

Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions

JoAnn Strauss*

Introduction

Kathi Vonderharr was eighteen years old when she died.¹ Statistically she will be listed as a teen suicide, but the story of her death is much more; it is the story of a society that protects "boys will be boys" behavior and of an innocent girl forced to fight for dignity and self respect.

On January 11, 1985, when she was fifteen years old, Kathi was assaulted. Her attacker was not the stranger young girls are warned to fear; her attackers were two fifteen-year-old boys and a fourteen-year-old boy, all of whom Kathi knew. And although the assault had a traumatic effect on her, according to Bryce Fier, a friend of the Vonderharr family, "I think she could have recovered from the assault, but everything that happened afterward made it much harder."

Kathi attended a youth hockey tournament in Rochester, Minnesota, with a friend's family. Kathi, her girl friend, and that friend's brother were in a motel room when several boys they knew began to pound on the door. Kathi's friend's brother let the boys in. As Kathi sat on the bed, three of the boys pulled up her blouse and pulled down her pants. They then fondled her breasts and vagina while the other boys watched.

Finally, all the boys left the room, but the three that assaulted Kathi returned. Saying they wanted to apologize, the three were allowed to re-enter. One did apologize, but the other two attacked Kathi again.

Not wanting to cause trouble, Kathi and her friend said noth-

* B.A. South Dakota State University. J.D. University of Minnesota Law School, 1993.

1. The following narrative is based on information contained in Doug Grow, *Suicide Ended Kathi's "Fight for Dignity"*, MINNEAPOLIS STAR TRIBUNE, July 5, 1987, at 1A.

ing for a week. Then Kathi heard the three were bragging that "they had screwed Kathi Vonderharr." Kathi told her parents, and charges were filed.

As soon as news of the incident spread, the Vonderharr phone began to ring. The calls were not calls of support and encouragement as one would expect when a child has been assaulted. They were calls from people of the hockey association reminding the Vonderharrs that "boys will be boys." One caller said to Mrs. Vonderharr, "Don't you remember when you were sixteen? You liked that when boys did that to you. You may have slapped their face, but you liked it . . . My sons bring girls to the house all the time and I know they do that and I know the girls like it."

Two of the boys ultimately pled guilty to fourth degree sexual assault,² and the third was found guilty of the same offense in juvenile court. The court placed the boys on probation until age nineteen and ordered them to perform 570 hours of community service each and to pay for Kathi's medical expenses related to the assault.

Outside the courtroom, the verdict was sadly different. The boys missed one hockey game. They became hockey heroes with articles about them in the yearbook and school and local newspapers. One article had the school hockey coach speaking of two of the boys' "hungry" and "aggressive" styles.

Ironically as Kathi's assailants became heroes at school and in the community, their victim became an outcast. Kathi's school mates called her "slut," "bitch," and "whore." Once on her locker she found scrawled, "Kill the bitch, she took our friends to court." According to Kathi's mother, on one occasion when Kathi reported to a vice principal the scrawls on the locker, she was told, "I've got 200 kids who were late for school. I've got to arrange their detention. Clean the locker yourself."

Although Kathi was bewildered by the experience at the high school, she was determined not to change schools. However, sometimes at night she would say, "Oh, just let me slip away and be free." On June 17, 1987, Kathi did slip away. She closed the garage door and started the car's ignition. When she was found, she had her teddy bear and a picture of the people she loved.

Kathi's teen suicide is evidence of a society which has lost its basic values—a society in which the victim of sexual assault is fre-

2. MINN. STAT. § 609.345 (1990) defines criminal sexual conduct in the fourth degree: "A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists. . . (c) the actor uses force or coercion to accomplish the sexual contact . . ."

quently treated as the guilty party. But Kathi's story is much more. Kathi's story vividly illustrates the impact of the school's environment upon its students, the difference between harassment that occurs in high schools and that which occurs in the employment context, the need to formulate a refined legal standard by which to judge sexual harassment in high schools and develop comprehensive sexual harassment policies and procedures at the high school level.

Sexual harassment is well-documented and analyzed in the workplace. Legislation has been proposed and adopted in many instances on the federal and state level to protect adult women, and there is a continuously developing body of case law recognizing the right to work in an atmosphere free from sexual harassment. In recent years the public has also been jolted into awareness of sexual harassment on the college campus, and universities and colleges have scrambled to develop policies.³

However, the recognition that sexual harassment does not suddenly begin when young people graduate from high school and leave home has been slow. Sexual harassment is prevalent in high school in the guise of "teasing" and all too often the reaction to such harassment is "boys will be boys." This article will examine litigation on the issue of sexual harassment and argue that education of young people, not remediation, is the most effective means of ending peer sexual harassment of high school students. Part I of the article will be an overview of the development of sexual harassment law. Part II will review the litigation that has occurred on the high school level in the context of peer sexual harassment. Part III, in addition to proposing a standard of peer sexual harassment more suitable for high schools than the present standard used in employment cases, proposes imposing an affirmative duty on school districts to deal with sexual harassment. Part IV will argue for policies, procedures, and training necessary to educate students about and to protect students from peer sexual harassment while they are in high school.

Part I: The Development of Sexual Harassment Law

Sexual harassment is not a modern phenomenon, but it is only in the last three decades that it has emerged as an issue. It

3. For a discussion of the issues and of higher education's reactions to sexual harassment on the campus, see BILLIE W. DZIECH & LINDA WEINER, *THE LECHER-OUR PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* (1990); IVORY POWER: *SEXUAL HARASSMENT ON CAMPUS* (Michele A. Paludi ed., 1990)

was the surge of women into the workforce in the sixties⁴ which created the societal consciousness that would gradually formalize sexual harassment as a problem in need of a remedy.

Passage of Title VII of the 1964 Civil Rights Act⁵ was the seed for future sexual harassment litigation. Although its original intent was to protect African-Americans,⁶ the Act's impact significantly broadened when Title VII, which dealt with employment discrimination, was expanded to include sex discrimination.⁷ Title VII also created the Equal Employment Opportunity Commission (EEOC) to investigate employment discrimination complaints.

