or cover
said clothing or will be sent home to do so. Refusal to change or cover said clothing
will result in the student’s not being allowed to attend class until they have complied
with the code. The student should understand that failure to attend class may subject
him to a penalty under the existing class attendance and truancy regulations at South
Hadley High School and the South Hadley School Department.

Clothing expressing political views clearly is allowed as long as the views are not
expressed in a lewd, obscene, profane or vulgar manner.

Id. at 163-64.

150. The shirt was a gift to Jeffrey’s father from him Mount Holyoke students. Id. at 162, n.2.
Jonathan, wore a shirt bearing the slogan "See Dick Drink. See Dick Drive. See Dick Die. Don’t Be A Dick." Jeffrey and Jonathan were sent to the administration office and were told their shirts were not acceptable. They were given three options: turn the shirts inside out, change into other shirts, or go home and change. They decided to go home and did not return to school until the next day. In the following days, Jonathan continued to protest the dress code by wearing home-made shirts stating “Coed Naked Gerbils: Some People Will Censor Anything” and “Coed Naked Censorship – They Do It In South Hadley.” In addition, he also wore a shirt celebrating the Smith College centennial, which read “A Century of Woman on Top.” The school did not find any of these shirts to be in violation of the dress code. Jeffrey and Jonathan then continued their protest by filing a suit challenging the dress code’s constitutionality.

In evaluating the dress code, the district court looked to the Supreme Court’s decisions in Tinker, Fraser and Hazelwood, and stated:

These cases reveal at least three approaches to the First Amendment rights of high school students. First, “vulgar” or plainly offensive speech (Fraser-type speech) may be prohibited without a showing of disruption or substantial interference with the school’s work. Second, school-sponsored speech (Hazelwood-type speech) may be restricted when the limitation is reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school-sponsored (Tinker-type speech) may only be prohibited if it causes a substantial and material disruption of the school’s operation.

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151. Id. at 162.
152. Id.
153. Id. at 163.
154. Id.
155. Id. at 166 (citing Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)). In Chandler, the Ninth Circuit enunciated these three distinct areas of student speech and then reversed a lower court’s holding that buttons worn by students which referred to replacements for striking teachers as “scabs” were “offensive” and “disruptive.” The court in Chandler stated that it had discerned three distinct areas of student speech from the Supreme Court’s school precendents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude . . . that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by Fraser, school-sponsored speech by Hazelwood, and all other speech by Tinker. 978 F.2d at 529 (cites omitted).

It should be noted, however, that a concurring judge stated that in reaching its ultimate decision the court “did not have to reach out and create a comprehensive three-part categorical scheme for deciding all student speech cases.” 978 F.2d at 532 (Goodwin, J., concurring). Judge Goodwin then stated:
In applying these approaches, the court in *Pyle* upheld the dress code's prohibition on clothing that is "obscene, profane, vulgar or lewd" but struck down the ban on clothing that "harasses, intimidates or demeans an individual or group of individuals." The court cited *Fraser* in support of its first holding, and stated, "[S]chools are entitled to prohibit speech that is expressed in lewd, vulgar or offensive terms, regardless of whether the speech causes a substantial disruption."156

If lower courts need categorical guidance in determining how to approach student speech cases they should look to the one implicitly provided by Justice White in *Hazelwood* rather than the one established by the majority here. Justice White distinguished between (1) "a student's personal expression that happens to appear on the school premises," and (2) "educators' authority over school-sponsored [activities] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S. at 270-71, 108 S. Ct. at 569-70. In the first category the more vigorous judicial scrutiny of *Tinker* is applied. Generally, school authorities must show that they could reasonably forecast the student's expression would cause substantial disruption or would materially interfere with the school activities in order to punish such expression without interference with the student's First Amendment rights. In the second category, judicial scrutiny of the actions of school authorities is far more deferential since the school must be able to set "high[er] standards for the student's speech that is disseminated under its auspices." *Hazelwood*, 484 U.S. at 271-72, 108 S. Ct. at 570.

*Id.* at 532, n. 1.

156. 861 F. Supp. at 168. The court also cited previous decisions which had upheld school dress codes. See *Broussard v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992) (upholding suspension of 12-year-old girl wearing shirt with the words "Drugs Suck" on the front and the name of the group NKOTB (New Kids on the Block) on the back); *Gano v. Sch. Dist. No. 411 of Twin Falls County*, 674 F. Supp. 796 (D. Idaho 1987) (denying student's motion for preliminary injunction and holding that shirt containing a caricature of three school administrators drinking alcohol and acting drunk was "clearly offensive" and need not be tolerated by school officials).

More recently in *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 738 (7th Cir. 1994), the court held that a grade school student (Chelsie Baxter) who was barred from wearing shirts which protested a school's grading and racial policies was not entitled to damages in a § 1983 action because she had failed to show that she had a "clearly established" right to free expression. Chelsie and her parents argued that they had attempted to complain about grades, racism and other unspecified problems at Lost Creek Elementary School when she wore T-shirts which read "Unfair Grades," "Racism," and "I Hate Lost Creek." *Id.* at 730. The school principal prevented her from wearing these shirts and subjected her to unspecified punitive actions. *Id.*

In the resulting suit, the principal argued that he was immune from liability under § 1983 because Chelsie did not have a "clearly established" right to free expression. *Id.* at 737. He maintained that *Tinker* was not dispositive because it involved students older than Chelsie. *Id.* The court agreed:

In this case, Chelsie was in elementary school when her attempts at self-expression were blocked. She was at least several years younger than the youngest student in *Tinker*. This does not mean that elementary school students are entitled to no First Amendment protection. *Cf. Hedges v. Wauconda Comm. Sch. Dist. No. 18*, 9 F.3d 1295, 1298 (7th Cir. 1993) (stating that "nothing in the first amendment postpones the right of religious speech until high school"). But given the indications in *Fraser*
The court reached the opposite conclusion, however, on the dress code provision which prohibited "harassing" clothing.

The Constitution forbids a school from prohibiting expression of opinion merely "because of an undifferentiated fear of apprehension of disturbance." It follows that while a school can bar a T-shirt that causes a material disruption, they cannot prohibit one that merely advocates a particular point of view and arouses the hostility of a person with an opposite opinion.\(^{157}\)

It then stated:

It is impossible to avoid the conclusion that the 'harassment' provision of the South Hadley dress code is aimed directly at the content of speech, not at its potential for disruption or its vulgarity.

\[\ldots\]

Despite students' more limited First Amendment rights in the school setting, South Hadley cannot silence non-vulgar, non-disruptive speech simply based upon the viewpoint expressed. Unfortunately, the "harassment" provision of the dress code does just that:

\[\ldots\]

Under the current code, if a student wore a T-shirt to South Hadley High School containing a message expressing antipathy towards, or for that matter sympathy with, a particular group, the school could still ban the T-shirt, if it reasonably concluded that the message would cause a

\[\text{and Kuhlmeier that age is a relevant factor in assessing the extent of a student's free speech rights in the school, in addition to the dearth of caselaw in the lower federal courts, we are unable to conclude that the Baxters have demonstrated that the right [the principal] is alleged to have violated was "clearly established." Thus, [the principal] in his individual capacity was entitled to qualified immunity with respect to Chelsie's First Amendment claim.}\]

\textit{Id.} at 738.

One court, however, recently struck down a school dress code as applied to grade school students. Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993). The dress code at issue in \textit{Jeglin} prohibited, among other things, clothing identifying any professional sports team or college. \textit{Id.} at 1460. The school district argued that the such clothing could be barred because it was associated with gang activity that led to a disruption of the educational environment. \textit{Id.} at 1461-1462. The court struck down the code as applied to elementary and middle school students because it found no evidence of a gang presence at the district's elementary schools and that there was only a negligible presence in the middle schools. \textit{Id.} The court upheld the code as applied to high school students, finding that the district had carried its burden of proof in showing a gang presence and activity resulting in the disruption of school activities. \textit{Id.} at 1462.

