North Dakota Law Review

Volume 76 | Number 4 Article 8

2000

Civil Rights - Federal Remedies: Public Schools May Be Liable for Student-on-Student Sexual Harassment

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CIVIL RIGHTS—FEDERAL REMEDIES: PUBLIC SCHOOLS MAY BE LIABLE FOR STUDENT-ON-STUDENT SEXUAL HARASSMENT

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)

I. FACTS

LaShonda Davis was a fifth-grade student at Hubbard Elementary School during the 1992-93 school year.[1] G.F., a male classmate, was also in the fifth grade.[2] In December of 1992, G.F. told LaShonda "I want to feel your boobs" and "I want to get in bed with you."[3] These comments were accompanied by G.F.'s attempt to touch LaShonda's breasts and vaginal area.[4] During a physical education class in February of 1993, G.F. inserted a doorstop in his pants and "behav[ed] in a sexually suggestive and harassing manner" towards LaShonda.[5] G.F. also rubbed against LaShonda "in a sexual manner" in April of 1993.[6] G.F. was charged with and pled guilty to sexual battery in May of 1993.[7]

These incidents of sexual harassment and others like them—a total of eight instances—spanned a six-month period.[8] Either LaShonda or her mother reported all of these incidents to a teacher.[9] G.F. harassed other girls who also reported this harassment to their teacher.[10] Mrs. Davis asked the school's principal, Mr. Querry, to discipline G.F. so that her daughter could be protected.[11] Mr. Querry responded by saying, "[I] 'guess [I'll] have to threaten [him] a little bit harder.'"[12] However, nobody at Hubbard Elementary or the Monroe County School Board ever disciplined G.F. for his behavior.[13] Over the course of the 1992-93

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1. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999). Hubbard Elementary School is a public school located in Monroe County, Georgia. *See id.*

2. *See* Brief for the Petitioner at 4, *Davis* (No. 97-843).

3. *Id.* LaShonda and her mother reported this behavior to LaShonda's classroom teacher, Mrs. Fort. *See id.* Mrs. Fort stated that she told the principal, Mr. Querry, about this incident. *See id.*

4. *See id.* Beginning with this incident and several times up to three months later, LaShonda asked Mrs. Fort if she could change her seat in class so that she would not have to sit next to G.F. *See id.* These requests were denied. *See id.*

5. *Id.* LaShonda and her mother reported this behavior to the teachers in charge of the class, Coach Whit Maples and Mrs. Joyce Pippen. *See id.* In March 1993, LaShonda and other girls, who were subject to similar behavior by G.F., asked to meet with Principal Querry. *See id.* This request was denied by Mrs. Fort. *See id.*

6. *See id.* LaShonda told Mrs. Fort about this behavior. *See id.*

7. *See id.* at 5.

8. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1394 (11th Cir. 1997).

9. *See supra* notes 1-6 and accompanying text.

10. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 635 (1999).

11. *See* Brief for the Petitioner at 5, *Davis* (No. 97-843).

12. *Id.*

13. *See id.*

school year, Mrs. Davis noticed a change in LaShonda's behavior.[14] Her previously high grades dropped.[15] In addition, LaShonda's father discovered that she had written a suicide note.[16]

Mrs. Davis brought suit against the Monroe County School Board (Board) in the United States District Court for the Middle District of Georgia, claiming on behalf of her daughter that the Board violated Title IX of the Education Amendments of 1972.[17] The district court found no basis for this claim, stating that the Board had in no way contributed to the alleged harassment and that the Board was not responsible for the acts of a student.[18] An appeal to the Court of Appeals for the Eleventh Circuit reversed the district court's decision.[19] The court of appeals found that student-on-student sexual harassment constituted a cause of action by analogizing this type of harassment to hostile environment sexual harassment in the workplace, for which an employer may be liable for acts of employee-on-employee sexual harassment.[20]

The school moved for a rehearing en banc, which the Court of Appeals for the Eleventh Circuit granted.[21] The en banc court affirmed the district court's decision.[22] The court reasoned that under the Spending Clause,[23] an entity must have notice that it will be liable for acts of third parties, and the school in this case lacked notice of its possible liability for peer sexual harassment.[24] The United States Supreme Court granted certiorari to determine whether a school district may be liable for student-on-student sexual harassment.[25] In a five-to-four decision, the Court *held* that a school may be liable for peer harassment when the school is deliberately indifferent to the harassment.[26] The Court also required that the harassment be "serious enough to have the systemic

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14. *See id.*

15. *See id.*

16. *See id.* LaShonda told Mrs. Davis that she "didn't know how much longer she could keep [G.F.] off her." *Id.* at 4-5.

17. *See* Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994) (citing 20 U.S.C. § 1681(a) (1994)). Mrs. Davis also brought suit against the school district's superintendent, Charles Dumas, and the principal, Mr. Querry. *See id.* at 364. These claims were subsequently dismissed because of the doctrine of qualified immunity, which gives officials immunity from actions where they exercise their discretion in an official capacity. *See id.* at 367.

18. *See id.*

19. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir. 1996).

20. *See id.* at 1194.

21. *See generally* Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996).

22. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997).

23. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

24. *See Davis*, 120 F.3d at 1399-1400.

25. *See generally* Davis v. Monroe County Bd. of Educ., 524 U.S. 980 (1998).

26. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 653 (1999).

effect of denying the victim equal access to an educational program or activity."[27]

II. LEGAL BACKGROUND

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[28] The primary purpose of Title IX is to prevent gender-based discrimination in schools by disallowing federal assistance to educational institutions[29] that implement or are responsible for practices favoring or hampering a student because of his or her gender.[30] Title IX was meant not only to prevent using federal money for discriminatory practices, but also to protect individuals from discriminatory practices.[31]

The enactment of Title IX of the Education Amendments of 1972 was in the wake of civil rights legislation in 1964.[32] In fact, the language from Title IX was borrowed from Title VI of the Civil Rights Act of 1964 (Title VI).[33] The standards developed for an actionable Title IX

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27. *Id.*

28. 20 U.S.C. § 1681(a) (1994).

29. Throughout this Comment, those liable under Title IX will be referred to as grant recipients, educational institutions, or schools. A liable entity is defined as

> any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1681(c) (1994).

30. *See* Cannon v. University of Chicago, 441 U.S. 677, 704 n.36 (1979) (citing 117 CONG. REC. 39,252 (1971)). In *Cannon*, a woman was denied admission to two private medical schools. *See id.* at 680. She then brought a Title IX suit against the universities claiming that she was denied admission because of her sex. *See id.* The district court in which she brought her case dismissed the action, finding no private right of action for Title IX. *See id.* The appeals court affirmed. *See id.* The United States Supreme Court, however, reversed the appeals court decision, finding that even though Congress did not expressly provide for a private remedy, it was its intent to do so. *See id.* at 717.

31. *See id.* at 704.

32. *See id.* at 694.

33. *See* 42 U.S.C. § 2000(d) (1994). Title VI states that "[n]o person in the United States shall, on the ground 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." *Id.* Senator Bayh noted the similarities between Title VI and Title IX. *See* 117 CONG. REC. 30,408 (1971). He stated that in enacting Title IX, "[w]e are only adding the 3-letter word 'sex' to existing law [Title VI]." *Id.*

Civil rights legislation was enacted primarily to redress discrimination against black persons in the workplace and in education. *See* United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 202-03 (1979) (stating that although blacks had equal social rights, employment discrimination hampered their ability to obtain a job, and therefore income, to enjoy equal social rights). While black persons were the initial focus of the Civil Rights Act, the Act also came to stand for equality for all

suit to remedy gender-based discrimination have aligned closely with those standards developed for other sections of the 1964 Civil Rights Act in two instances: (1) implying a private right of action[34] and (2) determining elements of an actionable Title IX claim.[35]

A. PRIVATE RIGHT OF ACTION ALLOWED FOR TITLE IX

Title IX does not expressly provide for a private right of action.[36] Courts have determined, however, that Title IX warrants a private right of action by finding it is implied not only from the language of the statute,[37] but also from the context in which the statute was adopted.[38] Legislative history shows that Title IX was modeled after Title VI, which does allow a private right of action.[39] Relying on Title VI, courts have found that Title IX also implies a private right of action.[40]

The Supreme Court has stated that this private right of action is available because the alternative remedy, withholding federal funds in isolated instances of sexual harassment, may be too damaging to educational institutions.[41] Alternative means to remedy discrimination should be allowed when those means adequately discourage discrimination, which is the purpose of the statute.[42] This private right of action allows compensatory damages for a violation of Title IX.[43] These damages are limited, however, to cases in which the grant recipient

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races, sexes, religions, and national origins. *See* 42 U.S.C. 2000e-2(a) (1995) (outlining the provisions of Title VII of the Civil Rights Act of 1964).

34. *See Cannon*, 441 U.S. at 710 (stating that Congress, in enacting Title IX, understood that the remedies for Title IX should be the same as Title VI).

35. *See generally* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992) (applying Title VII elements to a Title IX issue). The Court in *Franklin* held that money damages were available to successful Title IX claimants. *See id.* at 76. However, the case also has significance because the Court borrowed the Title VII sexual harassment rule and applied it to a Title IX claim where a student was bringing suit against her teacher for sexual harassment. *See id.* at 75. The Court applied the Title VII rule because it found similarities between a supervisor-subordinate relationship in a workplace setting and a teacher-student relationship in a school setting. *See id.*

36. *Cannon*, 441 U.S. at 683. Prior to *Cannon*, the only remedy available to a successful Title IX claimant was that federal financial aid to the educational institution was withheld. *See id.* at 695-96.

37. *See id.* at 694. The language of Title IX focuses on the class to be benefited from the statute. *See id.* at 691. If the Title IX focus were instead on simply prohibiting the use of federal funds or on preventing discrimination, a private right of action would not so easily be implied. *See id.* at 690-93.

38. *See id.* at 703.

39. *See id.* at 699.

40. *See id.* at 702-03.

41. *See id.* at 704-05.

42. *See id.* at 706-08.

43. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992). The Court in *Franklin* allowed compensatory damages for Title IX even though a private right of action does not automatically presume compensatory damages as a remedy. *See id.* at 66. The Gwinnett County Public Schools proposed that Ms. Franklin's damages be limited to backpay and prospective relief. *See id.* at 75. The Court, however, found this proposal unworkable because the harassing teacher no longer worked at the school, and Ms. Franklin no longer attended the school. *See id.* at 76.

was aware of, or had notice of, circumstances that could lead to liability under Title IX.[44]

B. ELEMENTS OF A TITLE IX SEXUAL HARASSMENT CLAIM

While the concept of a private cause of action was patterned after Title VI, the elements of a Title IX sexual harassment claim were borrowed from Title VII of the Civil Rights Act of 1964 (Title VII).[45] To have a valid Title IX sexual harassment claim, a plaintiff must satisfy three elements: (1) the harassment must be the *quid pro quo* type or the sexually hostile environment type,[46] (2) the educational institution must have notice of the harassment, and (3) the educational institution must be deliberately indifferent to the harassment.[47]

If it is a sexually hostile environment case, then the harassment must be "sufficiently severe or pervasive to alter the conditions of the [student's education] and create an abusive [educational] environment."[48] Part of the standard for determining if a person has a valid hostile environment claim is subjective, meaning the claimant must believe that the environment is abusive.[49] At the same time, there is an

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44. *See id.* at 74 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28-29 (1981)) (explaining that remedies are limited only when the violations are unintentional).

45. *See* Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1356 (E.D. Mich. 1996) (citing *Franklin*, 503 U.S. at 75). Title VII is codified at 42 U.S.C. § 2000e-2 (1995).

46. These two specific types of harassment have been identified within the Equal Employment Opportunity Commission Guidelines. *See Meritor*, 477 U.S. at 65. These guidelines define sexual harassment as

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1999). The first type of harassment, *quid pro quo* sexual harassment, recognizes harassment when sexual favors are granted in exchange for a favorable employment position or benefit. *See Meritor*, 477 U.S. at 65. The second type of sexual harassment, hostile environment sexual harassment, occurs when conditions in the workplace are "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67.

47. *See* Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127-28 (10th Cir. 1998). In *Morse*, two students at the University of Colorado's Reserve Officer Training Corps alleged that they had been harassed by a higher ranking cadet. *See id.* at 1126. They reported this behavior to their supervising officer. *See id.* The supervising officer failed to stop the harassment and, in fact, subjected them to further harassment. *See id.* The students then reported the harassment to the administration at the university. *See id.* Claiming that the university did not adequately respond, the students brought suit against the school under Title IX. *See id.*

48. *Meritor*, 477 U.S. at 67 (modified so as to apply to the educational context).

49. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). The Court requires that the claimant must subjectively believe that the environment is abusive; otherwise, the conditions of the claimant's environment would not be altered and, therefore, there would be no violation of the statute. *See id.* at 21-22.

objective standard that a claimant must show that a reasonable person would find the environment hostile or offensive.[50] Also, the harasser must have the intent to harass the victim because of his or her sex.[51] Finally, the harassment must be more than one incident of name-calling to be severe or pervasive enough to constitute a violation of Title VII.[52]

While courts have adopted Title VII principles as a basis for the first element of an actionable Title IX sexual harassment claim, the United States Supreme Court added the remaining two elements, notice and deliberate indifference, for cases of teacher-student sexual harassment.[53] Adding the elements of notice and deliberate indifference was necessary because of the differences between the two statutes.[54] Title IX was enacted pursuant to the Spending Clause,[55] but Title VII was not.[56]

When legislation is enacted pursuant to the Spending Clause, a contractual relationship is formed between the federal government and the state.[57] That is, in order for the state to receive those federal funds, it must fulfill the conditions upon which the funds are granted.[58] A state should only be obligated to fulfill those conditions, however, when the conditions are unambiguous, such that "[s]tates [can] exercise their choice knowingly, cognizant of the consequences of their participation."[59] Thus, to have an actionable Title IX suit against a school, a claimant must demonstrate that the school was on notice of its

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50. *See id.* at 21. The Court found that this objective standard only means that a reasonable person would believe that the harassing behavior caused a hostile or abusive working environment. *See id.* at 22. Additionally, the Court held that no concrete injury or psychological harm was required to have a valid claim. *See id.* at 23.

51. *See* Seamons v. Snow, 84 F.3d 1226, 1230-31 (10th Cir. 1996) (finding a Title IX action invalid because it was not based on sex when the action involved upper-class football players hazing a fellow football player).

52. *See Meritor*, 477 U.S. at 67 (citing and quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), which found that "mere utterance of an ethnic or racial epithet" could not be classified as harassment under Title VII).

53. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292-93 (1998) (inferring that it is only fair to withhold federal funds from a school district for a teacher's harassment when the school district has notice of the discrimination and fails to remedy or attempt to remedy the harassment). *See generally* Debra L. Hoffarth, Case Comment, *United States Supreme Court Adopts "Actual Notice" and "Deliberate Indifference" as the Standard for Title IX Damages for Teacher-Student Sexual Harassment*, 75 N.D. L. REV. 117 (1999) (discussing the United States Supreme Court's decision in *Gebser* to hold school districts liable for teacher-student sexual harassment). In *Gebser*, a freshman student had a sexual relationship with her teacher. *See* 524 U.S. at 278. The relationship had lasted over a year. *See id.* The student, however, did not, at any time, report this relationship to the school. *See id.* The teacher was eventually arrested. *See id.*

54. *See id.* at 286-87.

55. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992). The Spending Clause is quoted in *supra* note 23.

56. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 206 n.6 (1979) (stating that Title VII was enacted pursuant to the Commerce Clause).

57. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

58. *See id.*

59. *Id.*

possible liability for such an action.[60] This notice must be provided to "an official of the recipient entity with authority to take corrective action to end the discrimination."[61]

Constructive notice is not enough, however.[62] Just because the school should have known of the harassment does not make the school liable.[63] In *Gebser v. Lago Vista Independent School District*,[64] the Court refused to apply agency principles[65] to impute liability under Title IX.[66] The Court found that when a teacher harassed a student and the school was unaware of the harassment, the school could not be liable.[67] As a result, a school may not be liable for actions of its teachers merely because the school employs the teacher.[68]

Besides requiring that an educational institution have actual notice, a claimant must also show that an educational institution was deliberately indifferent to the harassment.[69] This means that the claimant must show

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60. *See id.*

61. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). In *Gebser*, the Lago Vista Independent School District had almost no notice of its teacher's sexual relationship with a student. *See id.* at 278. The student had not notified school administrators of the relationship. *See id.* When parents of two students complained that the teacher made inappropriate comments in class, the principal arranged a meeting with the teacher, at which time the teacher agreed that he would make no more offensive comments. *See id.* The Court found that based on these facts the Lago Vista Independent School District lacked notice of the behavior. *See id.* at 292-93.

62. *See id.* at 290 (holding that absent "actual notice" one may not have an actionable sexual harassment claim under Title IX).

63. *See id.*

64. 524 U.S. 274 (1998).

65. An agent is "a person authorized by another to act on his [or her] account and under his [or her] control." RESTATMENT (SECOND) OF AGENCY § 1(3) cmt. e. For example, when an employee acts on behalf of an employer or for that employer's benefit, the employee is said to be an "agent" of that employer. *See id.* Under agency principles, the actions of the employee-agent are to be treated as those of the employer; therefore, the employer is potentially liable for the actions of the employee even if the employer was unaware of the actions. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (stating that an employer may be vicariously liable for acts of its supervisor employees).

66. *See Gebser*, 524 U.S. at 288. The Court did not apply agency principles because of the contractual nature of Title IX. *See id.* at 287-88. An educational institution forms a contract with the federal government when the institution accepts federal funding in return for its agreement not to discriminate. *See id.* at 286. Therefore, an educational institution must have the opportunity to remedy any harassment to comply with federal requirements. *See id.* at 288. When a teacher acts independently, the educational institution is denied the chance to remedy the discrimination because it is unaware of the discrimination. *See id.* at 287.

While agency principles do not apply to Title IX, under Title VII, an employer may be liable for the misconduct of supervisors even though the employer may not know of the harassment. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). In *Meritor*, a bank employee was subjected to repeated harassment by her supervisor. *See id.* at 60. The employee brought suit against her employer under Title VII by alleging sexual harassment. *See id.* The bank stated that it did not know of the harassment and therefore could not be held liable. *See id.* at 69. The Court found that an employer is not absolutely liable for all instances of sexual harassment by supervisors. *See id.* at 73. However, the Court stated that because the definition of employer in 42 U.S.C. § 2000e(b) includes agents of the employer, notice may not be required to have an actionable Title VII claim. *See id.* at 72 (stating that an employer will not always be protected if it lacks notice).

67. *See Gebser*, 524 U.S. at 292-93.

68. *See id.* at 289-93.

69. *See id.* at 292-93.

that no action was taken by the educational institution to prevent further harassment.[70] Once a claimant has established the three elements of a sexual harassment claim, that she or he was subject sexual harassment and that the educational institution knew of the harassment, but was deliberately indifferent to the it, the claimant will have an actionable Title IX hostile environment sexual harassment claim.[71] However, before the decision in *Davis v. Monroe County Board of Education*,[72] the Supreme Court had only recognized the latter two elements in cases of teacher-student sexual harassment.[73] Using the framework established by teacher-student sexual harassment cases and hostile environment sexual harassment cases, the Supreme Court decided *Davis*.

III. ANALYSIS

In *Davis*, the Supreme Court decided whether a school district might be liable for peer sexual harassment.[74] In a five-to-four decision set forth in an opinion written by Justice O'Connor,[75] the Court *held* that peer sexual harassment in schools is privately actionable for monetary damages, but only when the educational institution is deliberately indifferent to known harassment.[76]

A. MAJORITY OPINION

The Court clarified its opinion in *Gebser* by explaining the notice requirement of a Title IX claim.[77] The Court found that a peer sexual harassment claim is allowed under Title IX and then went on to explain how a peer sexual harassment analysis is the same as, and how it is different from, a teacher-student sexual harassment analysis.[78]

1. *Notice Required for Title IX Claim*

In determining whether educational institutions may be liable for compensatory damages for peer sexual harassment under Title IX, the Court first noted that a private right of action under Title IX is implied.[79]

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70. *See* Morse v. Regents of Univ. of Colo., 154 F.3d 1124, 1128 (10th Cir. 1998) (finding deliberate indifference when no remedial action was taken after Reserve Officer Training Corps members reported harassment to the university dean and to the university affirmative action officer).

71. *See id.*

72. 526 U.S. 629, 653-54.

73. *See Gebser*, 524 U.S. at 292.

74. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 653-54 (1999).

75. Justice O'Connor was joined by Justices Stevens, Souter, Ginsburg and Breyer. *See id.* at 632.

76. *See id.* at 653-54.

77. *See id.* at 645-49.

78. *See id.* at 649-53.