During the seventies, which was an era of activism, the concept of sexual harassment became formalized.⁸ In 1972 Congress passed the Equal Rights Amendment⁹ and forwarded it to the states for ratification. However, the final deadline for ratification passed in 1982 without the requisite vote of three-quarters (thirty-eight) of the states. In 1972, Congress also passed the Equal Employment Opportunity Act (EEOA)¹⁰ and the Education Act Amendments.¹¹ The EEOA, in addition to giving enforcement power to the EEOC, expanded coverage of Title VII.¹² Title IX of the Education Amendments prohibited sex discrimination in any educational program or activity receiving federal funds.¹³

Sexual harassment victims began suing under a variety of

4. Charles S. Clark, *Sexual Harassment*, 1 CQ RESEARCHER 537, 546 (Aug. 9, 1991). In 1959, 22 million women were in the workforce (33% of the workforce). By 1991, there were 57 million women in the workforce (45.5% of the workforce). *Id.*

5. 42 U.S.C. §§ 2000e to 2000e-17 (1981).

6. *But see* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163, 184 (1991) (arguing that the addition of "sex" to Title VII was no fluke and that the success of committing the federal government to the prohibition of sex discrimination in employment came through persistence).

7. 42 U.S.C. § 2000e-2(a) (1981) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin."

8. *See Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976). Sexual harassment simply happened to women and did not have a name. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definition*, 13 HARV. WOMEN'S L.J. 35, 41 (1990).

9. The text of the Equal Rights Amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

10. Pub. L. No. 92-261, 86 Stat. 103 (1972).

11. Pub. L. No. 92-318, 86 Stat. 235 (1972).

12. Clark, *supra* note 4, at 546.

13. 20 U.S.C. § 1681 (1990).

laws,¹⁴ although Title VII was the principal vehicle,¹⁵ and the courts began the process of defining sexual harassment through the broad prohibition of sex discrimination in the various statutes. In developing sexual harassment law during the late seventies, the courts first defined "quid pro quo" harassment in the workplace.¹⁶ "Quid pro quo" harassment "occurs when submission to sexual

14. Legal theories used in sexual harassment cases include statutory claims under Title VII of the Civil Rights Act of 1964, Title IX of the 1972 Education Amendments, and various state statutes; tort theories; contract theories; and institutional grievance procedures. Title VII can only be used in workplace harassment, and its remedies were limited to equitable relief only until passage of the 1991 Civil Rights Act. The EEOC, which is charged with enforcement of Title VII, has formulated a definition of sexual harassment which has been relied upon in other statutory claims.

Title IX is only useful in educational institutions receiving federal money. Unlike Title VII, the Office of Civil Rights, which enforces Title IX, has not promulgated regulations concerning sexual harassment. Remedies under Title IX were limited to termination of federal funding, attorney fees, and court costs until the recent decision in *Franklin v. Gwinnett County Pub. Sch. and William Prescott*, 60 U.S.L.W. 4167 (U.S. Feb. 26, 1992)(No. 90-918). For a discussion of the case, see *infra* notes 37-49 and accompanying text.

State statutes, such as the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 5 (1990), like Title IX, prohibit discrimination on the basis of sex within educational institutions but allow for monetary damages, lawyer's fees, and modest punitive awards as well as termination of state funding. However, these statutes have a short claims period; in Minnesota filing must occur within one year after the occurrence of the harassment. In addition, some require exhaustion of administrative remedies before civil action can be filed.

Tort theories, such as intentional infliction of emotional distress, battery, invasion of privacy, negligent infliction of emotional distress, and negligent hiring, have generally only been used in the workplace thus far, but if they were to gain acceptance in the educational setting, they would have great attractiveness for the victim as tort theory can potentially provide the victim with extensive financial compensation.

Contract theories involving students have not been highly successful. Contract theories require that a student pay tuition and thus establish a contract which includes the right to be free from sexual harassment.

For those who wish to avoid the scrutiny and publicity involved in a suit, institutional grievance procedures are a possible way to handle a complaint. Many educational institutions have tried to define and be responsive to sexual harassment of their students. The procedures developed often provide for an informal resolution system and a system for formal complaints. Sanctions vary from reprimand to removal for cause. Courts will generally defer to action taken under school policy. Linda J. Carpenter, *Legal Issues: Sexual Harassment*, J. PHYSICAL EDUC., RECREATION & DANCE Apr. 1989, at 18; Judith B. Langevin & Thomas C. Kayser, *Sexual Harassment in Educational Institutions*, TRIAL, June 1988, at 28, 29.

15. Title VII makes no mention of sexual harassment. See *supra* note 7. Those that sued under Title VII argued that sexual harassment was a form of sex discrimination.

16. See, e.g., *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979) (plaintiff discharged when she refused to cooperate with her supervisor's sexual advances); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (plaintiff's job abolished after she refused to submit to her supervisor's sexual advances); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *on remand sub nom.* *Williams v. Civilette*,

conduct is made a condition of concrete employment benefits.”¹⁷ This form of harassment includes hiring and firing decisions and changes in pay, promotion, job duties, or job conditions based on acquiescence to sexual advances.¹⁸

In 1980, the EEOC issued guidelines that declared sexual harassment a violation of section 703 of Title VII, established criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defined the circumstances under which an employer may be held liable, and suggested affirmative steps an employer should take to prevent sexual harassment.¹⁹ The courts in the early eighties accepted the EEOC definitions and began to extend the definition of sexual harassment to include “hostile environment.”²⁰ This form of sexual harassment unreasonably interferes with job performance or creates an environment that is intimidating, hostile, or offensive, even if it leads to no tangible or economic job consequences.²¹

487 F. Supp. 1387 (D.D.C. 1980) (plaintiff reprimanded and eventually terminated for refusing to submit to her supervisor's sexual demands).