\(^{157}\) 861 F. Supp. at 171 (quoting \textit{Tinker}, 393 U.S. at 508).
substantial and material disruption to the daily operations of the school. *Tinker* allows the school to do this. But the school cannot pick and choose; it may not prohibit antipathetic slogans but allow positive ones. The “constitutional line is crossed when, instead of really teaching, the educators demand that the students express agreement with the educators’ values.” *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 994 (3d Cir. 1993). Since the harassment section of the defendant’s dress code overlaps this constitutional boundary, the court will allow this portion of the plaintiff’s motion for injunctive relief.\(^{158}\)

The decision in *Pyle*, however, does not mean that all school “harassment” or hate speech codes will be held unconstitutional. Indeed, the court noted that the school still could ban a shirt “if it reasonably concluded that the message would cause a substantial and material disruption to the daily operations of the school.”\(^{159}\) The court did not object to “harassment” or hate speech codes *per se*, but to one which was content-based so that it applied only to certain kinds of speech and not to fighting words generally.

The Supreme Court's decisions in *Tinker*, *Fraser* and *Hazelwood*, make it clear that schools have broad latitude in proscribing students' speech. Even with the decision in *R.A.V.*, school speech codes should pass constitutional muster as long as they apply to all students and are not content-based. The question then becomes not whether schools can bar hate speech, but the possible consequences if they fail to do so.

### II. THE CIVIL RIGHTS STATUTES PROHIBITING DISCRIMINATION AND THE GUARANTEE OF A NON-HOSTILE LEARNING ENVIRONMENT

#### A. *Title VI, Title IX and Section 504*

Federal law prohibits programs receiving federal financial assistance from discriminating on a variety of grounds. Title VI of the Civil Rights Act of 1964\(^{160}\) states that:

\(^{158}\) *Id.* at 171, *citing R.A.V.*, 172-73. In addition to *R.A.V.*, the court also cited *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993), in support of its position. In the latter, a university punished a fraternity because it conducted an "ugly woman contest" that contained racist and sexist overtones. The court overturned the sanctions imposed against the fraternity, finding that the university punished the message conveyed by the "ugly woman contest" solely because it "ran counter to the views the University sought to communicate to its students and the community." 993 F.2d at 393.

\(^{159}\) 861 F. Supp. at 173.

No person in the United States shall on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance.

Prohibitions against discrimination on the basis of sex and handicap, respectively, are found in Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973. The implementing regulations for these statutes prohibit the recipients of federal funds from denying an individual any benefit or providing services or other benefits to an individual in a manner different from that provided to others, or from restricting an individual in the enjoyment of any advantage or privilege enjoyed by others on the basis of race, color, national origin, sex, or handicap.

B. Investigations by Office of Civil Rights

These statutes and regulations are enforced by the Department of Education's Office for Civil Rights (OCR). The OCR interprets Title VI and Title IX to prohibit harassment which occurs in the recipient's educational program because of race or sex. OCR staff in its various regional offices conduct both compliance reviews and complaint investigations.

Compliance reviews are initiated by OCR to determine whether or not districts are complying with the civil rights laws that OCR enforces. OCR selects institutions for a review based on information from such sources as

163. 34 C.F.R. § 100.3(b)(1)(i), (ii) & (iv) (1993); 34 C.F.R. § 104.43 (1993); & 34 C.F.R. § 106.31(b)(2), (3) & (7) (1993).
164. In an August 1981 Policy Memorandum, the OCR adopted the following definition of sexual harassment:

sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.


The author has been unable to find any OCR or court decisions dealing with harassment of the handicapped, but given the similarities between Title VII, Title IX and Section 504, it can be assumed that a school's failure to react to harassment against the handicapped would also be actionable. For examples of handicapped harassment, see Lorenza Munoz, High Life; Special Courage; Students with Handicaps Gain Fresh Perspectives on Behavior that Go Beyond Teasing, Name-Calling, L.A. TIMES, Apr. 14, 1989, § 9, at 4.
survey data, interest groups, the media and the general public that may indicate potential compliance problems.\textsuperscript{165} Compliance reviews involved investigation into issues such as within school discrimination, equal education opportunities for students with limited English skills, ability grouping which results in segregation on the basis of race or national origin, racial harassment in education institutions, equal education opportunity for pregnant students, appropriate identification of special education and related services for certain student populations such as homeless children with handicaps, and discrimination on the basis of sex in athletic programs.\textsuperscript{166}

The OCR also conducts complaint investigations. On March 7, 1994, the OCR issued a document which provides "guidance" as to the standards for such investigations.\textsuperscript{167} The document identified two types of discrimination: (1) different treatment of individuals because of their race,\textsuperscript{168} and (2) the existence of a hostile environment. In addressing the second type of discrimination the OCR stated:

A violation of Title VI may... be found if a recipient has created or is responsible for a racially hostile environment – i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. . . .

Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient's general duty to provide a non-discriminatory educational environment.\textsuperscript{169}

\textsuperscript{165} Office for Civil Rights, U.S. Dep't of Educ., \textit{Information about the Office for Civil Rights} 5 (1991).

\textsuperscript{166} Id.

\textsuperscript{167} Investigative Guidance on Racial Incidents and Harassment Against Students, 59 Fed. Reg. 11448 (1994). While addressing only Title VI complaints based on discrimination because of race, color, or national origin, these guidelines are helpful in evaluating Title IX in Section 504 claims as well. The "guidance" includes as an appendix a "compendium of legal resources". \textit{Id.} at 11451. In it the OCR notes that "in addition to racial incidents/harassment cases, many sexual harassment cases are cited throughout this compendium – because the legal standards and theories applicable to these two different types of discrimination are similar." \textit{Id.} at 11451 n.2.

\textsuperscript{168} For the sake of simplicity and clarity, the term "race" was used throughout the guidance to refer to all forms of discrimination prohibited by Title VI – i.e., race, color, and national origin. 59 Fed. Reg. at 11448 n.2.

\textsuperscript{169} 59 Fed. Reg. at 11448. In applying the different treatment analysis, OCR staff will address the following questions:

(1) Did an official or representative (agent or employee) of the recipient treat someone differently in a way that interfered with or limited the ability of a student
To establish a violation of Title VI under the hostile environment theory, the OCR must determine that:

(1) a racially hostile environment existed;

(2) the recipient had actual or constructive notice of the racially hostile environment; and

(3) the recipient failed to respond adequately to redress the racially hostile environment.\textsuperscript{170}

Whether the conduct constitutes a hostile environment must be determined from the totality of the circumstances with particular attention paid to whether (1) the racial harassment is severe, pervasive or persistent; (2) the school has actual or constructive notice of the harassment; and (3) the school’s response to the harassment.\textsuperscript{171}

In determining whether the harassment is severe, pervasive or persistent, OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved.\textsuperscript{172} In most cases the harassment must consist of more than a casual or isolated incident.\textsuperscript{173} However, a racially hostile environment requiring appropriate responsive action by a school may result from a single incident that is sufficiently severe.\textsuperscript{174} Racial acts need not be targeted at the complainant in order to create a racially hostile environment.\textsuperscript{175} Also, the harassment need not be based on the victim’s or complainant’s race so long as it is racially motivated.\textsuperscript{176} For example, it might be based on the race of a...
friend or associate of the victim.\textsuperscript{177}

