

WARNING BELL: THE INHERENT DIFFICULTIES OF RESPONDING TO STUDENT-ON-STUDENT SEXUAL HARASSMENT IN COLORADO MIDDLE SCHOOLS

M. BRENT CASE*

INTRODUCTION

Max had made up his mind—he was going to snap Johanna’s bra strap today. A newly-crowned middle school student, Max was unsure of how to express his affection for the beautiful girl who now stood nearly a foot taller than him. Though Johanna and Max were friends in elementary school, he never considered speaking to her—insecurities about his braces now forbade *that*. Curious about the apparatus that had suddenly appeared over the summer break, Max approached Johanna in a hallway, grabbed her strap, and pulled with all the might a 90-pound eleven-year-old could muster. In his head, the resulting pop sounded like a Black Cat firecracker exploding in a sewer drain. Johanna immediately responded with a knee directly to Max’s groin and ran sobbing to the bathroom.

It came as no surprise to Johanna and Max when they found themselves in the principal’s office shortly before lunch. A concerned teacher who observed the incident wrote an office referral in the hope that the students would atone for their middle school sins. As they sat grimly before the assistant principal, Max silently prayed that she would have mercy on him and pardon his deed. He looked up to see the assistant principal with a puzzled look on her face.

Under current Colorado law, both Johanna and Max may have unknowingly committed sexual harassment or, worse, sexual assault. In addition, if the aforementioned middle school teacher and administrators responded with “deliberate indifference,” they may be civilly liable for their actions under Title IX as interpreted by Supreme Court and Tenth

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Circuit decisions.¹ Further, if certain incidents go unreported to the police, the administrators might face criminal charges and be subject to jail time or large fines.²

The middle school years, coinciding with puberty, are crucial to personal and sexual development. As students discover their sexual identities, the middle school social environment can be volatile and bewildering. Administrators face the difficult task of classifying behavior, such as the abovementioned exchange, somewhere in the continuum between episodes of harmless flirtation and obvious cases of assault.

Colorado school administrators must closely scrutinize each incident and respond to inappropriate sexual behavior between students. However, a series of broad Supreme Court holdings, imprecise Colorado laws, and ambiguous district policies on the subject threaten to expose the Colorado middle school administrator to a minefield of civil and criminal liability. Part I of this comment provides insight into the world of middle school students, taking a look at their progress towards psychological and sexual maturity and analyzing the sexual climate of middle schools. Part II analyzes the federal approach to sexual harassment in schools, describing Title IX and laying out the Supreme Court's standard in *Davis v. Monroe County Board of Education*.³ Part III describes criminal and civil liabilities for teachers and administrators that may arise from inappropriate sexual conduct in Colorado schools. Part IV discusses the Colorado school administrator's responsibility of classifying sexual misconduct and taking the appropriate actions in response to the conduct in question. This comment concludes with several recommendations to protect students from harassment and administrators from liability in Colorado, including making legislative changes, adding resource officers, and enacting systems of student training.

I. THE WORLD OF THE MIDDLE SCHOOL STUDENT

Children enter a world vastly different from that of their grade school days when they begin middle school. During the elementary school years, relationships are usually characterized by "gender cleavage"—the tendency for boys to associate with boys and girls with girls.⁴

1. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999).

2. See COLO. REV. STAT. § 19-3-304 (2003); see also CAL. PENAL CODE § 11,164 (West 2004); N.Y. SOC. SERV. LAW § 420 (Consol. 2004).

3. 526 U.S. 629.

4. JAMES W. VANDERZANDEN, HUMAN DEVELOPMENT 291 (6th ed. 1997).

This separation of the genders tends to reach its peak in the fifth grade, just before the middle school years begin.⁵ Much of the interaction between girls and boys at this age takes the form of “bantering, teasing, chasing, name calling, and displays of open hostility.”⁶

However, the onset of puberty paves the way for sweeping changes in social relations for both sexes.⁷ The dramatic physical and psychological changes that occur in children during puberty are governed by the central nervous system.⁸ The pituitary gland, a pea-sized structure located at the base of the brain, is especially active in this process; it stimulates other glands to produce growth hormones.⁹

Researchers at the National Institute of Mental Health have discovered evidence that links hormones and adolescent behavior.¹⁰ Boys’ tendencies to exhibit social and behavioral problems may be closely related to their comparatively high levels of testosterone.¹¹ Some boys’ newfound increase in strength may encourage them to use aggression to achieve their goals.¹² But while all adolescents experience hormone increases, not every teen exhibits destructive behavior.¹³ Other contributory factors are likely involved, such as “changing roles, social or cultural expectations, environmental situations in the home or school, and even the media.”¹⁴

Middle schools students face a number of crucial tasks at this period in their development. They are expected to master more difficult schoolwork, form positive and healthy relationships with peers, and adapt to their physical, sexual, and reproductive maturity.¹⁵ The famed psychoanalyst Erik Erikson stated in *Identity: Youth and Crisis* that the main task of children of this age is “to build and confirm a reasonably stable identity.”¹⁶ Unfortunately, adolescents are often plagued by what Erikson calls “role confusion”—a state characterized by “bewilderment about who one is, where one belongs, and where one is going.”¹⁷

5. *Id.*

6. *Id.*

7. Puberty is the period of the life cycle where sexual and reproductive maturation become evident. *Id.* at 318.

8. *Id.* at 291.

9. Females produce estrogen, while males produce testosterone. *Id.* at 318.

10. *Id.* at 319.

11. *Id.*

12. *Id.*

13. GRACE J. CRAIG, HUMAN DEVELOPMENT 411 (7th ed. 1996).

14. *Id.*

15. VANDERZANDEN, *supra* note 4, at 329.

16. *Id.* at 291.

17. *Id.*

Every middle school student "pays a great deal of attention to the behaviors and opinions of other young people with whom he or she comes into contact."¹⁸ Peer pressure and conformity are at their greatest during the middle school years; thinking is often characterized by "if the group is doing it, it must be good and right."¹⁹ Not surprisingly, the combination of raging hormones and a volatile social structure can cause problems with inappropriate sexual behavior between the sexes. Many middle school boys report that their treatment of the opposite sex is largely motivated by the danger of appearing "weak" to their friends.²⁰

These non-sexual desires lead many boys to abuse or disrespect teenage girls.²¹ A group of Boulder, Colorado, males who recently completed middle school acknowledge the need to seem "funny" and "cool" in front of their friends.²² They report that boys at their middle school took the following actions on a regular basis:

We know guys who smack a girl's butt every single time she walks by. They snap girls' bras—they even do their thongs! Some of them rub up against girls in crowded or dark places where they know they can't get caught and then tell everyone in the whole school about it. A lot of people ask to take a picture of a girl's bare butt or boobs.²³

The boys also reported gaining the approval of their friends by fondling or yelling sexually explicit comments at girls they pass in the hallways.²⁴

Girls from the same group report similar behavior: they routinely slapped boys who stared at them, grabbed their crotches, "racked"²⁵ them "for a laugh," and, most commonly, "pantsed"²⁶ them in hallways during passing periods. The girls also noted same-sex harassment took place between boys.²⁷ They described episodes of "nut-checking"²⁸ tak-

18. KAREN L. FREIBERG, *HUMAN DEVELOPMENT: A LIFE-SPAN APPROACH* 265 (4th ed. 1992).

19. JOSE B. ASHFORD ET AL., *HUMAN BEHAVIOR IN THE SOCIAL ENVIRONMENT: A MULTIDIMENSIONAL PERSPECTIVE* 381 (2d ed. 2001).