17. *Hall v. Gus Constr.*, 842 F.2d 1010, 1013 (8th Cir. 1988).

18. *Continental Can Co. v. State*, 297 N.W.2d 241, 248 (Minn. 1980).

19. Key to the Guidelines is the definition of harassment:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when (1) submission to such conduct is made 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) (1991) [hereinafter “Guidelines”].

20. *See, e.g., Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (plaintiff's workplace pervaded with sexual slurs, insults, and innuendo and plaintiff subjected to verbal sexual harassment consisting of extremely vulgar and offensive sexually related epithets); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (plaintiff's supervisor subjected her to numerous harangues of demeaning sexual inquiries and vulgarities and repeated requests that she have sexual relations with him); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (plaintiff subjected to sexual propositions by supervisors, and sexual intimidation was “standard operating procedure” in the workplace).

21. *Henson*, 682 F.2d at 897. The *Henson* court justified its holding that a hostile environment was sex discrimination by explaining that:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to the terms, condition,

Finally in 1986 the Supreme Court for the first time in *Meritor Savings Bank v. Vinson*²² addressed the issue of sexual harassment and firmly established that sexual harassment is a form of sex discrimination actionable under section 703 of Title VII.²³ The *Vinson* court followed the Equal Employment Opportunity Guidelines and recognized both "quid pro quo" and "hostile environment" sexual harassment.²⁴

The *Vinson* Court found the gravamen of both "quid pro quo" and "hostile environment" sexual harassment claims is that the alleged sexual advances were "unwelcome."²⁵ The challenged conduct must be unwelcomed "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."²⁶ Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hy-

or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.

Id.

22. 477 U.S. 57 (1986).

23. *Id.* at 64.

24. The *Vinson* court rejected the idea that the language of Title VII was limited to "economic" or "tangible" discrimination and found the phrase "terms, conditions, or privileges of employment" to evince "a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment." 477 U.S. at 64 (citations omitted).

The Supreme Court added however that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.'" *Id.* at 67 (citations omitted).

25. 477 U.S. at 68.

The fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Id.

However, the court added that "[w]hile voluntariness in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcomed." *Id.* at 69.

26. *Henson*, 682 F.2d at 903. The record as a whole and the totality of the circumstances will be viewed on a case-by-case basis when the evidence is conflicting as to "welcomeness." 29 C.F.R. § 1604.11(b) (1991).

Plaintiffs who go along with or put up with sexual harassment have a difficult time convincing the court that they consented to the behavior but did not welcome it. *See, e.g., Weinsheimer v. Rockwell Intern. Corp.*, 754 F. Supp. 1559, 1564 (1990), *aff'd*, *Weinsheimer v. Rockwell Int'l Corp.*, 949 F.2d 1162 (11th Cir. 1991) (plaintiff's involvement in sexual innuendo in work area indicated she did not find majority of such conduct unwelcome). *But see, e.g., Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) (plaintiff's use of foul language or sexual innuendo does not waive legal protection).

persensitive."²⁷ Sexual flirtation or innuendo,²⁸ even vulgar language²⁹ that is trivial or merely annoying would probably not establish a sexual harassment claim.³⁰

The *Vinson* decision did not address the perspective from which "welcomeness" of behavior is to be determined³¹ and by what standard employer liability is to be judged for harassment perpetrated by supervisors³² and by co-employees.³³ Although the law is still emerging, today sexual harassment receives serious attention in business. Businesses are creating sophisticated anti-harassment policies, grievance procedures, and training seminars which are transforming the workplace.

Part II: Litigation of Sexual Harassment at the High School Level

Although there has been considerable litigation of sexual harassment in the employment context and an adoption of the EEOC

27. *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984).

28. *See, e.g., Ferguson v. E.I. du Pont de Nemours and Co., Inc.*, 560 F. Supp. 1172, 1197-98 (D. Del. 1983).

29. *See, e.g., Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 433 (D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986); *Downes v. F.A.A.*, 755 F.2d 288, 293 (Fed. Cir. 1985).

30. *See, e.g., Hall*, 842 F.2d at 1017 ("Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the road way. One may well expect that in the heat and dust of the construction site language of the barracks will always predominate over that of the ballroom."); *Continental Can*, 297 N.W.2d at 249 ("Title VII does not impose a duty on the employer to maintain a pristine working environment."). *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NOTICE #N-915-050 7-14 (Mar. 19, 1990) [*hereinafter* EEOC] for a full discussion on determining whether sexual conduct is unwelcomed and evaluating evidence of harassment.

31. Most courts have implicitly adopted the reasonable person standard. *But see* *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (reasonable woman standard used to evaluate welcomeness of advances); *Lipsett v. U. Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (events should be viewed from the perspectives of both parties); *Gradine v. College of St. Scholastica*, 426 N.W.2d 459 (Minn. Ct. App. 1988) (subjective test based on the intentions of the perpetrator should be used).

However, seminars involved in the continuing legal education of employment attorneys are now using the "reasonable woman" as the standard. Interview with Marcy Crain, Employment Division Anoka County Attorney's Office, in Anoka, Minn. (Feb. 7, 1991).

32. The *Vinson* court declined to define the federal standard for employer liability for hostile environment harassment by supervisors. The Court did, however, reject that employers were automatically liable in hostile environment cases. 477 U.S. at 72. In "quid pro quo" cases, the federal courts have held the employers strictly liable for harassment when supervisors perform or condone the offending conduct. *See, e.g., Horn v. Duke Homes, Inc.*, 755 F.2d 599, 604-06 (7th Cir. 1985); *Crimm v. Missouri Pac. R.R.*, 750 F.2d 703 (8th Cir. 1984).