If OCR finds that a hostile environment existed under these standards it then proceeds to determine whether a school had notice of the harassment and took reasonable steps to respond to the harassment.\textsuperscript{178} Notice to the school can be either actual or constructive.\textsuperscript{179} Actual notice will be imputed as long as any agent or responsible employee of the school received the notice.\textsuperscript{180} A school will be charged with constructive notice:

\begin{quote}
[I]f, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In other words, if the recipient could have found out about the harassment had it made a proper inquiry, and if the recipient should have made such an inquiry, knowledge of the harassment will be imputed to the recipient.\textsuperscript{181}
\end{quote}

The school can also be charged with constructive notice if it has notice of some, but not all, of the incidents involved in a particular complaint.\textsuperscript{182}

Once a school has notice of a hostile environment, it has a legal duty to take reasonable steps to eliminate it.\textsuperscript{183} If the school took responsive action, OCR will evaluate the appropriateness of that action by examining disciplinary policies, grievance policies and any applicable anti-harassment policies.\textsuperscript{184} Possible elements of appropriate responsive action include the imposition of disciplinary measures, the development and dissemination of a policy prohibiting harassment, the provision of grievance or complaint procedures, the implementation of racial awareness training, and the provision of counseling for the victims of racial harassment.\textsuperscript{185}

\begin{footnotes}
\item 177. Id.
\item 178. Id. at 11450.
\item 179. Id.
\item 180. Id.
\item 181. Id.
\item 182. Id.
\item 183. Id.
\item 184. Id. In a footnote the guidance states: “Of course, OCR cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment of the United States Constitution.” Id. at 11450 n.7. An earlier note states that “[i]n cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United State Constitution. In such cases, regional staff will consult with headquarters.” Id. at 11448 n.1.
\item 185. Id. at 11450-51. The OCR “guidance” on its investigations is essentially an official compilation of statements which it has made in a number of individual rulings. An excellent overview of 17 cases of peer harassment investigated and resolved by OCR in 1992 and 1993 can be found in a recently published article by Gail Sorenson. See Gail Paulus Sorenson, Peer Sexual Harassment: Remedies and Guidelines under Federal Law, 92 ED. L. REP. 1 (1994).
\end{footnotes}
The procedures for OCR investigations and hearings under Title VI are found at 34 C.F.R. sections 100.6-100.11 and 34 C.F.R., section 101. These procedures also apply to Title IX and Section 504 proceedings. The following discussion is taken from a review of those procedures and conversations and correspondence with OCR officials.

Complaints of discrimination can be filed at any OCR regional office by anyone who believes that an education institution receiving federal funding has discriminated against someone on the basis of race, color, national origin, sex, handicap, or age. A complaint must be filed within 180 days of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee. Under OCR procedures, it is required to complete the investigation of any complaint and to issue written findings within 135 days of receipt of the complaint.

The first step in the complaint investigation is for the OCR to send a Letter of Inquiry to the school. The school must respond within 15 calendar days from the date of the letter, or, if it cannot respond immediately for any reason, such as staff’s absence, advise the OCR at once. Once the OCR has received the data requested in the Letter of Inquiry it may send an investigator to conduct an on-site visit to the school.

After the investigation is complete, the OCR will notify both the school and the complainant of the results of the investigation in a Letter of Findings (LOF). If the OCR finds that a violation has occurred, it will attempt to resolve the matter before issuing the LOF so that when issued it will indicate that, while the violation did take place, it has been resolved and the matter closed. If the OCR and the school are unable to reach a settlement agreement, the OCR will then issue the LOF and the parties will have 60 days after its issuance to negotiate a remedy. If the parties are still unable to agree upon an appropriate remedy, OCR is required to initiate enforcement measures within the following 30 days.

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186. 34 C.F.R. § 104.61 (1993).
188. 34 C.F.R. § 100.7(b) (1993).
189. Letter from David J. Gaffny, Chief, Indiana Branch OCR Region V, to Dennis French (Sept. 12, 1991) (on file with author).
190. Id.
191. Id.
193. Id.
194. Id.
195. Id.
clude requiring that the school provide counseling for both the harasser and the harassed, conduct sensitivity awareness training, transfer students or even cut off federal funding.

If the school disagrees with either the findings or the punishment set down by the OCR, it may appeal the decision to the Civil Rights Reviewing Authority within the Department of Education, and then to the Secretary of Education personally.\textsuperscript{196} After the school has exhausted these administrative remedies it may then seek judicial review.\textsuperscript{197}

During the course of an investigation, the school may not intimidate, threaten, coerce or engage in any other discriminatory conduct against anyone who has either taken action or participated in an action to secure rights protected under the Civil Rights statutes. Under the Freedom of Information Act the OCR may be required to release the LOF and related correspondence and records upon request.\textsuperscript{198} If such a request is made, the OCR will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.\textsuperscript{199}

\textbf{III. CIVIL LIABILITY}

An investigation by the Office of Civil Rights, however, may be the least of a school district's worries. Numerous students who have suffered harassment at the hands of either students or teachers have attempted to bring actions under 42 U.S.C. § 1983 alleging that schools have a constitutional duty to protect them from such harassment. The most common claim is that the student's individual liberty interests, guaranteed by the substantive component of the Due Process Clause of the Fifth and Fourteenth Amendments have been violated.\textsuperscript{200} Students have also brought claims under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{201} As discussed in Section A below, most courts have been reluctant to recognize such claims.

A new theory of liability based on violations of the civil rights statutes, however, has arisen in the last two years. This theory is based on the landmark case of \textit{Franklin v. Gwinnett County Pub. Sch.},\textsuperscript{202} where the Supreme Court

\begin{itemize}
  \item \textsuperscript{196} 34 C.F.R. § 100.10(e) (1993).
  \item \textsuperscript{197} \textit{Id.}
  \item \textsuperscript{198} Orris letter, supra note 192; \textit{See also} Gaffny letter, supra note 189.
  \item \textsuperscript{199} \textit{Id.}
  \item \textsuperscript{200} "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V; "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.
  \item \textsuperscript{201} "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws". U.S. CONST. amend. XIV, § 1.
  \item \textsuperscript{202} 112 S. Ct. 1028 (1992).
\end{itemize}
held that monetary damages are available for violations of Title IX. In the months since Franklin was decided, several courts have allowed actions for damages under Title VI and under section 504 of the Rehabilitation Act. As discussed in Section B below, students who have suffered harassment have now begun to bring suit claiming that the schools’ failure to stop such harassment subjected them to a hostile environment in violation of the civil rights statutes.

A. Theories of Liability Under Section 1983

1. Special Relationship

The primary theory used by plaintiffs in school harassment cases is the “special relationship theory.” According to the plaintiffs, schools have a special relationship to their students because of state laws requiring children to attend school and putting the school in the position of in loco parentis. This special relationship, plaintiffs argue, imposes an affirmative duty on the

203. See id.


There is no requirement that plaintiffs exhaust their remedies with the OCR and Department of Education prior to filing a suit in Federal Court under any of these statutes. The Supreme Court announced this rule with regard to Title IX in Cannon v. University of Chicago, 441 U.S. 677, 706, n.41 (1979), and courts relying on Cannon have ruled that plaintiffs stating claims under Title VI and Section 504 also do not have to exhaust administrative remedies. See Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012 (6th Cir. 1989) (analyzing Title VI); Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990) (analyzing Section 504).

205. Most suits brought against schools for harassment or misconduct have alleged wrongful behavior on the part of a teacher rather than a student. The same theories of liability have been used in both types of cases, however, and those cases involving teachers are included in the following discussion as they are instructive in determining a school’s responsibility to prevent harassment or misconduct by other students.

school to provide for the students’ safety and to prevent harassment.

The majority of courts have rejected the special relationship theory, but a few have allowed plaintiffs to proceed under it.