20. VANDERZANDEN, *supra* note 4, at 361.

21. *Id.*

22. Interview with Five Male and Five Female Boulder Valley School District Freshmen High School Students, in Boulder, Colo. (Mar. 1, 2004) [hereinafter High School Interview].

23. *Id.*

24. *Id.*

25. According to the girls interviewed for this article, "racking" someone is "kneeing a boy's groin as hard as you possibly can." *Id.*

26. "Pantsing" someone is "pulling down a boy's pants and underwear so that everyone sees his privates and laughs." *Id.*

27. For an in-depth discussion of same-sex, student-to-student sexual harassment, see Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 *FORDHAM URB. L.J.* 641 (2001).

ing place in the halls on a regular basis. In addition, bullies sometimes gave “atomic wedgies”²⁹ to smaller boys. Not surprisingly, more than twenty percent of students in the Boulder Valley School District reported being touched, taunted, or otherwise sexually harassed on school grounds in 2003.³⁰

The thinly drawn lines that categorize behavior in middle school have become increasingly unclear. Younger students are becoming more sexually knowledgeable, and, in turn, more sexually aggressive.³¹ Furthermore, it is clear that many acts resulting from this aggression have the potential to shatter the safe learning environment that our schools seek to provide. These acts should be strictly prohibited since they distract students from one of the school system’s most important aims—helping students reach their academic potential.³² Courts have not been silent on this issue. In several important decisions, the Supreme Court has interpreted Title IX to address such behavior and has found that schools can be liable when students are subject to sexual harassment.

II. THE FEDERAL APPROACH TO SEXUAL HARASSMENT IN SCHOOLS

Lawsuits concerning inappropriate sexual behavior in schools, such as the behavior described in Part I, are often based on a law designed to promote gender equality in education. Section A discusses the underlying social concerns that prompted Congress to address the problem of gender inequality in our nation’s public schools. Section B describes Title IX,³³ the landmark legislation that resulted from the government’s ef-

28. “Flicking a guy’s testicles really hard with your hand.” High School Interview, *supra* note 22.

29. “Pulling someone’s underwear up their butt until it rips.” *Id.*

30. Boulder Valley School District, Spring 2003 Student Climate Survey Results (2003). Further, 72% of BVSD students report being physically harassed; 62% report being made fun of at school because they look different (e.g., body size or shape); 75% report they have been discriminated against for their perceived sexual orientation. *Id.* A 2001 national study found that 83% of girls in eighth through eleventh grade reported having ever experienced harassment. HARRIS INTERACTIVE, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 4 (2001), available at http://www.aauw.org/member_center/publications/HostileHallways/hostilehallways.pdf.

31. Shana Gruskin, *Child Sex Offenders Pose Challenge; Number of Cases Increase; Ages Decrease*, S. FLA. SUN-SENTINEL, June 14, 2004, at 1B, available at 2004 WL 82603145 (describing an apparent increase in the number of sexual assaults among young children in South Florida).

32. Boulder Valley School District’s slogan on its website reads: “Challenging students to achieve their creative, academic, and physical potential in order to become responsible, contributing citizens.” Boulder Valley School District Education Center, Boulder Valley School District, available at <http://www.bvdsd.k12.co.us> (last modified Mar. 3, 2004).

33. 20 U.S.C. § 1681 (2000).

fort. Section C briefs and analyzes four federal court decisions that interpret the federal statute.

A. Historical Background

In 1872, Justice Bradley of the United States Supreme Court wrote "the paramount destiny and mission of woman are to fulfil[!] the noble and benign offices of wife and mother."³⁴ This statement had a significant societal effect, helping to spawn the early Women's Movement that would flourish over the next 130 years.

Discontent with the government's treatment of women grew at an incredible pace with the turn of the twentieth century.³⁵ The Suffragette Movement was especially visible in its quest to obtain the right to vote for women.³⁶ A passage from Eleanor Clift's *Founding Sisters and the Nineteenth Amendment* illustrates the many injustices and attitudinal wrongs levied upon women during the time period:

When Woodrow Wilson was inaugurated president in March 1913, a married woman was considered the property of her husband. Women couldn't serve on juries or in the event of divorce gain custody of their children. Women couldn't travel alone comfortably. A lone woman staying in a hotel was considered "loose." It was radical thinking to propose that women participate in society directly as individuals rather than as an extension of their husbands or fathers. Opponents of suffrage predicted family life would collapse if women were allowed out of their preordained "sphere" of house and home.³⁷

In 1919, the House and Senate passed the Nineteenth Amendment to the United States Constitution, guaranteeing women the right to vote.³⁸ Three-quarters of state legislatures ratified the Nineteenth Amendment on August 26, 1920; women had won full voting rights.³⁹ Although the award of suffrage was a major legislative victory for women, a complete reversal of society's attitudes concerning the role of women did not occur overnight.⁴⁰

34. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

35. GEORGE KLOSKO & MARGARET G. KLOSKO, *THE STRUGGLE FOR WOMEN'S RIGHTS: THEORETICAL & HISTORICAL SOURCES* 107 (1999).

36. *Id.* Leaders of this movement included Sojourner Truth, Elizabeth Cady Stanton, Susan B. Anthony, and Jane Addams. *Id.* at 107, 117, 131, 147.

37. ELEANOR CLIFT, *FOUNDING SISTERS AND THE NINETEENTH AMENDMENT* 3 (2003).

38. DORIS WEATHERFORD, *A HISTORY OF THE AMERICAN SUFFRAGIST MOVEMENT* 250 (1998).

39. U.S. CONST. amend. XIX; *see also* WEATHERFORD, *supra* note 38, at 250.

40. See the lyrics to "To a Modern Woman," a popular 1920 song:

Traditional views on the education of women remained common in the 1920s; many believed that women were "socially, emotionally, spiritually, and physically unsuited for academic life."⁴¹ Thus, educational opportunities were withheld from women on a regular basis.⁴² Those involved in the Women's Movement saw the lack of educational opportunities for women as one of many indicia of sexual inequality.⁴³ Sex discrimination in education had radical effects on women throughout the 1960s, when a significant number of women finally began to receive higher education.⁴⁴ Despite this improvement, sex discrimination remained (and, many would argue, remains) entrenched in American society.⁴⁵ The need for educational reform for women soon became too much for lawmakers to ignore.

Women's activists sought to enlist the help of the Equal Protection Clause. Specifically, they sought to have gender recognized as a suspect classification, thereby making it easier to prove and win a suit for sex discrimination.⁴⁶ In 1971, in *Reed v. Reed*,⁴⁷ the Supreme Court found in favor of a woman in a sex discrimination case for the first time. How-

You've got the vote and you think it's your mission,
To go to the polls like a bum politician
And while you are voting, your husband must roam
For something to eat which he can't find at home.
He's getting dyspepsia and can't work for pain,
Your children are neglected, ask for you in vain.
While you make speeches from a broken soap box.
Your family is wearing soiled clothes and torn socks.

CLIFT, *supra* note 37, at 208.

41. 4-10 EDUCATION LAW § 10.02(2)(a).