33. The general standard used is whether the employer "knew or should have known" of the behavior alleged to have created the hostile work environment and failed to take appropriate steps to remedy the situation. *Hall*, 842 F.2d at 1010; *Continental Can*, 297 N.W.2d at 249.

guidelines,³⁴ few cases of sexual harassment have been reported in educational institutions.³⁵ Most of the cases that have reached the courts have involved harassment of a college student by a professor.³⁶

However, the Supreme Court recently in *Franklin v. Gwinnett County Public Schools and William Prescott*³⁷ left no doubt that sexual harassment of a high school student by a teacher is actionable under Title IX. In addition, the Court found that a damage remedy is available for an action brought to enforce Title IX. Affirming its decision in *Cannon v. University of Chicago*,³⁸ which held that Title IX is enforceable through an implied right of action, the Court held that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."³⁹

Franklin involved continual sexual harassment⁴⁰ of a high school student, Christine Franklin, by a sports coach and teacher, Andrew Hill, employed by Gwinnett High School in Gwinnett County, Georgia.⁴¹ Franklin charged that when the school district

34. See *supra* notes 16-30.

35. The Minnesota Human Rights Department has handled 26 cases of alleged sexual harassment in educational institutions since July of 1983. Of those only six have been complaints from secondary or elementary students based on the "hostile environment" principle. One case was dropped for lack of probable cause, three are now being investigated. Rebecca Sisco, *Sexual Harassment - Girls fight Back*, MINNESOTA WOMEN'S PRESS, Oct. 9, 1991, at 1A. For a discussion of the other two cases, see *infra* notes 51-70 and accompanying text.

36. See, e.g., *Bougher v. U. Pitt.*, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989); *Lipsett v. Rive-Mora*, 669 F. Supp. 1188 (D.P.R. 1987), *rev'd sub nom.*, *Lipsett v. U. Puerto Rico*, 864 F.2d 881 (1st Cir. (Puerto Rico) 1988), *appeal after remand*, *Lipsett v. U. Puerto Rico*, 759 F. Supp. 40 (D.P.R. 1991); *Moire v. Temple U. Sch. Med.*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); *Alexander v. Yale U.*, 631 F.2d 178 (2d Cir. 1980). For a discussion of the cited cases and as to why few complaints exist, see Kimberly A. Mango, *Students versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355 (Winter, 1991).

37. 60 U.S.L.W. 4167 (U.S. Feb. 26, 1992)(No. 90-918).

38. 441 U.S. 677 (1979).

39. *Gwinnett*, 60 U.S.L.W. at 4170.

40. Franklin, a student at North Gwinnett High School in Gwinnett County, Georgia, alleged that she was subjected to continual sexual harassment beginning the autumn of her tenth grade year. She charged that the teacher, Andrew Hill, had engaged her in sexually-oriented conversations and asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man. She also charged that he had forcibly kissed her on the mouth in the school parking lot and that on three occasions in her junior year he had interrupted a class, requested that the teacher excuse her, and taken her to a private office where he subjected her to coercive intercourse. *Id.* at 4168.

41. Prior to bringing the lawsuit in federal court, Franklin had filed a complaint with the Office of Civil Rights (OCR) of the United States Department of

became aware of the harassment and investigated it, the district took no action to halt it and discouraged Franklin from pressing charges.⁴²

The Court found that where intentional discrimination is alleged, sexual harassment of a student by a teacher is a form of sex discrimination. The Court relying on its decision in *Vinson* stated:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student.⁴³

Franklin involved the unequal power between teacher and student. Peer sexual harassment in the educational setting, however, is only beginning to emerge as an issue, but several ideas have gained acceptance. First, although the Office for Civil Rights, which is charged with enforcing Title IX's prohibition on sex discrimination in education,⁴⁴ has not promulgated regulations or guidelines on sexual harassment, it maintains that sexual harassment is prohibited by Title IX.⁴⁵ This creates a presumption that sexual harassment of students by peers as well as faculty members is prohibited. Second, even though Title VII applies strictly to employment, a persuasive argument can be made for applying the guidelines developed by the EEOC⁴⁶ in a refined form to sexual

Education in August 1988. The OCR determined that the school district had violated Franklin's rights by subjecting her to physical and verbal sexual harassment and by interfering with her right to complain about conduct proscribed by Title IX. However, because of the resignations of the teacher-harasser, Andrew Hill, and Respondent William Prescott and because the school had implemented a grievance procedure, the OCR determined that the district had come into compliance with Title IX and terminated its investigation. *Id.* n.3.

42. Hill resigned from the school district on the condition that all matters pending against him be dropped. The school then closed its investigation. *Id.*

43. *Id.* 4171 (citing *Vinson*, 477 U.S. at 64).

44. Title IX provides "[Except as otherwise provided] [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ." 20 U.S.C. § 1681(a) (1990).

45. In an August 1981 policy memorandum, the OCR reaffirmed its jurisdiction over sexual harassment complaints under title IX and adopted the following working definition: "Sexual harassment consists of verbal, or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX." OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). Langevin & Kayser, *supra* note 14, at 29.

46. See *supra* note 19.

harassment claims in the educational environment.⁴⁷ The EEOC guidelines have proven workable in the employment context and have been used in the analysis of professor-student harassment.⁴⁸ Finally, and most persuasive is the fact that the guidelines are already being used in state statutes prohibiting sexual harassment in the educational setting.⁴⁹ However, presently, no clear lines have been drawn. Although *Franklin* clearly establishes that at minimum sexual harassment of a student by a teacher is prohibited in the educational environment,⁵⁰ the issue of peer harassment is still undecided.

Whereas "quid pro quo" harassment applies in a situation involving unequal power, peer harassment has newly emerged as a term that groups student-to-student problems such as sexist language, date rape, hostile school environment, and sexual harassment. Two cases in Minnesota are among the first in the nation in which a high school student has successfully brought sexual harassment complaints dealing with peer harassment against a school

47. For a discussion of applying the Guidelines to sexual harassment claims in the educational environment, see Mango, *supra* note 36; see also FRANK J. TILL, THE NATIONAL ADVISORY COUNCIL ON WOMEN'S EDUCATIONAL PROGRAMS, SEXUAL HARASSMENT, A REPORT ON THE SEXUAL HARASSMENT OF STUDENTS, PART II 6-11 (Aug. 1980).