In *J.O. v. Alton Community Unit Sch. Dist.* 11, an action was brought against school authorities for the alleged sexual molestation of several children by a teacher. The court held that the action was barred because there was not a “special relationship” which placed an affirmative constitutional duty on the school to protect the children. The *DeShaney* Court held that the government only had an affirmative duty to protect an individual where the state had exercised its power to take a person into custody and had rendered the individual unable to care for himself or herself such as with prisoners and mental patients.

Following *DeShaney*, the Seventh Circuit held that, “School children are not like mental patients and prisoners such that the state has an affirmative duty to protect them.” Thus, the court held that whatever duty of protection a school does owe to a student is best left to laws outside the Constitution, as Illinois had done in *Eversole v. Wasson*.

Most courts have agreed with the Seventh Circuit’s decision in *J.O.* and held that a school does not have such a special relationship to a student so as to protect the student from harassment or attacks by fellow students. In *D.R. v. Middle Bucks Area Vocational Technical Sch.*, the court held that the

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207. 909 F.2d 267 (7th Cir. 1990).
208. *Id.* at 268.
209. *Id.* at 272.
212. *J.O.* 909 F.2d at 272-273.
213. *Id.* at 272.
215. 972 F.2d 1364 (3d Cir. 1992)(en banc).
school did not have a duty to two female students in a graphic arts class who alleged that several male students in the same class physically, verbally and sexually molested them in the unisex bathroom and dark room which were part of the graphic arts classroom.\(^{216}\) Similarly, in *Dorothy J. v. Little Rock Sch. Dist.*,\(^{217}\) the court dismissed a due process action brought by the mother of a mentally retarded student who had been sexually assaulted in the boys’ shower of a high school.\(^{218}\)

One court, however, has held that a school was in a special relationship with a student and had a duty to protect him from harassment and assault by other students. In *Pagano v. Massapequa Pub. Sch.*,\(^{219}\) the student alleged that during his 5th grade year and part of his 6th grade year he was the target of physical and verbal abuse by other students on a total of 17 different occasions.\(^{220}\) The court held that, even under *DeShaney*, a special relationship existed because both the victim and the perpetrators were under the care

\(^{216}\) See id.

\(^{217}\) 7 F.3d 729 (8th Cir. 1993).

\(^{218}\) See id. See also *Seamons v. Snow*, 864 F. Supp. 1111 (D. Utah) (1994) (school did not have duty to protect football player who was taped to towel rack in locker room by other players who then showed him to girl he had taken to the homecoming dance); *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363 (N.D. Ga. 1994) (school did not have duty to protect fifth grade girl from harassing comments and actions by classmate); *Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir. 1994) (school did not have special duty to student who was allegedly shot and killed by another student); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) (court affirmed summary judgment in favor of school corporation on complaint alleging teacher’s failure to supervise her students which led to child’s accidental death by strangulation after he caught his bananda on a hook in the school cloakroom); *Doe v. Bd. of Educ. of Hononegah Community High Sch. Dist. No. 207, 833 F. Supp. 1366 (N.D. Ill. 1993)* (school did not have special duty to protect student who was allegedly sexually abused by teacher); *B.M.H. v. School Bd. of City of Chesapeake, Virginia, 833 F. Supp. 560 (E.D. Va. 1993)* (school did not have special duty to student who was sexually assaulted by fellow student); *Hunter v. Carbondale Area Sch. Dist.*, 829 F. Supp. 714 (N.D. Pa. 1993) (school corporation did not owe special duty to junior high special education student who was chased off school property after detention period by non-special education students and drowned in a stream); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818 (S.D. Ohio 1992) (court rejected a claim by a student who alleged that she had been repeatedly harassed and assaulted by other students); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992), *aff’d*, 981 F.2d 1263 (11th Cir. 1992) (court found the fact that fights occurred in high school on a regular basis was insufficient to establish that the school should have known that a student beat up by another student was in danger of assault so as to give rise to a duty to protect the student); *Doe v. Douglas County Sch. Dist. Re-1*, 770 F. Supp. 591 (D. Colo. 1991) (holding that public school did not have a special relationship with student so as to impose affirmative duty on the school to protect student from sexual abuse by school psychologist); *Stauffer v. Orangeville Sch. Dist.*, 1990 WL 304250 (N.D. Ill. May 17, 1990) (concluding that public school does not have a special relationship with student; otherwise, “every time a school child is assaulted by the class bully during recess it would be a tort of constitutional dimensions under § 1983”).


\(^{220}\) *Id.* at 642,
of the school in its *parens patriae* capacity at the time the alleged incidents occurred.\(^{221}\)

2. Deliberately or Recklessly Establishing and Maintaining a Custom, Practice or Policy Causing Harm to a Student

Plaintiffs have also tried to argue that a school is liable for a student’s injuries even though a special relationship did not exist. They have argued that by failing to take action to halt harassment or assault the school has

\(^{221}\) Id. at 643. See also Waechter v. School Dist. No. 14-030 of Cassopolis, Michigan, 773 F. Supp. 1005 (W.D. Mich. 1991) (court found that a handicapped student who died after he was required to run 350 yards in less than two minutes as punishment for talking with another classmate was in a custodial relationship with the teacher who imposed the punishment); Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992) (holding that special relationship existed between school and student who alleged that she had been sexually molested by teacher); *cert. denied*, 113 S. Ct. 1066 (1993), *reh’g denied*, 113 S. Ct. 1436 (1993), *reg’g en banc granted and opinion vacated*, 987 F.2d 231 (5th Cir. 1993), *aff’d on different grounds on rehearin*, 15 F.3d 443 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 70 (1994). On rehearing, the Fifth Circuit limited its analysis to whether a supervisory school official can be held personally liable under § 1983 for a subordinate’s violation of a student’s constitutional rights. 15 F.3d at 454. The Court refused even to consider whether a *DeShaney* special relationship arises in the public school context because the issue was irrelevant to the facts before it. Id. at 451 n.3.

Three Fifth Circuit panels subsequently addressed the special relationship question in a school context. In Walton v. Alexander, 20 F.3d 1350 (5th Cir. 1994), *reh’g en banc granted*, (5th Cir. July 1, 1994) (No. 93-7313), the party in interest was a student at the Mississippi School for the Deaf who was sexually assaulted by a fellow student. 20 F.3d at 1352-53. The court found that a special relationship did exist between the school and the student. Id. at 1355. Among the factors that lead to this conclusion were (1) the school was a boarding school with 24-hour custody of the student, (2) the student was deaf and lacked the basic communication skills that normal children possess, (3) the student was obviously not free to leave while he lived at the school, and (4) economic realities essentially force most Mississippi families with deaf children to send their children to the school. Id. Thus the court concluded: “The residential special education program provided by the State of Mississippi had a significant custodial component wherein Walton was dependent on the School for his basic needs and lost a substantial measure of his freedom to act.” Id. See also Spivey v. Elliot, 29 F.3d 1522 (11th Cir. 1994) (holding Georgia school for the deaf was in special relationship with eight-year old resident who was sexually assaulted by a thirteen-year old schoolmate, but finding school officials were entitled to qualified immunity because duty was not clearly established at time of assault).