42. EDWARD H. CLARKE, SEX IN EDUCATION 127 (1873). Not a supporter of the education of women, Clarke astonishingly concluded later in his career that higher education would cause women's uteruses to atrophy. Ellen Spertus, *Sex-Based Intellectual Differences*, MASS. INST. OF TECH., at http://www.mills.edu/ACAD_INFO/MCS/SPERTUS/Gender/pap/node37.html (last visited Mar. 3, 2005).

43. 4-10 EDUCATION LAW § 10.02.

44. Between 1960 and 1965, the number of women who obtained bachelors and first professional degrees increased by fifty-seven percent. CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 171 (1988). By 1968, women earned one-third the number of masters' degrees and thirteen percent the number of doctorates, and by 1970, women earned eighty percent the number of bachelors' and masters' degrees as men. MYRA FERREE & BETH HESS, CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS THREE DECADES OF CHANGE 6 (1985).

45. 4-10 EDUCATION LAW § 10.02.

46. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971).

47. *Id.* Though gender never ascended to the level of a suspect class, courts scrutinize gender classifications quite carefully. The courts examine gender classifications with intermediate scrutiny, meaning that in order for the classification to survive, the government must show that it is pursuing an important state objective and that the sex-based classification is *substantially* related to that objective. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

ever, the Court refused to apply the suspect class standard.⁴⁸ One year later, women's rights activists achieved a major legislative victory when Congress enacted Title IX of the Education Amendments of 1972.⁴⁹

B. Title IX

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."⁵⁰ The most well-known and controversial provisions of Title IX require schools receiving federal funds to provide equal athletic opportunities to men and women.⁵¹ However, Title IX eclipses the mere boundaries of sport, generally prohibiting schools from engaging in virtually all discriminatory actions on the basis of sex.⁵²

Title IX applies to every educational institution that receives federal assistance.⁵³ Thus, Title IX's prohibition of discrimination is not abso-

48. *Reed*, 404 U.S. at 76.

49. 20 U.S.C. § 1681.

50. *Id.* § 1681(a).

51. *Id.*; see also Editorial, *No Retreat on Title IX*, BOULDER DAILY CAMERA, April 27, 2003, available at http://www.dailycamera.com/bdc/editorials/article/0,1713,BDC_2489_1916247,00.html.

52. See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (holding that a female who was denied admission to two private medical schools had a right to pursue a private cause of action against the universities under Title IX).

53. Federal assistance is defined as any of the following:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

34 C.F.R. § 106.2(g) (2004).

lute. Private schools, for example, might not accept federal assistance and, in turn, are not bound to follow the anti-discrimination statute.⁵⁴ However, the vital importance of federal funding to schools may make this decision less than voluntary.⁵⁵ Nevertheless, schools that *do* accept federal funding should be aware that they, therefore, must abide by Title IX.

Virtually all schools qualify as educational institutions under the statute.⁵⁶ An educational institution must “implement specific and continuing steps to notify . . . students and parents of elementary and secondary school students [and] employees . . . that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX . . . not to discriminate in such a manner.”⁵⁷

Title IX only applies with respect to *entities* receiving federal funding,⁵⁸ so a plaintiff may not make a claim against an individual acting as an administrator or employee of the institution or entity.⁵⁹ However, several authorities suggest that liability of these officials may be established under section 1983 of the Civil Rights Act.⁶⁰ In addition, plaintiffs may obtain relief from these officials under the Equal Protection Clause of the Fourteenth Amendment, which provides a broader right to equal educational opportunities.⁶¹

The standard of proof applied under Title IX generally requires a claimant to establish a *prima facie* case of discrimination.⁶² Raising a *prima facie* case involves making a clear inference of discrimination. Once the claimant has done so, the defendant educational institution has

54. *Id.*

55. President George W. Bush has sought to “[c]odify into law an executive order that allows religious institutions to use tax dollars to deliver various social services.” Sean Loughlin, *Bush Warns of “Work Unfinished”: Making the Case for a Second Term*, CNN.COM, Jan. 21, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.speech/index.html>. An interesting issue presents itself when considering whether private Muslim schools would accept federal funding. Would these schools be willing to accept the rules mandated by Title IX in exchange for funding? See Fathi Malkawi, *The Future of Muslim Education in the United States: An Agenda for Research*, 20 AM. J. ISLAMIC SOC. SCI. 46 (2003).

56. An educational institution is “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.” 20 U.S.C. § 1681(c).

57. 32 C.F.R. § 106.9(a)(1).

58. 20 U.S.C. § 1681(a).

59. See *Does v. Covington County Sch. Bd. of Educ.*, 930 F. Supp. 554, 566 (M.D. Ala. 1996).

60. See, e.g., *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988).

61. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1242 (10th Cir. 1999).

62. See *Middlebrooks v. Univ. of Md. at Coll. Park*, 980 F. Supp. 824, 829 (D. Md. 1997).

the burden to disprove the presumption of discrimination by producing evidence that the claimant's treatment was based on a legitimate, nondiscriminatory reason.⁶³ If the defendant is successful in doing so, the burden then shifts back to the plaintiff to prove that the educational institution's nondiscriminatory explanation was without merit.⁶⁴

To state a claim under Title IX, a plaintiff must demonstrate that (1) he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the exclusion from the program was based on the plaintiff's gender.⁶⁵

C. Federal Caselaw on Student-on-Student Sexual Harassment

Three Supreme Court cases that interpret Title IX shape federal law on sexual harassment in schools. *Franklin v. Gwinnett County Public Schools*⁶⁶ held that money damages are available for violations of Title IX. *Gebser v. Lago Vista School District*,⁶⁷ a teacher-on-student sexual harassment case, established the "deliberately indifferent" standard that administrators must surpass to avoid Title IX liability. *Davis v. Monroe County Board of Education*⁶⁸ expanded the "deliberately indifferent" standard to student-on-student cases and commented on the many difficult issues in student-on-student sexual harassment cases. A case decided by the Court of Appeals for the Tenth Circuit, *Murrell v. School District No. 1*,⁶⁹ interprets *Davis* and exposes administrators to personal liability in school sexual harassment cases.

1. *Franklin v. Gwinnett County Public Schools*⁷⁰

For two years, Christine Franklin, a Georgia high school student, was subjected to continual sexual harassment by Andrew Hill, a sports coach and teacher employed by the school district.⁷¹ Christine alleged that Hill often "engaged her in sexually oriented conversations in which he asked about her sexual experiences with her boyfriend and whether

63. *Id.*

64. *Id.*

65. *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996).

66. 503 U.S. 60 (1992).

67. 524 U.S. 274 (1998).

68. 526 U.S. 629 (1999).

69. 186 F.3d 1238 (10th Cir. 1999).

70. 503 U.S. 60.