48. *Moire*, 613 F. Supp. at 1366-67 n.2 ("Though the sexual harassment doctrine has generally developed in the context of Title VII, these guidelines seem equally applicable to Title IX.").

49. See *infra* notes 51-70 and accompanying text.

50. See also *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989). In *Stoneking*, a former student, Kathleen Stoneking, brought a section 1983 civil rights action against the school district and school officials alleging that she had been sexually abused and harassed by a band director, Edward Wright, during her years in high school. *Id.* at 722. Due to uncertainty in the law, the court did not rest its decision on an affirmative duty of the school officials to protect students under the doctrine of respondeat superior. *Id.* at 723. The court, however, found Stoneking could maintain her section 1983 action against school officials for establishing and maintaining, with deliberate indifference to the consequences, a policy, practice or custom which directly caused her constitutional harm. *Id.* at 725. The court found persuasive Stoneking's argument that these practices, customs or policies at a minimum created a climate which facilitated the abuse of students by teachers and that there was a causal relationship between these practices and customs and the repeated sexual assaults against Stoneking. *Id.* See also *Alexander v. Yale U.*, 459 F. Supp. 1 (D. Conn. 1977). The district court maintained that if sexual harassment does occur, it may constitute sex discrimination prohibited under Title IX:

It is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisor have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment.

Id. at 4.

district.⁵¹ Both cases were brought under the Minnesota Human Rights Statute.⁵² Using a definition for sexual harassment which echoes the EEOC definition,⁵³ the Minnesota State Department of Human Rights investigated the charges and found probable cause⁵⁴ for sexual harassment. In the first case [hereinafter referred to as the Duluth case], the charging party and the respondent school district arrived at a settlement in September 1991. The second case [hereinafter referred to as the Chaska case] is still in the conciliation process.⁵⁵

In the Duluth case, the charging party alleged that her daughter was the subject of sexually offensive graffiti on the stall walls in a bathroom in Duluth Central High School and that the school district failed to take timely, appropriate action to remove

51. Minnesota Department of Human Rights, REF: 360 (1991) (Gorman, Enforcement Supervisor); Minnesota Department of Human Rights, REF: 341 (1990) (Lapinsky, Director); Jill Hodges, *Chaska High Cited for Inaction in Sex Case: Agency Acts on Girl's Complaint*, MINNEAPOLIS STAR TRIBUNE, Oct. 3, 1991, at 7B.

52. Minn. Stat. § 363.03, subd. 5 (1990) provides:

It is an unfair discriminatory practice:

- (1) to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance or disability, or to fail to ensure physical and program access for disabled persons

....

Id. Section 363.01, subd. 14 (1990) defines "discriminate": "[F]or purposes of discrimination based on sex, it includes sexual harassment."

53. The Minnesota Human Rights Act defines sexual harassment to include: unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when: (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing; (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decision affecting that individual's employment, public accommodations or public services, education, or housing; or (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodation, public services, educational, or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

MINN. STAT. § 363.01, subd. 41. (1990) (emphasis added).

54. Under MINN. STAT. § 363.06, subd. 4 (1990), once a charge has been filed with the commission, an investigation of the allegations will be made. A finding of probable cause is necessary for the charge to move either to conciliation or a hearing. A decision that no probable case exists is not appealable to the Minnesota Court of Appeals.

55. Hodges, *supra* note 44 at 7B.

the graffiti and to eliminate the continuing harassment.⁵⁶ Although the charging party notified the school district on repeated occasions between May 1988 and August 1989 and requested that the graffiti be removed, the graffiti remained.⁵⁷ The Human Rights Department found that even if some of the graffiti was removed in a timely manner vestiges of it remained or reappeared on numerous occasions.⁵⁸

The Department also found that the school district did not take sufficient affirmative measures to totally remove, monitor, or discourage the sexual harassment until formal charges were filed and that the school district had a responsibility to respond in a "timely and increasingly aggressive manner to investigate and remedy manifested sexual harassment and to affirmatively act to halt continuing sexual harassment."⁵⁹ The Department further found it would have been appropriate for the school district to educate its employees to respond to sexual harassment involving students.⁶⁰

After the Human Rights Department's finding of probable cause, the parties failed to achieve conciliation, and the case was given to the Minnesota Attorney General's Office where a settlement agreement was reached.⁶¹ The agreement included both remedial action by the district and monetary compensation for the

56. Minnesota Department of Human Rights, Ref: ED341 (1991) (Lapinsky, Director).

57. *Id.* The school district claimed its policy was to check for and remove graffiti daily and that "all possible reasonable steps were taken to remove graffiti." However, the district acknowledged that graffiti that is scratched into the wall remains until repainting is done. The district also claimed that "often graffiti reappears daily after removal," and that it was "unable to prevent reappearance of the graffiti since the perpetrators have never been suspected or identified." *Id.* at 2.

58. *Id.*

59. *Id.* at 3. The school district was found not to have acted affirmatively. The Department in its findings stated that the school district's timely and remedial actions should have included:

a) prompt removal of all sexual graffiti and any vestiges of graffiti relating to Charging Party's daughter; b) additional attempts to identify and then discipline the perpetrator(s); this reasonably could have been done by monitoring and doing spontaneous spot checks of subject bathroom; c) educational efforts to make the [district's] students aware of [the district's] sexual harassment policies, which would include specifically identifying that graffiti of a sexual nature is a form of sexual harassment (and vandalism), and perpetrators would be subject to disciplinary action."

Id.