In *Leffall v. Dallas Ind. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994), however, the court distinguished Walton and found that there was no custodial relationship between a school and a student who was shot by another student at a school-sponsored dance held outside regular school hours. The decision in *Leffall*, however, is a narrow one. The court stated that because the shooting took place at a dance which the student was not compelled to attend, it

need not go so far as have some of our sister circuits and conclude that no special relationship can ever exist between an ordinary public school district and its students; we conclude only that no such relationship exists during a school-sponsored dance held outside of the time during which students are required to attend school for non-voluntary activities.
maintained a custom, practice or policy which allowed the harm to happen to a student. Courts faced with this argument have distinguished between actions by students and teachers. Specifically they have held that an action can be maintained under this theory against a school for a teacher’s actions because the teacher is a state actor. However, they have held that no action can be maintained against a school for a student’s action because a student is a private actor.222

3. State-Created Danger Theory

Another theory which plaintiffs have attempted to use to impose liability on a school system for the acts of students is the state-created danger theory. Under this theory the state can be held liable where it affirmatively acted to create or exacerbate the danger to the individual. Courts, however, have rejected this theory when applied to situations where a student is harassed or assaulted by another student.223

Id. at 529.

Finally, in Johnson v. Dallas Ind. Sch. Dist., 38 F.3d 198 (5th Cir. 1994), the court again declined to rule on the special relationship question. It held that even if the theory applied to schools it would not result in liability for the school in the case before it where a student was killed when he was shot by a non-student trespasser. Id. at 203.


4. School District and School Official Immunity Under the Eleventh Amendment

Another possible argument which school districts and school officials can make when faced with a Section 1983 action is that they are immune from liability under because they are not a "person" as defined in that section. At least two courts have recently held that school corporations are immune from Section 1983 claims because they are arms of the state government and, thus, subject to the protection of the Eleventh Amendment. For school officials, such immunity, however, only applies to suits which are brought against them in their official rather than individual capacities. Suits for damages against school officials in their individual capacities arising from their official acts are not barred.

These decisions on immunity are based on the text of Section 1983 which does not create substantive rights, but rather provides a cause of action and remedy for the protection of federally protected civil rights. It provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

The Supreme Court has repeatedly held that neither a state nor its officials acting in their official capacities are "persons" under Section 1983. In Monell v. Department of Social Services, however, the court overruled its prior ruling in Monroe v. Pape, "insofar as it holds that local government units are wholly immune from suit under Section 1983." However, the Supreme Court expressly limited its holding in Monell to local government

224. Belanger v. Madera Unified Sch. Dist., 963 F.2d 248 (9th Cir. 1992), cert. denied, 113 S. Ct. 1280 (1993); Board of Trustees of Hamilton Heights Sch. Corp. v. Landry, 622 N.E.2d 1019 (Ind. Ct. App. 1993). The Eleventh Amendment states: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
226. Id. at 361-65.
228. See e.g., Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).
231. Monell at 663.
units which are not considered a part of the state for Eleventh Amendment immunity purposes.\textsuperscript{232} More recently in \textit{Howlett v. Rose},\textsuperscript{233} the Court concluded that "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under §1983 in either federal or state court."\textsuperscript{234}

School districts have seized on this language and argued that because they are governed by extensive state regulations they are armed of the state and therefore immune from suit under the Eleventh Amendment. In \textit{Belanger v. Madera Unified Sch. Dist.},\textsuperscript{235} the court applied a multi-factor balancing test to determine whether the school district was a state agency for purposes of the Eleventh Amendment.\textsuperscript{236}

To determine whether a governmental agency is in arm of the state, the following factors must be examined: [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.\textsuperscript{237}

Applying these factors, the court held that the school district was a state agency for purposes of the Eleventh Amendment.\textsuperscript{238}

More specifically, the court emphasized that since California school districts, unlike in most states, had budgets that are controlled and funded by the state government rather than local districts, a judgment against the school district would be satisfied out of state funds.\textsuperscript{239} The court also emphasized, citing the California Constitution and California case law on the subject that under California law, the school district was a state agency performing a central governmental function.\textsuperscript{240}

\textsuperscript{232} \textit{Id.} at 690 n.54.
\textsuperscript{233} 496 U.S. 356, 365 (1990).
\textsuperscript{234} \textit{Id.} at 365.
\textsuperscript{235} 963 F.2d 248 (9th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1280 (1993). Belanger was removed from her position as principal of an elementary school and reassigned to a classroom teaching position. She alleged that she was reassigned because of her gender and in retaliation for testifying against the school district in a separate discrimination suit. \textit{Id.} at 249.
\textsuperscript{236} \textit{Id.} at 251.
\textsuperscript{237} \textit{Id.} at 250-251 (quoting \textit{Mitchell v. Los Angeles Community College Dist.}, 861 F.2d 198, 201 (9th Cir. 1988), \textit{cert. denied}, 490 U.S. 1081 (1989)).
\textsuperscript{238} \textit{Id.} at 253.
\textsuperscript{239} \textit{Id.} at 248.
Harassing Speech in the Public Schools

The Indiana Court of Appeals reached a similar conclusion in *Board of Trustees of Hamilton Heights Sch. Corp. v. Landry.* Citing both the Indiana Constitution and state and federal case law, the Court held that an Indiana school corporation is not a local government unit but is in arm of the state for Eleventh Amendment purposes and is therefore not a person amenable to suit under Section 1983.

The success of such an Eleventh Amendment defense will vary according to state law. The leading case on the issue is *Mt. Healthy Bd. of Educ. v. Doyle,* the Supreme Court concluded an Ohio school board is "more like a county or a city than it is like an arm of the state" and that, therefore, it was not entitled to Eleventh Amendment immunity. Accordingly, counsel should make a close examination of the applicable state constitution and decisional law to determine the propriety of Section 1983 action against a school board. If it appears that the school system will be immune, the possibility still exists for an action based on one of the civil rights statutes.

**B. Franklin Announces the Availability of Money Damages Under Title IX**

Given the limited success achieved in Section 1983 actions, students who have suffered harassment or abuse have recently turned to the civil rights statutes as the basis of action against a school district. This movement has been spurred by the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools* that money damages are available under Title IX.

*Franklin* involved the sexual harassment of a student by a teacher over

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241. 622 N.E.2d 1019 (Ind. Ct. App. 1993), rev'd on reh'g, 638 N.E.2d 1261 (Ind. Ct. App. 1994). Landry, a junior high school teacher removed the glossary from the back of 146 science textbooks owned by the school. He was suspended from work without pay for two days and required to repay $1.00 for each textbook damaged. Following his discipline, Landry filed a § 1983 claim alleging violation of his constitutional rights, including infringement of academic freedom and denial of due process. *Id.* at 1020.

242. *Id.* at 1024-25 (citing IND. CONST. art. VIII, § 1; State ex rel. Clark v. Haworth, 23 N.E. 946 (Ind. 1890); State ex rel. Osborn v. Eddington, 195 N. 92 (Ind. 1935); United States v. Board of School Commissioners of Indianapolis, 368 F. Supp. 1191 (S.D. Ind. 1973), aff'd, 483 F.2d 1406 (7th Cir. 1973), cert. denied, 421 U.S. 929 (1975). In fact, the Hamilton Heights decision was ultimately reversed, 638 N.E.2d 1261 (Ind. Ct. App. 1994) after being criticized by the Seventh Circuit as dubious authority. Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 735 (1994).


244. *Id.* at 280-81. Nearly all the other courts considering the issue since *Mt. Healthy* have refused to grant local school districts Eleventh Amendment immunity. *See* Grande Bd. of Educ. 995 F.2d 992, 995 (10th Cir. 1993) (en banc) (citing cases.)


246. *See id.*
a period of years.\textsuperscript{247} The harassment allegedly included sexually oriented conversations, forcibly kissing the student, telephone calls and coerced intercourse in the teacher’s office.\textsuperscript{248} The student alleged that the district, which did not have a formal policy and procedure for the reporting and investigation of sexual harassment and abuse, was aware of and investigated her allegations but took no action and discouraged her from pressing charges.\textsuperscript{249} The student filed a complaint with the Office of Civil Rights which investigated the charges and concluded the district had violated the student’s rights by subjecting her to sexual harassment and interfering with her right to complain about it.\textsuperscript{250} The Office of Civil Rights found, however, that the district had come into compliance with Title IX because the teacher and an administrator had resigned, and the district had implemented a grievance procedure.\textsuperscript{251} The student then sued.