71. *Id.* at 63.

she would consider having sex with an older man.”⁷² In addition, Christine alleged that Hill forcibly kissed her on the mouth in the school’s parking lot and that he telephoned her at home to ask if she would meet him socially.⁷³ Most seriously, Christine alleged that on three occasions during her junior year, Hill interrupted class, asked that the teacher excuse her, and took her to a private office where he forced her to have intercourse.⁷⁴ Christine further alleged that though teachers and administrators knew of and investigated Hill’s sexual harassment of Christine and other female students, they took no action to stop it and, in fact, discouraged Christine from pressing charges against Hill.⁷⁵ The school closed its investigation on the matter after Hill resigned with the condition that all pending charges against him be dropped.⁷⁶

Christine filed an action for damages under Title IX.⁷⁷ Both the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit dismissed her claim on the grounds that Title IX only afforded equitable relief to a complainant.⁷⁸ The Supreme Court reversed, holding that Title IX provided a damages remedy for Christine.⁷⁹ The Court presumed the availability of all appropriate remedies unless Congress had expressly indicated otherwise.⁸⁰ The Court remanded the case back to United States Court of Appeals for the Eleventh Circuit, which directed the United States District Court for the Northern District of Georgia to determine the amount of money damages and attorney fees due to Christine.⁸¹

2. *Gebser v. Lago Vista School District*⁸²

In 1991, Alida Gebser was an eighth-grade student at a middle school in Lago Vista, Texas.⁸³ Alida joined a book discussion group led by Frank Waldrop, a teacher at Lago Vista High School.⁸⁴ During the book discussion sessions, Waldrop often made sexually suggestive

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 64.

76. *Id.*

77. *Id.* at 60.

78. Thus, money damages were not available. *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 620 (11th Cir. 1990).

79. *Franklin*, 503 U.S. at 76.

80. *Id.*

81. *Id.*; *Franklin v. Gwinnett County Pub. Schs.*, 969 F.2d 1022, 1022 (11th Cir. 1992).

82. 524 U.S. 274 (1998).

83. *Id.* at 277.

84. *Id.*

comments to the students.⁸⁵ Alida entered high school later that year and was placed in Waldrop's class.⁸⁶ There, Waldrop's sexually suggestive comments towards Alida increased in both frequency and intensity.⁸⁷ Waldrop initiated sexual contact in the spring when, on a trip to her home to give her a book, he kissed and fondled her.⁸⁸ Alida did not report the relationship to school officials, as she was uncertain how to react and wanted to continue having Waldrop as a teacher.⁸⁹

In 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class.⁹⁰ The principal arranged a meeting where Waldrop apologized to the parents and promised to cease this type of behavior.⁹¹ The principal advised Waldrop to be careful about his comments, but otherwise took no other disciplinary action.⁹² The principal did not report the complaint to Lago Vista's superintendent, the district's Title IX coordinator.⁹³ In 1993, a police officer discovered Alida and Waldrop having intercourse and arrested Waldrop.⁹⁴ Lago Vista fired Waldrop and the Texas Education Agency revoked his teaching license.⁹⁵ However, at that time, the district had not promulgated an official procedure for lodging sexual harassment complaints, nor had it posted a formal anti-harassment policy.⁹⁶

Alida and her mother filed suit against Lago Vista Independent School District in 1993, raising claims under Title IX.⁹⁷ The United States Supreme Court found that the student was not allowed to recover for sexual harassment by one of the district's teachers unless an official of the district had actual notice of and was "deliberately indifferent" to the misconduct.⁹⁸ The Court found that it would have frustrated the purposes of Title IX to permit a recovery of damages against the district based on the principles of respondeat superior⁹⁹ or constructive notice¹⁰⁰ without actual notice to the district.¹⁰¹ The court opined that:

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Gebser v. Lago Vista School Dist.*, 424 U.S. 274, 277 (1998).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* Some large school districts have full-time employees specifically dedicated to Title IX enforcement.

94. *Id.*

95. *Gebser v. Lago Vista School Dist.*, 424 U.S. 274, 277 (1998).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 285. Black's Law Dictionary defines respondeat superior as "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed

Presumably, a central purpose of requiring [actual] notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.¹⁰²

3. *Davis v. Monroe County Board of Education*¹⁰³

In *Davis*, the United States Supreme Court continued the expansion of Title IX, holding that a school board could be held civilly liable in a case of student-on-student harassment.¹⁰⁴ The plaintiff's minor daughter, LaShonda, was subject to a long period of sexual harassment by one of her fifth-grade classmates. The classmate repeatedly attempted to touch LaShonda's breasts and genital area, making comments such as "I want to get in bed with you" and "I want to feel your boobs."¹⁰⁵ These incidents were reported to LaShonda's teacher, and, in turn, her principal.¹⁰⁶ No disciplinary action was ever taken against the classmate.¹⁰⁷ When the plaintiff complained to the school principal, he merely stated "I guess I'll have to threaten him a little bit harder."¹⁰⁸ During the period of harassment, LaShonda's previously high grades fell, and her father discovered a written suicide note.¹⁰⁹ The string of incidents ended two months later when the classmate was charged with, and pleaded guilty to, sexual battery for his misconduct towards LaShonda.¹¹⁰ The plaintiff sued the public school board, urging that Title IX intended to

within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1313 (7th ed. 2004).

100. *Gebser*, 524 U.S. at 288. Black's Law Dictionary defines constructive notice as "notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice presumed by law to have been acquired by a person and thus imputed to that person. BLACK'S LAW DICTIONARY, *supra* note 99, at 1088.

101. *Gebser*, 524 U.S. at 285.

102. *Id.* at 289.

103. 526 U.S. 629 (1999).

104. *Id.* at 633.

105. *Id.*

106. *Id.* at 634. Weeks later, the classmate allegedly placed a doorknob in his pants and acted in a sexually suggestive manner toward LaShonda. *Id.*

107. *Id.*

108. *Id.* at 635.

109. *Id.* at 634.

110. *Id.*

bar recipients of federal funding from permitting this form of discrimination in their programs and activities.¹¹¹

The Court concluded that federal funding recipients are liable for damages when they are deliberately indifferent to sexual harassment if they have actual knowledge and if the conduct is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.¹¹² These conditions were met, and the Court found that LaShonda had an actionable claim against the school district.¹¹³

In dicta, the Court commented on the special situation of student-on-student sexual harassment. Justice O'Connor noted that "[c]ourts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults."¹¹⁴ As students are still learning how to interact appropriately with their peers, it is understandable that they "often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it."¹¹⁵ The Court forbade damages for "simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender."¹¹⁶ Noting that the classmate was eventually found guilty of criminal sexual misconduct, the Court concluded that the activity here was obviously severe, pervasive, and objectively offensive.¹¹⁷ The drop in LaShonda's grades was evidence of a link between her education and the classmate's misconduct, and there seemed to be actual knowledge and deliberate indifference on the part of the board. Therefore, the Court concluded that LaShonda had an actionable claim.¹¹⁸

However, the Court was not unanimous in its decision. Justice Kennedy filed a dissent joined by Chief Justice Rehnquist and Justices Thomas and Scalia.¹¹⁹ Justice Kennedy disagreed with the majority's decision so strongly that he took the uncommon measure of reading passages of his dissenting opinion from the bench.¹²⁰ Predicting a flood of litigation, he stated that the majority's decision "will breed a climate of

111. *Id.* at 635-36.

112. *Id.* at 633.

113. *Id.* at 654.

114. *Id.* at 651.

115. *Id.* at 651-52.

116. *Id.* at 652.

117. *Id.* at 653.

118. *Id.* at 652.

119. *Id.* at 654 (Kennedy, J., dissenting).

120. CHRISTINA HOFF SOMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* 69 (2000). "Justices do this on very rare occasions when they find the majority decision especially egregious." *Id.*

fear that encourages school administrators to label even the most innocuous of child conduct sexual harassment.”¹²¹

4. *Murrell v. School District No. 1*¹²²

Murrell, a Tenth Circuit case interpreting *Davis*, has special significance to student-on-student sexual harassment in Colorado and is a warning to administrators in every state. Both the principal of the school and the school district in question became liable for inaction in this tragic situation. Though the case concerns behavior that took place in a high school, the analysis contemplated by the Tenth Circuit also applies to middle schools. Any lawsuit for sexual harassment brought by a middle school student in Colorado would almost certainly rely heavily on *Murrell*.