60. *Id.*

61. Although the school district denied it violated the Minnesota Human Rights Act, to avoid delays, expenses and uncertainties of litigation, the parties agreed to a settlement. Department of Human Rights, ED341-GSS5-6N (1991) (David Beaulieu, Acting Commissioner).

victim.⁶² The remedial action included the district's adopting and posting a sexual harassment policy. The remedial action also required the district's aggressive commitment to eliminating and preventing sexual harassment by providing staff development for identification and prevention, classroom curriculum and instruction, student services, and student, staff, and community participation.⁶³

In the Chaska case the charging party alleged that the school district failed to take adequate action regarding complaints of sexual harassment and that this lack of action contributed to an offensive educational atmosphere.⁶⁴ The Department of Human Rights found probable cause and noted that:

the student events and program activities complained about by the Charging Party in the above investigation and the Respondent in its inappropriate response to these complaints and other complaints, creates an offensive atmosphere that promotes sexual harassment in general, in the Respondents school's programs and activities; and thus is in violation of Minnesota Statutes 363.03 subd. 5(1).⁶⁵

The charging party, a high school student, brought three specific charges that were found sufficient to create an offensive educational environment. First, the school district was found not to have taken appropriate action on a specific student skit⁶⁶ and not to have consistently taken effective action to eliminate activities

62. *Id.* The school district agreed to pay the victim \$15,000 for alleged mental anguish and suffering. *Id.* at 2.

63. *Id.* at Exhibit B.

64. Minnesota Department of Human Rights, Ref: ED360 (1991) (Gorman, Supervisor).

65. *Id.* at 11.

66. *Id.* at 6. A skit was performed in 1989 in which:

the male character had a mirror on his shoe and was looking up the dress of a female character. The female character said something to the effect of, 'Oh, don't look up my dress I don't have any panties on.' The charging party complained to the school principal, but no disciplinary action was taken.

Id. at 1.

The school district argued that action to prevent discriminatory or offensive material had been taken because the student council had frequently been counseled by school personnel and had received training on sexual harassment, because a policy existed to review skits in advance by staff members, including the student council advisor, principal, and assistant principal. Furthermore, respondent principal and the student council advisor had met with the student performers and decided no further disciplinary action was warranted. *Id.* at 4-5. The Human Rights Department found that although respondent did talk to the individual performers, no effective message was sent to the student body and staff that such presentations were not acceptable behavior nor were any warnings or notice of specific kinds of future consequences given to the student body if such behavior were to occur in the future. *Id.* at 5.

and presentations of a discriminatory and offensive nature.⁶⁷ Secondly, the school district was found not to have taken immediate action when a student complained of explicit photographs of females on a male student's notebook.⁶⁸ Finally, the school district was found not to have taken appropriate action involving an offensive list of female students circulated by male students.⁶⁹ One charge made by the student was found insufficient.⁷⁰

67. There was evidence of other presentations and activities at the school. A lip sync contest was performed in which "teen gals were dressed in lingerie (teddies) and they sang a song titled "Sex Shooter" while making undulating movements with their bodies in response to male students in the audience making cat calls and sexual comments." *Id.* at 5. There was another lip sync contest with girls dressed in two piece swimsuits engaging in pelvic thrusting on male's upper thighs. *Id.* at 4-5. The school had a "slave day" which involved students being led around by a leash and collar who could be bought and sold by other students. *Id.* at 6. A skit was performed "in which the opposing football team was composed of gay men with bare chests, bows around their necks and effeminate behavior while fans were mocked as being fat and opposing fans were nerds." *Id.* at 6.

68. *Id.* at 8. A male student had sexually explicit photographs of females on his folder in a humanities class. The charging party complained to a teacher who indicated he would ask the student to remove the pictures. When nothing was done, the charging party and another student complained to an assistant principal. The attitude of the assistant principal was that the students were overly sensitive. The male student was finally told by the teacher to get rid of the folder. *Id.* at 1.

The Department of Human rights found that sufficient evidence existed to show that the school district did not take immediate action and that there was reluctance on part of the school to intervene. *Id.* at 8.

69. *Id.* at 7. In January 1990, a list was circulated by some male students rating 25 female students and how "f***able" they were. The list also included descriptions of the female's anatomy and other sexual comments. When a teacher found the list, it was given to a dean. When the charging party's mother asked what was being done to let the student body know this was not acceptable, the dean stated, "Nothing, we don't want to make a big deal out of this." She was also told that the list had been thrown away. *Id.* at 2.

The school district acknowledged that the list was circulated by unidentified students. However, the district argued that several students were interviewed and a complete investigation was discreetly conducted and that the district took precautions to ensure the list was not further circulated. Furthermore, the district cited its sexual harassment policy and efforts to educate staff and students. *Id.* at 3.

The Department of Human Rights found the district did not take appropriate action in response to the list. Although the district did try to determine who wrote the list, the action of simply destroying the list was not sufficient. The district's "hush hush" attitude did nothing to educate the general school population. The district's actions confirmed the students' perceptions that the sexual harassment policy was vague and without tangible consequence. This promoted confusion, rumors, and uncertainty among the students about what is offensive behavior. *Id.* at 7.

70. The school decided to put paper on the restroom walls to curb writing on the walls. The charging party alleged that after the paper was put up, the amount of sexually explicit graffiti increased and that the school refused to address the problem. *Id.* at 1.

The school district acknowledged the paper did not discourage graffiti but that the principal had decided the paper was to stop being posted in the fall of 1990.

The Human Rights Department found insufficient evidence existed to show that the amount of sexually explicit school restroom graffiti increased or that the school district refused to address the problem. *Id.* at 11.

What seems clear from these two decisions is that a willingness exists to transfer the definition of sexual harassment used in the employment context⁷¹ into the educational setting⁷² at least where state statute includes sexual harassment as a form of sex discrimination. In both the Duluth and Chaska cases the finding of probable cause rested on the creation of an offensive environment and on the inaction of the school district to take affirmative action to end peer sexual harassment.

Part III: A Reasonable Student Standard and an Affirmative Duty in Peer Sexual Harassment of High School Students

With the growing recognition that sexual harassment occurs between students in the high school setting and that it may be subject to legal action,⁷³ distinctions must be drawn between harassment in the workplace and peer harassment that occurs in high schools. Two areas in particular need refining: the standard by which to judge whether harassment has occurred and the duty of the school district as opposed to the duty of the employer to eliminate sexual harassment.