The District Court dismissed her complaint on the ground that Title IX did not authorize an award of damages, and the Court of Appeals affirmed.\textsuperscript{252} A unanimous Supreme Court, however, held that the student had stated a valid cause of action and allowed her suit, which asked for $6,000,000 in damages from the school district, to go forward.\textsuperscript{253}

In reaching its decision, the Court relied both on the general rule “that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute”\textsuperscript{254} and two congressional amendments to Title IX after the Court had found an implied right of action under it in \textit{Cannon v. University of Chicago}.\textsuperscript{255} The first amendment was the Civil Rights Remedies Equalization Amendment of 1986,\textsuperscript{256} which abrogated the States’ Eleventh Amendment immunity under Title IX, Title VI, Section 504 and the Age Discrimination Act of 1975.\textsuperscript{257} The second was the Civil Rights Restoration Act of 1987,\textsuperscript{258} which Congress passed “to correct what it considered to be an

\textsuperscript{247} \textit{Id.} at 1031.
\textsuperscript{248} \textit{Id.}
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Id.} at 1031, n.3.
\textsuperscript{252} \textit{Id.} at 1031-32.
\textsuperscript{253} \textit{Id.} at 1032.
\textsuperscript{254} \textit{Id.} at 1035.
\textsuperscript{257} \textit{Franklin} at 1036.
unacceptable decision" in *Grove City College v. Bell.*

Specifically, the Court in *Grove City* had held that the receipt of federal financial aid by some of a college’s students did not trigger institutionwide coverage under Title IX. Instead, the receipt of financial aid only imposed Title IX regulations on the college’s financial aid program. Congress’s response was to amend Title IX, Title VI and Section 504 by defining a “program” or “activity” to mean all the operations of the entity receiving federal funding. Pointing to these two amendments, the majority of the Court concluded that “[w]e cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX.”

The Civil Rights Remedies Equalization Amendment of 1986 was particularly important to Justice Scalia, with whom the Chief Justice and Justice Thomas joined in a brief concurrence. While questioning whether the Court should ever find implied rights of actions under federal statutes, he noted that “it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. The Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. section 2000d-7(a)(2), must be read, in my view, not only ‘as a validation of Cannon’s holding,’ but also as an implicit acknowledgment that damages are available.”

260. *Id.* at 573.
261. *Id.* at 574.
263. *Franklin* at 1036-37.
264. *Id.* at 1038-39.
265. *Id.* at 1039 (citation omitted). The Supreme Court has not yet ruled on the issue of whether employees of educational institutions can bring discrimination claims under Title IX. Lower courts are split on this question. In *Bowers v. Baylor Univ.,* 862 F. Supp. 142, 145 (W.D. Tex. 1994), the court stated that the decisions in *Cannon* and *Franklin* “lead this Court to the conclusion that the Supreme Court would take the next logical step of recognizing [an employee’s] cause of action under Title IX.” *See also* *Preston v. Commonwealth of Virginia,* 31 F.3d 203 (4th Cir. 1994) (holding that implied right of action extends to employment discrimination on the basis of gender by educational institutions receiving federal funds); *Henschke v. New York Hosp.-Cornell Medical Ctr.,* 821 F.Supp. 166 (S.D. N.Y. 1993) (same).

Other courts, however, have dismissed Title IX employment discrimination claims, holding that they are preempted by Title VII. For example, in *Wedding v. University of Toledo,* 862 F. Supp. 201, 203 (N.D. Ohio 1994), the court held that Title VII preempted Title IX employment discrimination claim because “if an employee could maintain an implied right of action under Title IX, the very comprehensive, detailed, and express provisions of Title VII could be completely avoided.” *See also* *Storey v. Board of Regents,* 604 F.Supp. 1200 (W.D. Wis. 1985) (holding that Title VII preempts Title IX employment discrimination claim); *Day v. Wayne County Bd. of Auditors,* 749 F.2d 1199 (6th Cir. 1984) (same).
C. Hostile Environment

Since Franklin was decided, several federal suits have been brought claiming that school districts failed to take adequate measures to stop male students from sexually harassing female classmates. To date, only a few of these cases have resulted in a reported decisions. And, only one of these decisions features an in-depth discussion of the viability of a hostile environment claim in a school setting.

1. Petaluma Recognizes Cause of Action for Hostile Environment Discrimination but Requires Proof of Intentional Discrimination for Damages

In Petaluma, a student alleged that she had been repeatedly subjected to sexual harassment by other students throughout the seventh and eighth grades, that she had informed school officials of the harassment and they did not respond to the harassment adequately. Most of the harassment was verbal, in the form of statements about the student having a hotdog in her pants or that she had sex with hotdogs.

In Petaluma, the court found that a cause of action may be maintained under Title IX for hostile environment sexual harassment, but held that, where the harassment is perpetrated by fellow students, the fact that the school knew or should have known of the harassing behavior and failed to stop it is not enough to establish liability. Instead, a student must prove intentional discrimination by showing that the school's inaction (or insufficient action) in the face of complaints of student-to-student harassment was a result of an actual intent to discriminate against the student on the basis of sex.

The Petaluma court based its decision that hostile environment sexual harassment claims may be brought under Title IX on an earlier decision by a fellow district court judge in the same district in a case involving alleged harassment of a student by a teacher. In that case, the judge had looked (1)

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268. Id. at 1564.

269. Id.

270. Id. at 1576.

271. Id.

to the legislative history of Title IX which indicated it was patterned after the Title VII protections for discrimination in the work place, (2) the Supreme Court's reliance on a case recognizing hostile environment sexual harassment in the work place\textsuperscript{273} in analyzing discrimination under Title IX in \textit{Franklin}, (3) two appellate court opinions that had adopted Title VII standards for assessing employment discrimination claims under Title IX\textsuperscript{274} and (4) the OCR's policy of applying Title VII standards in the Title IX context.\textsuperscript{275} Relying on


No appellate court has reached the issue of whether a school district can be held liable for hostile environment discrimination since the \textit{Franklin} decision. One court, however, has indicated its willingness to do so in \textit{dicta}. In Clyde K. v. Puyallup Sch. Dist No. 3, 35 F.3d 1396 (9th Cir. 1994), the issue before the court was whether a school district had fully complied with the Individuals with Disabilities Education Act, 20 U.S.C. \textsection 1400 et seq., in expelling a fifteen-year-old student with Tourette's Syndrome and Attention Deficit Hyperactivity Disorder. The student, Ryan K., had exhibited severe behavioral problems including disrupting classes by taunting other students with name-calling and profanity, insulting teachers with vulgar comments, directing sexually-explicit remarks at female students, assaulting students and teachers, and kicking and hitting classroom furniture. \textit{Id.} at 1398.

In affirming the school district's removal of Ryan from the classroom, the court noted:

Ryan also directed sexually-explicit remarks at female students, another legitimate cause for concern among school officials. \textit{Given the extremely harmful affects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools}. \textit{See} Monica L. Sherer, Comment, \textit{No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment}, 141 U. PA. L. REV. 2119, 2133-35 (1993) (noting that targets of peer sexual harassment often experience embarrassment, fear, anxiety and loss of self-confidence, which in turn can lead to diminished opportunities for social and educational growth). Moreover, school officials may reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to hostile educational environment.