79. *See id.* at 639 (citing Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (holding that

Private money damages, however, are not available when the educational institution does not have notice of its potential liability.[80]

The Board claimed that it lacked the requisite notice of potential liability for peer sexual harassment because neither the language nor the legislative history of Title IX indicated the possibility of this type of liability.[81] The Board maintained that under Title IX an educational institution is only liable for its own misconduct.[82] The Board asserted that the questionable conduct in this case was harassment by G.F.[83] and, further, that G.F.'s conduct could not be imputed to the Board under agency principles.[84] The Board argued, therefore, that G.F.'s conduct was not actionable under Title IX.[85]

The Court agreed with the Board that one may be liable for Title IX discrimination only for one's own misconduct.[86] However, the Court found that the actionable misconduct in this case was not G.F.'s actions, but rather the Board's inaction;[87] the Board caused the discrimination by not preventing it from happening.[88] The Court in *Gebser* held that a school district may be liable for a teacher's sexual harassment of a student provided that the school had actual notice of the harassment and was deliberately indifferent to the harassment.[89] Under the reasoning of

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while Congress did not expressly state a private right of action in the language of Title IX, Congress did intend that those benefited by the statute would have such a right)).

80. *See* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (explaining that a state must knowingly accept conditions placed on the receipt of federal money granted under Congress' spending power).

81. *See* Brief for Respondents at 5-6, *Davis* (No. 97-843).

82. *See id.* Those "receiving Federal financial assistance" will be liable under Title IX. 20 U.S.C. § 1681(a) (1994). Appellant stated that students are not included in the definition of recipient. *See* Brief for Respondents at 11, *Davis* (No. 97-843) (citing 34 C.F.R. § 106.2(h) (1998)). A grant recipient is defined as

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h).

83. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999).

84. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998) (rejecting the application of agency principles to Title IX). The Court stated that Congress did not intend for an educational institution to be vicariously liable. *See id.* at 1998. The effect of holding a school vicariously liable would be to withhold Title IX funds where the school was unaware of the incident and therefore unable to remedy that situation to comply with Title IX. *See id.* at 290.

85. *See Davis*, 526 U.S. at 640.

86. *See id.* at 640-41 (stating that "*the recipient itself* must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]'") (emphasis added) (quoting 20 U.S.C. § 1681(a) (1994)).

87. *See id.* at 649.

88. *See id.* at 644-45.

89. *See Gebser*, 524 U.S. at 292-93.

Gebser, the mere fact that the alleged harassment was committed by someone other than the state does not preclude liability under Title IX.[90]

The Board argued that it had little control over the conduct of the student and therefore could not prevent G.F.'s misconduct.[91] Further, the Board stated that to be held liable for harassment, an educational institution needs to have control over the discriminatory action because otherwise the educational institution would be unable to remedy the action.[92] The Court noted, however, that schools have traditionally maintained control over the context in which the harassment occurs and over the harasser.[93] This control is dictated by the role of the teacher as a custodian of the students while the students are in the school.[94] Thus, the Court rejected the Board's argument that it did not have authority over the students.[95]

When an educational institution acts with deliberate indifference to known harassment and the institution has the authority to prevent the discrimination, the Court concluded that the institution will be subject to liability for that discrimination.[96] The Court based its reasoning on the fact that school districts have ample notice that they could be subject to such liability.[97] This notice comes from several sources, including the language of Title IX itself,[98] the regulatory scheme surrounding Title IX,[99] and common law.[100]

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90. *See id.* at 292.

91. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (citing Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d. 1006, 1013 (5th Cir. 1996)).

92. *See id.* at 644.

93. *See id.* at 646.

94. *See id.* (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655 (1995)). In *Vernonia*, the Court held that subjecting participants in school athletics to random testing of urine for drugs did not constitute an unreasonable search under the Fourth Amendment. *See* 515 U.S. at 666. The Court reached this ruling in part because school administrators and teachers act as parents while the children are in school. *See id.* at 654. This pseudo-parent function allows teachers and school administrators to implement "parental authority" over school children. *See id.* at 655. Courts have noted, for example, that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (rejecting a claim by a fourteen-year-old student who maintained that his freedom of speech right was violated when his school suspended him for using lewd language in a school assembly).

95. *See Davis*, 526 U.S. at 646.

96. *See id.* at 646-47.

97. *See id.* at 644.

98. *See id.* The Court stated that the use of the word "subjects" in Title IX equates to the word "undergo." *See id.* at 644-45. Therefore, when an educational institution knows of discrimination, but is deliberately indifferent to the discrimination, then the educational institution is effectively causing the student to undergo or be subjected to such discrimination. *See id.* at 645.

99. *See id.* at 643-44 (stating that some regulations promulgated by the Department of Education may make a grant recipient liable for the actions of third parties) (citing 34 C.F.R. §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998)).

100. *See id.* at 644 (citing RESTATEMENT (SECOND) OF TORTS § 320, cmt. a (1965)).