To determine whether sexual harassment is sufficiently severe to create a hostile environment in the employment context,⁷⁴ the courts generally use an objective standard of a "reasonable person."⁷⁵ Thus, if a reasonable person's work environment would not be substantially affected by the harassment, no violation exists. However, this objective standard is not applied in a vacuum, and the context in which the alleged harassment took place must be

71. See Guidelines *supra* note 19.

72. See *supra* note 49 and accompanying text. *But see* Mango, *supra* note 36 (discussing the resistance in the Federal Circuits to apply Title VII Guidelines to claims of sexual harassment in the educational setting).

73. *But see* D.R. v. Middle Bucks Area Vocational Tech. Sch., 1991 WL 276292 (No.) (3d Cir.). In *Middle Bucks*, two minor female students alleged that they were physically, verbally and sexually molested by several male students over several months in parts of the graphic arts classroom. *Id.* at 1. In a section 1983 civil rights action against the school district and teachers and officials, the females contended that the defendants knew of the abuse and maintained a lax policy toward such conduct. *Id.* at 2. Finding that the compulsory attendance laws did not create a special custodial relationship between schools and students, the court dismissed the complaint for failure to state a constitutional duty that the individual defendants could have breached. *Id.* at 5. In addition, the court found that the school district could not be held liable for deliberately and recklessly establishing and maintaining a custom, practice or policy which caused harm to a student because there was no violation by state actors. *Id.* at 5-6. Here, the underlying violative acts were committed by private actors, namely the male students. *Id.* at 6.

74. The *Vinson* court did not answer whose perspective should be used in determining the "unwelcomeness" of behavior. See *supra* note 31 for the standards used by the courts.

75. EEOC, *supra* note 30, at 15.

considered.⁷⁶ Furthermore, the victim's perspective and not stereotyped notions of acceptable behavior should be considered.⁷⁷

Recently, the Court of Appeals for the Ninth Circuit rejected the "reasonable person" standard and adopted a "reasonable woman" standard in *Ellison v. Brady*.⁷⁸ The court adopted the standard of the

reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women have to "run the gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."⁷⁹

The court noted that the standard they adopted would classify conduct as unlawful sexual harassment even when the harasser did not realize that his conduct created a hostile working environment: "Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment."⁸⁰

In finding a standard that is appropriate for peer harassment at the high school level three ideas must be kept in mind. First is the problem that "girls do not readily name the behavior as unwanted for they have become inured to it."⁸¹ Secondly, sexual

76. *Id.* at 15-16. See, e.g., *Highlander v. K.F.C. Nat'l. Mgmt. Co.*, 805 F.2d 644, 650 (6th Cir. 1986) ("Trier of fact must "adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances.").

77. EEOC, *supra* note 30, at 16.

78. 924 F.2d at 872.

79. *Id.* at 879-80. In a dissenting opinion, Judge Stephens questioned the premise of the standard:

It is clear that the authors of the opinion intend a difference between the 'reasonable woman' and the 'reasonable man' in Title VII cases on the assumption that men do not have the same sensibilities as women. This is not necessarily true. A man's response to circumstances faced by women and their effect upon women can be and in given circumstances may be expected to be understood by men.

Id. at 884.

80. *Ellison*, 924 F.2d at 872. The court noted that where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man. *Id.* at 879 n.11.

81. Carrie M. Herbert, *Talking of Silence: The Sexual Harassment of School-girls* 23 (1989); See also Linda Owen & Cynthia Boyd, *Schools Taking New Steps to Deal with Sexual Harassment*, ST. PAUL PIONEER PRESS DISPATCH, Dec. 29, 1991, at A1; Sisco, *supra* note 35.

harassment passes as unremarkable in schools because the line between what constitutes normal male behavior and aberrant behavior is unclear.⁸² It would be an injustice to label as illegal that which the participants have as yet been unable to name or that which has not been clearly viewed as beyond the limits of normal behavior. Finally, there must be a recognition of the natural flirtations and sexual interest that occurs between high school students that stops short of sexual harassment.⁸³

A "reasonable student" would be the most appropriate standard to use in determining whether the educational environment⁸⁴ would be substantially affected by the alleged sexual harassment. This "reasonable student" would be based on the assumption that the student is somewhat educated on the issue. In addition, a reasonable female student standard would be applied for allegations made by a female student and a reasonable male student standard for allegations made by a male student. This standard has several advantages. The greatest advantage would be that while the standard would not address conduct which some students find offensive, it is not static, and conduct considered harmless today by many might be considered discriminatory in the future. Education of students would serve to change the views of reasonable students,⁸⁵ thus, changing the standard of acceptable behavior.⁸⁶ In addition, a "reasonable student" standard takes into account the age and sensibilities of those affected in a similar environment under similar circumstances. Finally, the "reasonable student"

82. Herbert, *supra* note 81, at 23; Owen & Boyd, *supra* note 81, at 8A; Sisco, *supra* note 35, at 10.

83. A much criticized sexual harassment policy now in effect at Amherst Regional High School in Massachusetts defines the following behaviors from a peer as sexual harassment: "staring or leering with sexual overtones, spreading sexual gossip, unwanted sexual comments, pressure for sexual activity, and unwanted physical contact of a sexual nature." *Slow Times at Amherst High*, HARPER'S Apr. 1991, at 32. See also John Leo, *What Qualifies as Sexual Harassment?*, U.S. NEWS & WORLD REPORT, Aug. 13, 1990, at 17.

84. In the employment context, the courts have noted that "hostile environment" harassment takes a variety of forms and many factors affect the determination if a hostile environment exists:

- (1) whether the conduct was verbal or physical, or both;
- (2) how frequently it was repeated;
- (3) whether the conduct was hostile and patently offensive;
- (4) whether the alleged harasser was a co-worker or a supervisor;
- (5) whether others joined in perpetrating the harassment;
- and (6) whether the harassment was directed at more than one individual.