The plaintiff's daughter in this case attended George Washington High School in Denver, Colorado.¹²³ The United States District Court for the District of Colorado, sitting in Denver, dismissed her lawsuit without a trial in October 1998.¹²⁴ The description of the Tenth Circuit Court of Appeals decision that follows is binding precedent for all federal court cases on student-on-student sexual harassment in Colorado.

In *Murrell*, the plaintiff claimed her daughter, Penelope, had been sexually assaulted by another student while at a Denver school and brought Title IX and Equal Protection claims against her daughter's teachers, principals, and school district.¹²⁵

Penelope was developmentally and physically disabled by spastic cerebral palsy.¹²⁶ Upon enrolling Penelope at the Denver school, her mother warned the special education teachers that Penelope “had been sexually assaulted at her previous school.”¹²⁷ The teachers assured Penelope's mother that she would be properly supervised.¹²⁸ However, Penelope was placed with another special education student known to have behavioral problems that included engaging in sexually inappropriate conduct.¹²⁹ Despite the student's history, he was appointed to a

121. *Davis*, 526 U.S. at 681 (Kennedy, J., dissenting).

122. 186 F.3d 1238 (10th Cir. 1999).

123. *Id.* at 1242.

124. *Id.* at 1243; Brian Weber, *Now Aiding Suit Against School System: Ex-Special Ed Student Claims that a Classmate Sexually Harassed Her*, ROCKY MTN. NEWS, Mar. 19, 1998, at 27A.

125. *Murrell*, 186 F.3d at 1242.

126. *Id.* at 1243.

127. *Id.*

128. *Id.*

129. *Id.*

“janitor’s assistant” position that gave him “access to certain unsupervised areas of the school.”¹³⁰

“[T]he teachers became aware that [the student] was engaging in aggressive, sexually inappropriate conduct towards [Penelope].”¹³¹ The plaintiff informed the special education teachers that the student “had been making harassing phone calls” to Penelope at home.¹³² Later, the student took Penelope “to a secluded area and sexually assaulted her.”¹³³ Penelope vomited and bled in the course of the assault.¹³⁴ A janitor discovered them, “told them to clean up the mess, returned them to class, and advised the teachers where he found [the two students].”¹³⁵

The teachers tied clothing around Penelope’s waist to cover up the blood.¹³⁶ They never informed the plaintiff of the incident; rather, they advised Penelope not to tell her mother about the assault and suggested she forget about it.¹³⁷ Days later, the student assaulted Penelope again; the teachers then informed the plaintiff only of a non-sexual battery.¹³⁸

Penelope began to engage in suicidal behavior and soon entered a mental hospital.¹³⁹ The plaintiff then learned of the sexual assaults and informed the teachers, who denied that they could have taken place.¹⁴⁰ Not satisfied, she contacted the principal and left a message.¹⁴¹ The principal neither returned the plaintiff’s call nor investigated the incidents.¹⁴² In a meeting to discuss the student’s sexual conduct with Penelope, the principal suggested that the sexual contact might have been consensual, although Penelope was legally incapable of consent.¹⁴³ The principal again declined to investigate the incident, and, in fact, actually suspended Penelope for “[b]ehavior which is detrimental to the welfare, safety, or morals of other pupils or school personnel.”¹⁴⁴ The school district never notified law enforcement officials about the assaults nor disciplined the assaulting student in any way.¹⁴⁵

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1243–44.

137. *Id.* at 1244.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; see also COLO. REV. STAT. § 18-3-402 (2004).

144. *Murrell*, 186 F.3d at 1244.

145. *Id.*

The court found that the plaintiff's allegations satisfied the four factors *Davis* requires to sustain a claim of school district liability under Title IX.¹⁴⁶ The plaintiff alleged that "the district (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive, and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school."¹⁴⁷ The court stated that the principal's complete refusal to investigate the plaintiff's claims amounted to deliberate indifference.¹⁴⁸ In addition, the court suggested several acceptable reactions to inappropriate sexual activity: transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision.¹⁴⁹

Davis is the current capstone Supreme Court case interpreting Title IX as it applies to student-on-student sexual harassment. However, the "deliberate indifference" standard discussed in the case and its predecessors remains ambiguous—every state's administrators should take note. Further, the *Murrell* court applies Title IX liability to actions by Colorado's teachers and administrators, so long as they exercise control over the harasser and the context in which the harassment occurred. With these holdings in mind, Colorado school administrators must look to Colorado law in order to make decisions about classifying inappropriate sexual conduct between students.

III. CRIMINAL LIABILITY THAT MAY ARISE FROM INAPPROPRIATE SEXUAL CONDUCT IN COLORADO SCHOOLS

Steve Pratt, executive director of the Colorado Association of School Executives, noted that student-on-student sexual harassment is "a very difficult issue to prove and address—one student's statement against another."¹⁵⁰ However, administrators do have some tools at their disposal to decipher the severity of inappropriate sexual conduct between students. The Colorado legislature has enacted a paradigm of several laws that relate to the problem of student-on-student sexual harassment. Of utmost importance to school administrators, Colorado law requires school administrators to report sexual crimes that take place in schools,

146. *Id.* at 1246, 1249 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, at 642–46 (1999)).

147. *Id.* at 1246.

148. *Id.* at 1248.

149. *Id.*

150. Karen Abbott, *Minimal Impact Expected from Ruling Schools "Don't Tolerate" Harassment by Students*, ROCKY MTN. NEWS, May 25, 1999, at 5A.

namely the crimes of unlawful sexual conduct, sexual assault, and sexual assault on a child. Section A describes the administrator's responsibility to report unlawful sexual behavior, while sections B through D discuss the above crimes that may initiate operation of the statute.

A. Failure to Report

Under state law, school administrators are "mandatory reporters" of possible child abuse or neglect.¹⁵¹ Therefore, "they must report possible child abuse to law enforcement officers 'immediately.'"¹⁵² Colorado caselaw is silent as to the meaning of the term "immediately," leaving it subject to the interpretation of the statute's reader. This statute seems to be aimed at adult-on-student sexual contact or harassment. However, it may also apply to student-on-student sexual harassment. One possible interpretation of the statute is to require the report of any incidents that may fall under the auspices of the crimes described below.

B. Unlawful Sexual Conduct

The first of Colorado's statutes on sexual conduct, Colorado Revised Statute § 18-3-404, describes unlawful sexual contact.¹⁵³ This law

151. Colorado law requires school administrators to report possible child abuse or neglect:

(1) Except as otherwise provided by section 19-3-307 and sections 25-1-122(4)(d) and 25-4-1404(1)(d), C.R.S., any person specified in subsection (2) of this section who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect or who has observed the child being subjected to circumstances or conditions which would reasonably result in abuse or neglect shall immediately upon receiving such information report or cause a report to be made of such fact to the county department or local law enforcement agency.

(2) Persons required to report such abuse or neglect or circumstances or conditions shall include any: . . .

(f) Public or private school official or employee

COLO. REV. STAT. § 19-3-304 (2003).

152. Christine Reid, *School Officials Cleared: Nederland Pair Accused of Failing to Report Assault*, BOULDER DAILY CAMERA, Jan. 24, 2004, at 4A.