\textit{Id.} at 1401-02 (emphasis supplied). In support of its last statement, the court cited \textit{Petaluma} and two newspaper articles discussing lawsuits alleging peer sexual harassment. \textit{Id.} at 1402 n.8. None of these courts, nor the court in \textit{Petaluma} addressed the issue of whether Title VII's regulations of harassing speech violate the First Amendment. For a recent commentary finding that these regulations do violate the First Amendment see Jules B. Gerard, \textit{The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment}, 68 NOTRE DAME L. REV. 1003 (1993). For the ACLU's position on the subject, see Nadine Strossen, \textit{Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding A Collision}, 37 VILL. L. REV. 757 (1992). \textit{See also} Kingsley R. Browne, \textit{Title VII as Censorship: Hostile-Environment Harassment and the First Amendment}, 52 OHIO ST. L. J. 481 (1991), for an encyclopedic survey of the cases on the subject.

\textsuperscript{275} \textit{Petaluma} at 1571-72.
these same factors, the court in *Petaluma* found that student-to-student sexual harassment is actionable under Title IX.276

The court, however, found that a student must prove actual intent to discriminate on the part of the school before damages can be awarded.277 The court based this decision on its reading of the decision in *Franklin*. In *Franklin*, the Court stated:

[T]he United States contends that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress’s Spending Clause Power. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28-29, 101 S. Ct. 1531, 67 L.Ed.2d 694, 1545-46 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was unintentional. Respondents and the United States maintain that this presumption should apply equally to intentional violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. See id. at 17, 101 S. Ct. at 1540. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Schools 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 ‘discriminate[s]’ on the basis of sex.” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L.Ed.2d 49, 2404 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.278

Based on this language, the court in *Petaluma* stated:

Although the *Franklin* Court refused to address the question of

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276. Id. at 1575. *Petaluma* and other courts which have addressed the issue, however, have found that Title VII’s allowance of damages actions against individuals does not apply in Title IX cases. Id. at 1576. See also Seamons v. Snow, 864 F. Supp. 1111, 1116 (D. Utah 1994); Bowers v. Baylor Univ., 862 F.Supp. 142, 145 (W.D. Tex. 1994); Bustos v. Illinois Inst. of Cosmetology, Inc., 1994 WL 710830 (N.D. Ill. Dec. 15, 1994); Slaughter v. Waubonsee Community College, 1994 WL 663596 (N.D. Ill. Nov. 18, 1994). The courts have based their decisions on the language of Title IX which prohibits discrimination only by educational “institutions” receiving federal funding. Because individuals cannot be “institutions,” the courts have found that they are not subject to Title IX liability. But see Mann v. University of Cincinnati, 864 F. Supp. 44 (S.D. Ohio 1994) (holding that suit could be brought against school officials in their individual capacities).

277. Id. at 1576.

278. 112 S. Ct. at 1037 (quoted in *Petaluma* at 1574). Since intentional discrimination had been alleged in *Franklin* and compensatory relief is available for intentional discrimination in violation of Spending Clause legislation, the Court refused to address the question of whether Title IX was actually enacted not just pursuant to the Spending Clause but also pursuant to Section 5 of the Fourteenth Amendment. Id. at 1038 n.8.
whether Title IX’s prohibitions and remedies are co-extensive with Title VII’s, the implication of the Court’s opinion is that they are not. Although not expressly stated in the opinion, the rule laid down by Franklin appears to be that, under Title IX, damages are available only for intentional discrimination but respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so.279

Accordingly, the court held that

[N]o damages may be obtained under Title IX (merely) for a school district’s failure to take appropriate action in response to complaints of student-to-student sexual harassment. Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex. The school’s failure to take appropriate action, as alleged in plaintiff’s complaint, could be circumstantial evidence of intent to discriminate. Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex. That, however, does not appear to be the theory behind plaintiff’s complaint. The Title IX claim is therefore DISMISSED WITH LEAVE TO AMEND within thirty (30) days of the date of this order.280

279. 830 F. Supp. at 1575 (footnotes omitted). This, in fact, was the decision reached in Hastings v. Hancock, 842 F. Supp 1315 (D. Kan. 1993), where the court held that the substantive law of Title VII should be used to determine whether or not a school may be held liable for the alleged acts of harassment by a teacher against a student. See also Ward v. Johns Hopkins Univ., 861 F. Supp. 367 (D. Md. 1994), Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993); Duron v. Hancock, 1993 WL 544519 (D. Kan., Dec. 18, 1993) (sexual harassment of employee by supervisor). Two other courts, however, have held that Title VII’s agency principles should not provide a basis for liability on the part of the school due to the difference between Title VII and Title IX. See Floyd v. Waiters, 831 F. Supp. 867 (M.D. Ga. 1993); R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993). It is not clear how these latter two cases square their decisions with Franklin’s language that “the same rule [as when a supervisor sexually harasses a subordinate under Title VII] should apply when a teacher sexually harasses and abuses a student.” 112 S. Ct. at 1037.

280. Id. at 1576 (footnote omitted). See also Mann v. University of Cincinnati, 864 F. Supp. 44 (S.D. Ohio 1994) (also recognizing that hostile environment claims are viable under Title II.) The court in Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363 (N.D. Ga. 1994), however, disagreed with the holding in Petaluma that a cause of action could be based upon a school’s inaction in face of complaints of student-to-student harassment. Unfortunately, it did so with only a conclusory statement and with no discussion of the case law cited in Petaluma.

Aurelia D. involved a complaint of harassment between two fifth-grade students. The complaint alleged that a fifth-grade boy had harassed one of his classmates by, among other things, attempting to touch her breasts and vaginal area, using vulgar language toward her, placing a doorstop in his pants and behaving in a sexually suggestive manner toward her, and rubbing his body against her in a suggestive manner. 862 F. Supp. at 364-65. At one point the student who filed the action and other girls who had been harassed by the same boy asked
2. Proof of Intentional Discrimination Can Be Shown by Inaction

For now, *Petaluma* is the only case law on the issue of what type of discrimination — intentional or unintentional — is needed in order to recover their teacher if they could go as a group to the principal’s office but were not allowed to do so. *Id.* at 365.

The district court dismissed the plaintiff’s Title IX action stating that it had no basis in law. Sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus any harm to [the student] was not proximately caused by a federally-funded educational provider.

Another district court has suggested that a Title IX cause of action could be based upon allegations of a school’s inaction in the face of complaints of student-to-student harassment when inaction was intended to discriminate against the child on the basis of sex. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993). However, this court finds no basis for such a cause of action in Title IX or case law interpreting it. *Id.* at 367.

The court in Seamons v. Snow, 864 F. Supp. 1111 (D. Utah 1994), also held in a conclusory fashion that no cause of action exists for hostile environment harassment under Title IX. The court stated that:

> Title IX does not expressly create a cause of action based on negligence for hostile environment. It would be inappropriate for this Court to import the doctrine of hostile environment sexual harassment from Title VII into this Title IX action. *Contrast Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292 (N.D. Cal. 1993).