The Court stated that even though a school may be liable for sexual harassment, it may still retain flexibility in its administration.[101] To prevent liability, a school must simply respond to the discrimination in a manner that is not "clearly unreasonable."[102]

2. *Peer Sexual Harassment Allowed as Title IX Claim*

After the Court determined that a student might validly pursue a claim under Title IX for peer sexual harassment, the Court addressed whether the harassment in this case rose to the level of actionable discrimination under Title IX.[103] To have a valid claim for discrimination under Title IX, the claimant must satisfy two conditions.[104] First, the actionable party must be a recipient of federal funding.[105] Second, the claimant must show that the actionable party subjected him or her to discrimination.[106] The Board did not dispute this first condition because it did receive federal funding.[107]

The Board contested the second condition and asserted that student-on-student sexual harassment is not a type of discrimination proscribed by Title IX.[108] The Court found that peer sexual harassment can rise to the level of actionable discrimination by showing that the harassment satisfied the conditions of a sexual hostile environment claim.[109] In other words, the harassment must be so "sufficiently severe or pervasive [as] to alter the conditions of the [student's education] and create an abusive [educational] environment."[110] Whether the harassment satisfies these conditions depends on the totality of the circumstances.[111] The Court cautioned that one factor or circumstance that a court must bear in mind is that children are just beginning to learn

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101. *See id.* at 648.
102. *See id.* at 648-49.
103. *See id.* at 650.
104. *See* 20 U.S.C. 1681(a) (1994).
105. *See id.*
106. *See id.*
107. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639 (1999).
108. *See id.* at 640.
109. *See id.* at 644.
110. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (modified so as to apply to the educational context).
111. *See Davis*, 526 U.S. at 651 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)). In *Oncale*, the Court held that a same sex sexual harassment claim is valid under Title VII. *See* 523 U.S. at 82. Justice Scalia, writing for the majority, noted that the analysis for these claims is no different than the analysis for any other claim. *See id.* at 79. The test to determine a valid sexual harassment claim is whether "a reasonable person in the plaintiff's position" would find the actions severely hostile or abusive when considering "all the circumstances." *Id.* at 81 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

how to interact with others, so their actions may not be held to as high of a standard as an adult in the workplace.[112]

The Court noted that specific circumstances to consider in instances of student-on-student sexual harassment include the age of the harasser, the severity of the actions, and the time period over which the harassment took place.[113] Additionally, a claim for peer sexual harassment will be harder to satisfy than teacher-student sexual harassment because harassment in a teacher-student relationship would more likely affect the ability of the student to receive an adequate education.[114] Overall, the behavior must have a "systemic effect of denying the victim educational access to an educational program or activity."[115]

Applying the hostile environment claim to this case, the Court noted that LaShonda may have a valid Title IX claim.[116] G.F.'s misconduct spanned over five months, included physical touching as well as sexual verbal comments, affected multiple victims, and affected LaShonda's mental condition and her grades.[117] Additionally, LaShonda asked for help from several teachers, as well as her principal, but these requests were denied.[118] The Court found that these circumstances amounted to actual knowledge and deliberate indifference.[119] As a result, the Court reversed and remanded the Eleventh Circuit's decision and *held* that a peer sexual harassment claim is actionable under Title IX.[120]

B. JUSTICE KENNEDY'S DISSENT

Justice Kennedy disagreed with the Court's opinion in four ways.[121] First, he stated that a school has no notice of a private action for peer sexual harassment.[122] Second, he explained that peer sexual harassment should not be considered discrimination under Title IX.[123] Third, he noted that the Court's decision was not narrowly tailored so as to limit "run-away litigation."[124] Finally, he argued that this decision "oblit-

112. *See Davis*, 526 U.S. at 651.
113. *See id.* at 651-52.
114. *See id.* at 653.
115. *Id.*
116. *See id.*
117. *See id.*
118. *See id.* at 634.
119. *See id.* at 636.
120. *See id.* at 654.
121. Justice Kennedy was joined in his dissent by Chief Justice Rehnquist, Justice Thomas, and Justice Scalia. *See id.*
122. *See id.* at 658 (Kennedy, J., dissenting).
123. *See id.* at 672.
124. *See id.* at 677.

erate[s the] distinctions between national and local spheres of interest."[125]

Justice Kennedy began his dissent by stating that a school did not have adequate notice to remedy peer discrimination because the plain language of Title IX did not give this notice.[126] He stated that Title IX imposes liability when a school district "subjects" students to harassment.[127] However, Justice Kennedy defined "subjects" as harassment "authorized" by the school, not merely as harassment occurring in a "context subject to the school's control."[128] In the instance of peer sexual harassment, there is no affirmative action by the grant recipient.[129]

Justice Kennedy also argued that the Board did not have notice because the Court had previously rejected the application of agency principles to Title IX claims.[130] Even if a grant recipient knows of the harassment, it does not have control over students in the way that it has control over teachers to remedy the discrimination.[131] Justice Kennedy rejected the Court's argument that schools had notice of their potential liability through the Department of Education's Title IX guidelines or state tort law.[132]

Second, Justice Kennedy asserted that student harassment usually is not discrimination under Title IX because students' inappropriate behavior is often just the result of learning how to interact with people.[133] Justice Kennedy wrote that the Court's ruling incorrectly applied an adult standard to children.[134] He argued that to apply Title VII work place standards to Title IX school standards is untenable, because "schools are not workplaces and children are not adults."[135]

Third, Justice Kennedy asserted that the majority's decision did not delineate which actions would or would not be viable under Title IX.[136] He contended that children are invariably teased in school and therefore,

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125. *Id.* at 654.

126. *See id.* at 658.

127. *See id.*

128. *Id.* at 658-60. Justice O'Connor, speaking for the Court, defined "subjects" as "causing to undergo" and stated that students are subjected to harassment when the school's deliberate indifference causes students to undergo harassment. *See id.* at 648.

129. *See id.* at 660.

130. *See id.*

131. *See id.* at 664.