153. Colorado defines unlawful sexual contact as:

(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

(a) The actor knows that the victim does not consent; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission

emphasizes sexual contact and lack of consent as the two most crucial elements of the crime. The consent element accounts for those victims that either do not give consent, or are physically helpless, drugged, or otherwise incapable of consent.¹⁵⁴

Using the hypothetical exchange described in the Introduction as an example, it is probably safe to assume that neither Johanna nor Max consented to the contact imposed upon each other. However, this only satisfies one element of the crime. The more important question deals with whether or not the contact between Johanna and Max fits under the definition of sexual contact. The Colorado Legislature defines sexual contact as:

[t]he knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.¹⁵⁵

Before analyzing the snapping of Johanna's bra, it is important to define "intimate parts." The Colorado Legislature defines the term as "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person."¹⁵⁶ The hypothetical indicated that Max grabbed Johanna's bra strap, perhaps touching her back, but certainly not her breasts.¹⁵⁷ However, Johanna's bra is clothing covering her breasts, and this contact of clothing might qualify as intimate parts. However, since Max's contact was not upon the immediate area of Johanna's intimate parts, that seemingly logical construction is probably not plausible. Some room for interpretation is obviously left to the reader under the "clothing" part of the definition.

In addition, there is some question whether Max's contact with Johanna's bra was for the purposes of sexual arousal, gratification or abuse. Though Max thought of her as "beautiful" and admitted being "curious" about her new bra, this does not necessarily mean that he touched it for the purposes of sexual gratification or arousal. Several reasons might be advanced to describe his motivation for snapping the bra. Suppose Max snapped the bra on a dare, because he lost a bet, or

COLO. REV. STAT. § 18-3-404.

154. "'Consent' means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. . . . Submission under the influence of fear shall not constitute consent." *Id.* § 18-3-401(1.5).

155. *Id.* § 18-3-401(4).

156. *Id.* § 18-3-401(2).

157. *See supra* Introduction.

because of peer pressure not to look "weak." The requisite *mens rea*¹⁵⁸ requirement may not be satisfied here as it would be nearly impossible to demonstrate that Max acted for the purposes of sexual gratification or arousal. However, inappropriate conduct has still occurred.

Johanna, on the other hand, made direct contact with Max's genitals when she retaliated. Since it is unlikely that sexual gratification could be obtained through knee-genital contact, the stimulus for Johanna's action almost certainly seemed to be self-defense or revenge. The fact that she ran off to the bathroom sobbing after the altercation probably indicates some other emotion, perhaps embarrassment. Johanna's motivation would be extremely difficult to determine with certainty; in an interview setting she may not reveal her true intentions and it seems unlikely another student would report that sexual motivation drove her conduct.

This discussion provides a glimpse into the difficulties faced by thoughtful administrators who try to determine whether sexually related inappropriate conduct is actually a commission of a sexual crime. Gray areas abound in this area of the law, and administrators must use a great deal of judgment when trying to decipher intent.

C. Sexual Assault

The crime of sexual assault¹⁵⁹ may also be applicable to some inappropriate sexual conduct between students. The simplest definition of

158. "The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY, *supra* note 99, at 1006-07.

159. The Colorado legislature has defined sexual assault thus:

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or

sexual assault involves sexual intrusion¹⁶⁰ or sexual penetration.¹⁶¹ Not surprisingly, if a student is raped, an administrator has both a legal and civil duty to report it.¹⁶² However, Colorado's sexual assault statute still might cause confusion in certain situations. Because many middle schools are located on the same campus as elementary schools, relatively large age differences between students might occur. For example, it may be possible for a fourteen-year-old eighth grader to inhabit the same campus as a ten-year-old fifth grader. If the two had intercourse, the eighth grader has committed sexual assault because the ten-year-old is incapable of consent.¹⁶³ If administrators knew about the sexual relationship between the students, they have a duty to report it since sexual contact between the students is statutorily prohibited.

D. Sexual Assault on a Child

Sexual assault on a child is typified by adult-on-student contact, and thus is largely beyond the scope of this paper. However, Colorado Revised Statute § 18-3-405 can be permuted to the student-on-student context: it might be triggered by the intercourse between the eighth-grader and the fifth-grader previously mentioned.¹⁶⁴ Another way this

(g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or

(h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

COLO. REV. STAT. § 18-3-402(1).

160. The Colorado legislature has defined sexual intrusion as:

any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

Id. § 18-3-401(5).

161. "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime." *Id.* § 18-3-401(6).

162. *Murrell v. School District No. 1*, 186 F.3d 1238 (10th Cir. 1999).

163. COLO. REV. STAT. § 18-3-402.

164. See *supra* Part III.A.2. Colorado's criminal statute on sexual assault on a child reads:

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:

(a) The actor applies force against the victim in order to accomplish or facilitate sexual contact; or

(b) The actor, in order to accomplish or facilitate sexual contact, threatens imminent death, serious bodily injury, extreme pain, or kidnapping against the victim

statute may be invoked is through a "pattern of sexual abuse," or the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.¹⁶⁵ This may be relevant as inappropriate sexual conduct is often repetitive in nature.¹⁶⁶

After considering both the *Davis* and *Murrell* holdings and Colorado state law, school district administrators face the lofty task of carefully crafting district policies to guide teachers and principals in making the right decisions regarding student-on-student sexual harassment.

IV. THE SCHOOL ADMINISTRATOR'S RESPONSIBILITY UNDER DISTRICT POLICIES

In response to the boom of sexual harassment lawsuits, school districts have no choice but to carefully address sexual harassment in official policies and handbooks. These policies have two purposes: First, they attempt to promote the initiative of schools to be safe learning environments. Second, they aspire to help the district and its employees to avoid litigation, or at least adverse results in defending the inevitable lawsuit. A look at specific district policies in Colorado and beyond is helpful. Section A examines school district policies on sexual harassment in Dallas, Texas. Section B focuses on Colorado's Boulder Valley School District Policies and analyzes the inherent difficulties they present administrators in this area. Section C distinguishes the two and discusses the relative shortcomings of the Boulder Valley policies.

A. Dallas Independent School District Policies on Sexual Harassment

The Dallas Independent School District ("DISD"), the nation's twelfth-largest school district, educates over 160,000 children per

or another person, and the victim believes that the actor has the present ability to execute the threat; or

(c) The actor, in order to accomplish or facilitate sexual contact, threatens retaliation by causing in the future the death or serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor will execute the threat; or

(d) The actor commits the offense as a part of a pattern of sexual abuse

COLO. REV. STAT. § 18-3-405.

165. COLO. REV. STAT. § 18-3-401(2.5) ("'Pattern of sexual abuse' means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.")