*864 F. Supp. at 1118.*

The main reason for the court’s dismissal of the plaintiff’s complaint, however, was his failure to show the school district’s alleged discriminatory behavior was based on his sex. *Id.* at 1117-19. The complaint alleged that on October 11, 1993, Brian Seamons, a junior at Sky View High School and a backup quarterback on the football team, was restrained by four other team members when he was leaving the shower area. *Id.* at 1115. Using athletic tape, they taped Brian to a towel rack. After Brian was secured by the tape, a fifth student left the locker room and returned with the girl Brian had taken to the homecoming dance a few weeks earlier. She was shown Brian in his taped condition. *Id.* Brian told the principal and the head football coach about the incident the next day. After several communications between the football coach, Brian and other members of the team, Brian was suspended and then dismissed from the team. *Id.* On the day following Brian’s dismissal from the team, the superintendent of the school district cancelled the remainder of Sky View High School’s football season because of the taping incident and the subsequent events related to it. *Id.*

Brian’s complaint against the football coach, several school administrators and the school district alleged that they should be liable under Title IX because, among other things, (1) the school district knew or should have known of several incidents of sexual harassment at Sky View High School and other schools prior to the assault against Brian, (2) Brian’s complaints about the assault as to the administrators were met with response that “boys will be boys,” (3) the football coach made public statements regarding the inappropriateness of imposing discipline or serious sanctions on the perpetrators of the assault because “hazing ... has always gone on in locker rooms,” and (4) the school district knowingly, intentionally, and continually characterized the locker room incident as “locker room pranks” and “hazings” to which male students should subject themselves. *Id.* at 1117. The court found that even if
damages for student-to-student harassment under *Franklin*. The last paragraph of the opinion, quoted above, however, shows that the distinction between intentional and unintentional conduct may not be as clear as schools might wish it to be. One commentator has stated:

> [A]lthough the opinion might suggest that intentional conduct must come from [an] employee or agent of the [school] district as opposed to a student’s peer, the court’s last paragraph clearly leaves open the door for plaintiff to prove that knowledge coupled with malfeasance can suggest intentional conduct.

These allegations were taken as true they were not sufficient to support a Title IX claim because there was no showing that any of the alleged actions showed an intent to discriminate against Brian on the basis of his sex. *Id.*

The court stated:

> Defendants’ statement that “boys will be boys” does not legally support Plaintiffs’ allegation that Defendants were motivated by an intent to discriminate against Brian on the basis of his sex. Taken in any reasonable light, and assuming the truth of the allegations as we must for the purposes of this motion, such a statement suggests at most an observation that students of the school, who happen by virtue of their birth to be male, occasionally commit immature and inappropriate acts during their path (hopefully) to maturity. Similar comments may be, and no doubt are, said about female students. But it strains common sense and any reasonable construction of Title IX’s anti-sex-discrimination purpose to crowd such comments by school officials into an actionable claim of intentional discrimination based on sex.

The lack of adequate allegations to support a sexual harassment claim is fatal to Plaintiffs’ hostile environment sexual harassment claim as well. The people who are directly affected by the situation at Sky View High School — especially Brian — may be convinced that a “hostile environment” existed at the school. It is important, however, to distinguish the common-sense definition of that term from its legal meaning within the sex-discrimination context. Liability for hostile environment sexual harassment exists under Title VII only when: (1) an employee engages in sexual harassment while acting in the course and scope of employment; (2) an employer negligently or recklessly fails to remedy or prevent a hostile or offensive work environment of which management-level employees know, or the exercise of reasonable care should have known; or (3) an employee’s act of sexual harassment may be imputed to the employer if the employer’s delegation of authority enabled the employee to act. *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 577 (10th Cir. 1990). Because Plaintiffs have not alleged facts supporting a claim of sexual harassment and because they have also failed to meet the more specific requirements of hostile environment as explained in *Hirschfeld*, it is clear they have no basis for asserting a claim under Title IX even if this Court were to apply case law from Title VII.


Knowledge will be the key element in determining school liability in hostile environment actions brought under Title VI, Title IX and Section 504. Specifically two kinds of knowledge are important. The first is notice of the requirements of these federal statutes.

The court in Petaluma placed great emphasis on the Franklin Court’s characterization of Pennhurst State Sch. & Hosp. as barring remedies under Spending Clause statutes when the alleged violation was unintentional, and its statement that the “point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award.” Given the decision in Cannon, the two amendments to Title IX and now the decision in Franklin, however, it is highly unlikely that any school corporation could now claim that it lacks notice that it will be liable for a monetary award.

Moreover, a close examination of the language in Pennhurst reveals that even under the Spending Clause, Congress can impose strong requirements on recipients of its funds. The Court in Pennhurst stated that:

> our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States . . . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.”

> “Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.”

Similar language is found in Guardians Ass’n v. Civil Serv. Commission of the City of New York, where the court found that while discriminatory

282. Franklin at 1037 (emphasis added).
283. Id. at 17 (citation omitted).
284. Id. at 24.

The issue in Roberts was whether Colorado State University had violated Title IX when it chose to discontinue its women’s varsity fast pitch softball team. The university argued that the plaintiffs had to show discriminatory intent to show that the action violated Title IX.

Defendant reasons that because Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to -4a, and because discriminatory intent is required
intent was not an essential element of a Title VI violation, a private plaintiff could recover only injunctive, non-compensatory relief for unintentional violations of Title VI.286

Closer examination of the facts in Guardians and Pennhurst, however, shows that there is a sharp distinction between them and a school’s responsibility for student-to-student harassment like that seen in Petaluma. For example, in Guardians, the court noted that

[t]he discrimination was unintentional and resulted from the disproportionate impact of the entry-level test on racial minorities. In this and similar situations, it is not immediately obvious what the grantee’s obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations.287

It was also not obvious to the grantee in Pennhurst that it was in violation of any statute of regulations. The question there was whether or not Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act288 created a substantive right in favor of the mentally retarded to “appro-
appropriate treatment” in the “least restrictive” environment.\textsuperscript{289} The court found nothing in either the Act or its legislative history to suggest such a congressional intent.\textsuperscript{290}

In the area of harassing speech, however, it is difficult for schools to argue that they do not know what their obligations are under Title IX, Title VI and Section 504. The OCR provided a definition of sexual harassment in 1981 and has been conducting compliance reviews and complaint investigations under all the civil rights statutes for over a decade.\textsuperscript{291} And, in 1994 it provided explicit “guidance” on how schools must respond to incidents of racial harassment.\textsuperscript{292} Schools can, or should, know what is required of them when they are confronted with student-to-student harassing speech.

The second kind of knowledge is notice of conditions creating a hostile environment. If a school has such notice, a failure to take such appropriate action is in itself an “intentional” action on the part of the school and should subject it to liability.

In fact, a school attorney commenting on the decision in Petaluma in an article appearing in For the Defense stated that while the Petaluma Court’s decision was understandable in light of the Supreme Court’s finding in Franklin,

\begin{quote}
\textit{it is somewhat disingenuous to conclude that a school district that knows about a pattern in practice of sexual harassment; but does nothing, and in fact encourages the victims to remain silent, does not engage in an intentional act of perpetuating a system designed to discriminate against a purported victim.}\textsuperscript{293}
\end{quote}

He then further stated:

\begin{quote}
\textit{It is difficult to imagine when a school district – or other employer – receiving the number and frequency of complaints as did the Petaluma School District, would not be charged with intentional discrimination for failure to act on those complaints.}\textsuperscript{294}
\end{quote}

Thus, if for no other reason then because of liability concerns, the time has come for schools to establish policies to train its employees in detecting and correcting potential abuse problems.

\begin{enumerate}
\item[289.] Pennhurst at 24.
\item[290.] Id. at 18.
\item[291.] See \textit{supra} note 164 and accompanying text.
\item[292.] See \textit{supra} notes 167-85 and accompanying text.
\item[293.] Knox, \textit{supra} note 281 at 16.
\item[294.] Id.
\end{enumerate}
IV. CONCLUSION

Schools have broad latitude in proscribing student speech. School speech codes should pass constitutional muster as long as they apply to fighting words generally and are not content-based. If the harassing and hostile speech is pervasive and persistent, a hostile environment may arise and subject the school to both a complaint investigation by the OCR and possible civil liability under Section 1983, Title XI, Title VI, or Section 504. Schools can and must act to proscribe harassing speech not only because it is good for their students but because it is good for their budgets.