132. *See id.* at 669. Justice Kennedy stated that most of the Department of Education Regulations cited by the Court only state that schools shall not give aid to third parties who discriminate. *See id.* He wrote that schools were not aware that students were these third parties. *See id.*

133. *See id.* at 672. Children lack the maturity to be fully accountable for their actions, stated Justice Kennedy. *See id.*

134. *See id.*

135. *Id.* at 675.

136. *See id.* at 678.

at some point are denied equal access to education.[137] Additionally, he noted that it would be difficult to draw the line between name-calling and actionable sexual harassment.[138] This decision will allow parents to bring suit against a school for simple name-calling.[139]

Fourth, Justice Kennedy asserted that even if a court could accurately determine which conduct constitutes sexual harassment and which does not, the educational institutions themselves and not a court should remedy the situation.[140] "This case is about federalism," he wrote.[141] Justice Kennedy noted that school administration has typically been left up to school administrators and parents, and it should not be subject to intrusion by courts in the federal system.[142] He cautioned that this decision opens the door to federal decisions dictating school policy.[143] In a final poke at the Court's opinion, Justice Kennedy wrote, "After today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away."[144]

IV. IMPACT

Initial reactions to the *Davis* decision are mixed: insurers are against the decision;[145] the National Organization for Women considers the outcome a victory, but wants an easier standard than "deliberate indifference;"[146] and the National School Board Association supports the decision.[147] An attorney before the Pennsylvania School Boards Association explained the decision in terms of good news and bad

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137. *See id.* Justice Kennedy contended that children react to teasing in a way that would deny them equal access to education. *See id.* That is, a child may skip class for being called "four-eyes." *See id.* The Court countered this argument by stating that this comparison was "inapposite and misleading" because the action by the student must be persistent and severe to have an actionable claim. *See id.* at 652.

138. *See id.* at 676-77.

139. *See id.* at 677. Justice Kennedy stated that the majority's position will open a flood of liability. *See id.* at 680. These decisions, he said, will amount to a huge expenditure by schools in defending these types of lawsuits. *See id.*

140. *See id.* at 684.

141. *Id.*

142. *See id.*

143. *See id.* at 686.

144. *Id.* Justice O'Connor responded to this comment, stating that the decision "assures that little Mary may attend class." Linda Greenhouse, *Sex Harassment in Class is Ruled Schools' Liability*, N.Y. TIMES ABSTRACTS, May 25, 1999, at sec. A.

145. *See* Steven Brostoff, *High Court Harassment Ruling Could Hike Costs*, NATIONAL UNDERWRITER PROPERTY & CASUALTY-RISK & BENEFITS MANAGEMENT, May 31, 1999 (defining the significance of the *Davis* decision for school litigation and liability cost).

146. *See generally* Thalia Myrianthopoulos, *Supreme Court Restricts Civil Rights Remedies*, NATIONAL NOW TIMES, Oct. 1, 1999 (discussing 1999 Supreme Court decisions important to the National Organization for Women).

147. *See* Greenhouse, *supra* note 144 (reporting that a spokesperson for the National School Boards Association indicated that schools were already meeting the high standard set by *Davis*).

news.[148] The good news is that the "deliberate indifference" standard is high and should limit the number of plaintiffs,[149] but the bad news is that courts may not throw out frivolous lawsuits.[150]

Courts following the decision in *Davis* need to define the boundaries of conduct included in an actionable Title IX claim to avoid these "frivolous" claims.[151] For instance, courts will have to determine when conduct is simple name-calling and, therefore, not actionable under Title IX, and when an action is "serious enough to have the systemic effect of denying . . . equal access to an educational program or activity."[152] Drawing a line between these two actions can be confusing and difficult in light of the varying attitudes towards sexual harassment.[153]

For guidance in determining when peer sexual harassment is "serious enough to have the systemic effect of denying . . . equal access to an educational program or activity,"[154] courts may look to cases involving teacher-student sexual harassment. However, the bar for actionable peer sexual harassment is necessarily set higher than for actionable teacher-student sexual harassment.[155]

Courts may also look to hostile environment sexual harassment cases under Title VII to define more clearly when a particular type of behavior is actionable, because the test for determining peer sexual harassment was borrowed from hostile environment sexual harassment cases.[156] Arguably, actionable behavior for peer sexual harassment may have a somewhat lower standard than "workplace hostile environment sexual harassment" because of the greater adverse effect that peer sexual harassment has on students.[157]

To be actionable under Title IX, peer sexual harassment must have a "systemic effect" on a student's education.[158] This suggests that the

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148. *See* Paula Wolf, *Harassment-Suit Trends in Schools: Good, Bad News*, LANCASTER NEW ERA, Jul. 25, 1999, at B1.

149. *See id.*

150. *See id.*

151. *See id.*

152. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652 (1999).

153. *See* Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205 (1999) (comparing the response of a principal who suspended a six-year-old child for kissing a fellow student and the response of school officials who did nothing after receiving a report of the "Spur Posse," a group of largely male athletes who had sex with girls for points).

154. *Davis*, 526 U.S. at 652.

155. *See id.* at 653. The relationship between a teacher and a student is such that actionable behavior under Title IX would be less severe than actionable behavior for peer sexual harassment. *See id.*

156. *See id.* at 651 (citing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986) (setting the standard for actionable Title VII hostile environment sexual harassment claims)).

157. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996).

158. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 653 (1999).

harassment must be pervasive and widespread.[159] While not clearly defined, an example of this "systemic effect" can be found in a recent Tenth Circuit decision.[160] This decision found a valid Title IX claim[161] where a developmentally handicapped girl was subjected to harassing behavior for over a month.[162] This girl was enrolled in special education classes with a boy who had known behavioral and disciplinary problems.[163] This boy sexually assaulted the girl several times.[164] Her teachers knew of these instances, but did not inform the girl's mother.[165] The girl entered a psychiatric hospital because of suicidal behavior.[166] When the girl returned to school, she was assaulted again.[167]

While the Court in *Davis* recognized that it was possible that single instances of harassment could have a systemic effect on a student's education,[168] isolated incidents of harassment generally have been held not pervasive enough to be actionable under Title IX.[169] In *Adusumilli v. Illinois Institute of Technology*,[170] a female student complained of multiple instances of sexual misconduct by teachers and students.[171] However, only two of these instances were reported: one involved a student touching her right shoulder, and the other involved another student touching her breast.[172] These single instances of harassment, the Court held, are not the type of severe and pervasive harassment that Title IX was meant to proscribe.[173] Similarly, the Texas Court of Appeals has held that where a student's leg was touched repeatedly by another student on a single day, the incident was not pervasive enough to amount to "systemic" harassment.[174]

Besides defining actionable behavior under Title IX for peer sexual harassment, courts will also need to define more clearly what constitutes a response by school officials as "clearly unreasonable in light of the

159. *See id.* (defining the standard which indicates liability in cases of peer sexual harassment).
160. *See generally* Murrell v. School Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999).
161. *See id.* at 1249.
162. *See id.* at 1243.
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.* at 1244.
167. *See id.*
168. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652-53 (1999) (stating that a single instance of harassment might be actionable if it is sufficiently severe, but Congress probably did not intend a single instance of harassment to be actionable).
169. *See* Adusumilli v. Illinois Inst. of Tech., No. 98-3561, 1999 WL 528169, at *1 (7th Cir. Jul. 21, 1999).
170. No. 98-3561, 1999 WL 528169 (7th Cir. Jul. 21, 1999).
171. *Adusumilli*, 1999 WL 528169, at *1.
172. *See id.*
173. *See id.*
174. *See* Mosley v. Beaumont Indep. Sch. Dist., 997 S.W.2d 934, 938 (Tex. Ct. App. 1999).

known circumstances" so as to amount to "deliberate indifference."[175] After *Davis*, the definition of "clearly unreasonable" was refined in *Wills v. Brown University*,[176] which noted that the educational institution must take "timely and reasonable" steps to prevent further harassment of the person being harassed.[177] In *Wills*, a professor harassed a student.[178] She notified the university which then reprimanded the professor.[179] The court did not allow evidence of students' later complaints of similar misbehavior by the professor because these incidents occurred after the reprimand and did not involve the plaintiff.[180]

The adequacy of the response depends on the credibility and seriousness of the complaint.[181] One court stated that a jury could find an inadequate response when several teachers, students, and members of the community reported to the principal incidents of inappropriate behavior by a female teacher towards her male students.[182] The principal did not respond adequately because he failed to investigate the incidents or confront the teacher with allegations of sexual relations.[183] An initial adequate response may still create liability if the school administration is aware that the initial response was inadequate and fails to do anything more to remedy the harassment.[184]

Courts also need to determine what constitutes "actual notice"[185] and what does not. After *Davis* was decided, one court ruled that a report of serious sexual misconduct need not come from the person who witnessed the harassment.[186] However, it is not clear what type of "actual notice" is needed in instances of less serious conduct.[187] It is also not clear what position the official who receives the notice should have.[188] A subsequent court decision refused to name a rank at which notice was sufficient, stating, "Different school districts may assign different duties to [varying] positions or even reject the traditional hierarchical structure

175. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649 (1999).
176. 184 F.3d 20 (1st Cir. 1999).
177. Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999).
178. *See id.* at 23.
179. *See id.*
180. *See id.* at 26.
181. *See* Doe v. School Admin. Dist., 66 F. Supp. 2d 57, 64 (D. Me. 1999).
182. *See id.*
183. *See id.*
184. *See Wills*, 184 F.3d at 26.
185. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291-92 (1998) (stating that an educational institution must have actual notice of the harassing behavior in order to be held liable for an actionable Title IX sexual harassment claim).
186. *See Doe*, 66 F. Supp. 2d 57, 64.
187. *See id.* (stating that the actual notice standard is relatively new and therefore not well-defined).
188. *See* Murrell v. Denver Sch. Dist., 186 F.3d 1238, 1247 (8th Cir. 1999).

altogether."[189] At a minimum, the official must have control over the situation.[190]

Some commentators question whether "actual notice" is even appropriate to achieve the objectives of Title IX when very young students are subjected to harassment.[191] Children may be unwilling or unable to report harassment because of the apparent authority that the harassing student has over the child. Additionally, young children may be unable to express or identify harassment because of their immaturity.[192]

V. CONCLUSION

By more clearly defining the boundaries of an actionable peer sexual harassment claim under Title IX, courts can "contain the flood of liability"[193] against educational institutions. At the same time, courts can help achieve the purpose of Title IX by preventing sexual harassment, which "chills the learning environment and subverts the very purpose of the educational institution."[194]

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189. *Id.* (quoting Rosa H. v. San Elizano Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997)).
190. *See id.*
191. *See* Kindred, *supra* note 153, at 220.
192. *See* Kindred, *supra* note 153, at 220.
193. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting).
194. Kindred, *supra* note 153, at 239.