166. See, e.g., *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-51 (1999).

year.¹⁶⁷ DISD maintains policies on student-on-student sexual harassment, defining the term with the following statement:

Students shall not engage in unwanted and unwelcome verbal or physical conduct of a sexual nature directed toward another student or a District employee. This prohibition applies whether the conduct is by word, gesture, or any other sexual conduct, including requests for sexual favors.¹⁶⁸

These policies initially describe the district's concern with the prevention and correction of sexual harassment, noting that individuals who engage in such behavior are subject to discipline.¹⁶⁹ Students and parents who believe sexual harassment has occurred can report incidents to the DISD's Title IX Coordinator.¹⁷⁰ District employees who learn that a student is being sexually harassed must report the behavior to the school principal.¹⁷¹ Employees who suspect child abuse or neglect have taken place must report the conduct to the appropriate authorities, presumably the police.¹⁷² The District then notifies the parents of *all* students involved.¹⁷³

The initial complaint process begins with a conference involving the complaining student, their parent or other representative, and a school administrator.¹⁷⁴ This conference will ordinarily be held with a person of the same gender as the complaining student.¹⁷⁵ The conference must take place within seven days of the complaint.¹⁷⁶ If the matter is not settled in this initial conference, the student may request a meeting with the Superintendent.¹⁷⁷ If the matter remains unresolved, the School Board

167. DALLAS INDEP. SCH. DIST., INSIDE DISD, http://www.dallasisd.org/inside_disd/ (last visited February 18, 2005). Cf. Sarah Diane Stevenson, Note, *The Revenge of the Hot Dog Slut: Peer Harassment After Davis v. Monroe*, 10 S. CAL. REV. L. & WOMEN'S STUD. 137, 157-63 (2000) (discussing sexual harassment policies in school districts in Los Angeles and New York).

168. DALLAS INDEP. SCH. DIST., *Student Conduct: Sexual Harassment/Sexual Abuse*, in LOCALIZED POLICY MANUAL: (2002), [http://www.tasb.org/policy/pol/private/057905/pol.cfm?DisplayPage=FNCJ\(LOCAL\).html&QueryText=Student%20CONDUCT%20SEXUAL](http://www.tasb.org/policy/pol/private/057905/pol.cfm?DisplayPage=FNCJ(LOCAL).html&QueryText=Student%20CONDUCT%20SEXUAL) (last visited February 22, 2005). The Dallas Independent School District maintains its policies on the Texas Association of School Board's server. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

will hear the complaint.¹⁷⁸ The three-level complaint process does not terminate unless the complaining student's concerns are remedied or the School Board adjudicates the matter.

B. Boulder Valley School District Policy

The Boulder Valley School District also addresses sexual harassment in its policies. The student conduct policy begins with a blanket statement requiring students to "conduct themselves in keeping with their level of maturity."¹⁷⁹ This part of the policy was probably meant to interpret inappropriate conduct differently depending on the age of the actor.

The student conduct policy goes on to flesh out what constitutes inappropriate conduct in a number of specifications.¹⁸⁰ Of particular im-

178. *Id.*

179. BOULDER VALLEY SCH. DIST., STUDENT CONDUCT (2001), <http://www.bvsd.k12.co.us/sb/policies/JFC.htm>, (last visited Mar. 5, 2003) [hereinafter BOULDER STUDENT CONDUCT]. The introductory paragraph reads:

While on school grounds, in school facilities, in school vehicles, or at school-sponsored activities, students shall be expected to conduct themselves in keeping with their level of maturity, acting with due regard for the supervisory authority vested by the Board in all District employees; the educational purpose underlying all school activities; the widely shared use of school property; and the rights and welfare of other students.

Id.

180. Specifically, it provides:

1. Student conduct shall at all times reflect consideration for the rights and privileges of others; cooperation with all members of the school community is required.

2. Students shall maintain high personal standards of courtesy, decency, morality, and honesty in their relationship with others.

....

5. No student shall engage in or encourage behavior which disrupts or poses a clear and convincing threat of disruption of the school operations or interference with the rights of others or with the ability of the school to provide educational opportunities to other students.

6. No student shall engage in or encourage behavior which is detrimental to the welfare or safety of students, teachers, or school personnel on or off school property.

....

10. No student shall engage in bullying behavior in the school, on school grounds, in school vehicles, at a designated school bus stop, or at school activities or sanctioned events. Bullying is defined as any written or verbal expression, or physical act or gesture, or a pattern thereof, that is intended to cause distress upon one or more students. A reasonable balance between the severity and pattern, if any, of the bullying behavior shall be taken into consideration when disciplinary decisions are made.

Id.

portance is the second provision, requiring students to maintain high personal standards of decency and morality in their relationships with others.¹⁸¹ Using the conduct described in the Introduction as a guideline, consider whether Max and Johanna engaged in 'immoral' or 'indecent' conduct. Because the determination of whether behavior qualifies as immoral or indecent is quite subjective, these may be inappropriate guidelines for classifying student conduct. Popping a bra strap or kneeling a groin is generally considered inappropriate conduct, but some decision-makers, depending on the totality of the circumstances, might not consider it immoral¹⁸² or indecent.¹⁸³

Schools, of course, are free to make their own more specific rules as long as they are in line with district policies. But when one school's policies are stricter than others, this may institute inequities among similarly situated students at different schools in the same district.

Another part of the student conduct code requires students to comply with Colorado law.¹⁸⁴ As discussed earlier, the intricacies of the laws pertaining to illegal sexual conduct make it difficult to determine whether the behavior described in the Introduction is a criminal violation. Therefore, that kind of sexual behavior can be difficult to classify under this standard as well.

Not surprisingly, the Boulder Valley School District devotes a distinct section of policies to harassment. They define harassment as "[b]ehavior toward students or adults based, in whole or in part, on race, ethnicity, national origin, gender, sexual orientation, age, disability, or religion which interferes with a person's school performance or creates an intimidating, hostile, or offensive school environment."¹⁸⁵

Sexual harassment of students is defined as:

[v]erbal, visual, or physical sexual or gender-based behavior that occurs when one person has formal or informal power over the other and

a. such behavior creates an intimidating, hostile, or offensive educational environment; or

b. such behavior interferes with an individual's educational performance or adversely affects an individual's learning opportunities.¹⁸⁶

181. *Id.*

182. Immoral is defined as "not moral . . . conflicting with generally or traditionally held moral principles." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 621 (11th ed. 2003).

183. Indecent is defined as "grossly improper or offensive." *Id.* at 632.

184. BOULDER VALLEY SCH. DIST., NONDISCRIMINATION (2001), <http://www.bvbsd.k12.co.us/sb/policies/AC-R.htm> (last modified November 29, 2001) [hereinafter BOULDER NONDISCRIMINATION].

185. *Id.*

186. *Id.*

The language of these sections of the conduct policy seems to echo that of Title IX; they were probably inserted to encourage compliance and avoid civil liability.

C. Significant Differences

Overall, there are significant differences between the codes of the Dallas School District and the Boulder Valley School District. The DISD policies prescribe specific procedures for dealing with student-on-student sexual harassment. The tragedy of *Murrell*¹⁸⁷ would have almost certainly been avoided had it occurred in present-day Dallas: Penelope's mother could have reported her concerns to the district's Title IX coordinator; the principal and teachers would have been required to report the conduct to the police; and school-parent communication would have occurred according to a strict schedule, not concluding until the complaining student was satisfied or had the chance to be heard before the school board.

The Boulder policies are much broader, leaving decisions on conduct up to the wide discretion of the administrator. However, the leeway entitled to administrators under the code may subject particular decisions about student-on-student sexual harassment to intense scrutiny. As many administrators are unsure as to their responsibilities under the law, this scrutiny may eventually lead to the filing of criminal or civil actions. In fact, two Boulder Valley School District middle school administrators, unclear how to proceed under District policies and Colorado law, were recently prosecuted for failure to report a situation involving unlawful sexual conduct.¹⁸⁸

CONCLUSION

All in all, middle school administrators face a very difficult task each time they attempt to correctly classify and respond to inappropriate sexual conduct between students. Unfortunately, the set of authorities provided by the United States Supreme Court and the Tenth Circuit are not complete in their guidance in these situations. Section A discusses

187. See *supra* Part II.C.4.

188. Boulder County prosecutors charged two Boulder Valley School District administrators under this statute in 2003 after they waited five days to report a possible case of child abuse. Reid, *supra* note 152. The charges were subsequently dropped after the pair attended mandatory training. *Id.* A substitute teacher had been accused of pinching a student's buttocks. Christine Reid, *Jury Finds Longtime Ned Teacher Not Guilty*, BOULDER DAILY CAMERA, Apr. 21, 2004, at 3A. The teacher was later exonerated on charges of sexual assault. *Id.*

the rampant confusion present in school administrators' offices about this subject. Section B proposes legislative changes, adding resource officers and expanding student training to alleviate this confusion in Colorado.

A. Confusion

Bernadette Seick, Denver Public Schools assistant superintendent for secondary education, made the following comments on student-on-student sexual harassment: "Whether an interaction between children is sexual harassment or not has a lot to do with the age of the children, the seriousness of the offense and how unwanted it is" ¹⁸⁹

For example, a pair of first-graders might not be punished for playing doctor on school grounds, while two tenth-graders who attempted something similar almost certainly would be. ¹⁹⁰ However, this rule may create a loophole for the middle school student to escape punishment for inappropriate sexual behavior. As discussed earlier, hormone-driven middle school students are prone to impulsive behavior. It might be considered that by acting out sexually, like the behavior described in the Introduction, the student actor is merely conducting himself according to his level of maturity. ¹⁹¹

Colorado law leaves much room for the interpretation of sexual conduct in middle school. For example, sexual assault is defined as a sexual intrusion or a sexual penetration. ¹⁹² One imagines that school administrators know to report an unlawful penetration. However, as proved by *Murrell*, ¹⁹³ even this behavior has occasionally gone unreported. While it is very likely that bad faith existed in that case, in another situation, a teacher or administrator might be confused about the

189. Janet Simons, *Children and Harassment: Parents and Educators Grapple with Where to Draw the Line*, ROCKY MTN. NEWS, Nov. 26, 1996, at 3D.

190. In light of schools' anxiety in recent years over sexual harassment lawsuits, this categorical statement has not always held true. In 1996, a mother in Worcester, Massachusetts, was told that her three-year-old son was reprimanded and forced to sit in the "time out chair" for hugging another child in his preschool class. SOMERS, *supra* note 120, at 54. In 1997, a nine-year-old Arlington, Virginia, boy who had been caught drawing a picture of a naked woman in class was charged with aggravated sexual battery after being accused of deliberately rubbing up against a girl in the cafeteria line. *Id.* The boy was arrested and fingerprinted, though the charges were later dropped. *Id.* That same year, another pair of ten-year-old boys were charged with sexual harassment after a girl overheard them comment that her belt looked like a dangling penis. *Id.*

191. Simons, *supra* note 189; see also BOULDER STUDENT CONDUCT, *supra* note 179, <http://www.bvsd.k12.co.us/sb/policies/JFC.htm>.

192. COLO. REV. STAT. § 18-3-402 (2003). For a definition of "sexual intrusion," see *supra* note 160. For a definition of "sexual penetration," see *supra* note 161.

193. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1243 (10th Cir. 1999).

specific parts of the sexual assault law.¹⁹⁴ For example, it is unclear whether the situation between Max and Johanna gave rise to criminal behavior. Administrators must effectively decide when to report conduct to police. As the laws evolve, steps should be taken to ensure that administrators are aware of what conduct *must* be reported.

B. Recommendations for Colorado

The Colorado Legislature should set a national precedent by drafting a section of law to be added to the current Colorado Revised Statutes on unlawful sexual conduct that specifically addresses contact between students in the school setting. However, formatting a statute for this purpose would be extremely complicated. As mentioned before, some types of conduct might be acceptable between members of one age group and unlawful between members of another older group. In addition, if the Legislature tried to identify *specific* types of prohibited actions, loopholes would be easily created. Therefore, the statute should make an allowance for the subjective interpretation of law enforcement officers. Specifically, the law enforcement officer should be allowed to closely inspect the impact of the conduct on the alleged victim.

Middle school administrators should not be confused with prosecuting attorneys or police officers, though they do seem to share many parallel roles. The school system might be well served if a resource police officer were allocated to each Colorado middle school. Many resource officers are currently assigned to high schools throughout Colorado. However, the need for law enforcement in middle schools has become more apparent as the problem of student-on-student sexual harassment plagues younger and younger students every year. Experienced resource officers would help alleviate some of the pressures on Colorado middle school administrators by shouldering some of the responsibility of determining that a crime has probably occurred.

"The Colorado Education Association, the state's largest teachers' union, has training materials that help staff to deal with student-to-student sexual harassment . . ."¹⁹⁵ In addition, the State of Colorado requires education about sexual harassment as a part of the administrative certification process.¹⁹⁶ Perhaps it is also time for more students to receive a type of "harassment sensitivity" training program at schools. An interview with Boulder Valley students revealed that the students see

194. COLO. REV. STAT. § 18-3-402 (2003).

195. Abbott, *supra* note 150.

196. COUNCIL OF SCH. ATTORNEYS, NAT'L SCH. BDS. ASS'N COUNCIL OF SCH. ATTORNEYS, A SCHOOL LAW PRIMER (2000).

little difference between flirting and what Colorado law seems to define as sexual assault.¹⁹⁷

An intensive training program could at least educate students about inappropriate sexual behavior and warn them of the potential consequences of engaging in it. Several schools in the Boulder Valley School District currently utilize the *Bully-Proof* curriculum, developed by Nan Stein, to do just that.¹⁹⁸ The *Bully-Proof* curriculum teaches students the boundaries between teasing and bullying as a way to prevent future harassment.¹⁹⁹ The curriculum involves both girls and boys to solve the problems of bullying and harassment.²⁰⁰ Colorado schools that are not currently using this curriculum could begin to do so, while schools that do use the curriculum could look to other programs to supplement their efforts.

For example, the *Empower Program* helps schools and organizations develop violence-prevention programs for young people.²⁰¹ The *Empower Program* differentiates between the sexes in its teaching methods; the girls' program focuses on improving self-esteem and boundary-setting to reduce the prevalence of tolerated sexual harassment, while the boys' program examines masculinity and its influences on male behavior.²⁰²

These programs are not without their critics. Christina Somers, in examining two similar curriculum guides created and funded by the Department of Education, deems them more appropriate "for disturbed children . . . than normal five to seven-year-olds in our nation's schools."²⁰³ She scoffs at the notion of "children, including kindergartners, learning to say '[s]top it. That's sexual harassment, and sexual harassment is against the law.'"²⁰⁴

However, observing the utterances of these uncomfortable words from the mouths of children is a small price to pay in exchange for our children's safety and the financial protection of the school districts. At any rate, action must be taken to ensure that Colorado middle school administrators are not so inhibited with the risks of dealing with student-on-student sexual harassment that they may no longer efficiently function with the best interests of their students in mind.

197. High School Interview, *supra* note 22.

198. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN 91 (1999).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. SOMERS, *supra* note 120, at 52-53.

204. *Id.* at 53.