EEOC, *supra* note 30, at 15.

85. See *infra* notes 88-92 and accompanying text on affirmative duty of the school district to educate students on sexual harassment and to enforce sexual harassment policies.

86. This parallels the justification used in *Ellison* in applying a "reasonable woman" standard. 924 F.2d at 879 n.12.

standard allows for that acceptable degree of flirtation and sexual interest that naturally occurs between students without crossing the line of creating a hostile environment.

To make the "reasonable student" standard a workable standard in peer harassment, the responsibility of the school district must be viewed differently than the responsibility of the employer. In the employment context, the employer is liable for co-employee sexual harassment which creates a hostile environment if the employer "knew or should have known" of the behavior and failed to take appropriate steps to remedy the problem.⁸⁷

Educational institutions must be held to a higher standard. The relationship between a student and an educational institution is significantly different than the relationship between the employee and the employer. A student's tenure is of a short length, and any individual student has little ability to bring about change. Essentially the student has no where else to go and does not have the option to change jobs to escape from the hostile environment. The institution serves as the parent and the student's "home away from home" for seven or more hours of the day, and generally legislators have adopted protectionist and paternalistic laws to protect those of school age.⁸⁸ Additionally, the student, through the taxpayer, is actively purchasing an education,⁸⁹ and thus, the obligation of the institution is to provide a learning environment free from distractions such as peer sexual harassment.⁹⁰

This difference between employers and educational institutions argues that schools have an affirmative duty to their students to create an environment free of harassment and to develop good citizens. Unlike the affirmative duty of employers which only arises when the employer "know[s] or should have known" of the

87. *Hall*, 842 F.2d at 1010 (company will be liable if management-level employees knew, or in the exercise of reasonable care should have known, about a barrage of offensive conduct); *Continental Can*, 297 N.W.2d at 249 (company liable when it fails to investigate or take other action to curtail similar occurrences after a complaint has been lodged); Minn. Stat. § 363.01, subd. 41(3) (1991).

88. *Mango*, *supra* note 36, at n.9.

89. *TILL*, *supra* note 47, at 10.

90. *Id.* MINN. STAT. § 363.01, subd. 41(3) (1990) makes a distinction between the affirmative duty in the educational context and the less restrictive "know or should have known" duty in the employment context:

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment; and *in the case of employment, the employer knows or should know* of the existence of the harassment and fails to take timely and appropriate action.

(Emphasis added).

harassment, a school's affirmative duty clearly arises earlier. Whereas, employers are only encouraged and not required by law to have sexual harassment policies,⁹¹ school districts by federal law under Title IX should be required to have explicit sexual harassment policies, procedures, and training programs which serve to prevent sexual harassment, not to just react once an incident has happened.⁹²

This affirmative duty placed on secondary schools to prevent as well as to react to sexual harassment would force schools to provide the environment free of harassment that is necessary for learning and that is the right of every student.

PART IV: Creation of Policies and Procedures to Educate Students on and to Protect Students from Peer Sexual Harassment

In keeping with the school district's affirmative duty to not merely address peer sexual harassment when it happens, the district must take steps to prevent sexual harassment before it happens by educating its students about sexual harassment. The first step in this affirmative process is to acknowledge that sexual harassment is not solely a women's issue and that much hostile environment harassment, especially peer harassment by high school students, is carried out by those lacking a sensitivity to the issue rather than by those intending to harass.

The total elimination of sexual harassment would require overwhelming change in societal attitudes, but this does not mean that affirmative steps cannot be taken to remedy parts of the problem. Schools are the logical and manageable place for this change to begin.⁹³ Schools need policies and training activities to ensure

91. EEOC Guidelines encourage employers to take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1991).

92. In 1989, Minnesota enacted a law requiring all educational institutions in the state to develop policies on sexual harassment and sexual violence. However, these policies only need to provide for a grievance procedure once an incident has happened and do not require the school district to educate students about sexual harassment. Minn. Stat. § 127.455-.46 (Supp. 1989). See also Minn. Stat. § 128C.20 (Supp. 1989) (sexual harassment policy for Minnesota High School League).

93. Schools have long been used by society to promote those values beyond the teaching of the "3 Rs" which have been identified as important in creating a just society where each person has the opportunity to reach his or her full potential. Recently, schools have been leaders in acknowledging the rights of the handicap through mainstreaming programs. Schools teach sex and AIDS education; they of-

that their students and staff understand when sexual harassment has occurred and understand how to appropriately deal with it. However, even more important for long term change, schools must educate students on sexual harassment so that it does not happen.

To effectuate meaningful and lasting change school districts must make a commitment to a curriculum that specifically addresses sexual harassment early in the high school years and that generally promotes sex equity. The specific curriculum could easily be offered as a short unit as a part of a health or social studies class. The goal of the unit would be to sensitize students to the reasons for and the effects of sexual harassment.

In the shorter term, schools must be concerned with the peer sexual harassment that is presently occurring. The key element for prevention is adoption and implementation of clear policies and procedures which include a basic definition of what constitutes sexual harassment and a strong policy statement of what will not be tolerated; effective communication to inform students and staff about that policy; education designed to aid all elements of the school to recognize and discourage sexual harassment; and an accessible grievance procedure.⁹⁴

First, schools should develop a clear policy statement prohibiting sexual harassment.⁹⁵ This statement of policy should include a definition of sexual harassment⁹⁶ and explicitly state that it is a

fer courses in family living and career development. For a very long time, health and physical education have been a part of the curriculum because society believes this is the most effective and efficient place to bring about change which will have a positive and lasting effect.

94. DZIECH & WEINER, *supra* note 3, at 200.

95. Robert H. Decker, *Can Schools Eliminate Sexual Harassment?*, EDUCATION DIGEST, Jan. 1989, at 59.

96. See, e.g., INDEPENDENT SCHOOL DISTRICT 709, SEXUAL HARASSMENT POLICY 1. Another schools district's policy states that:

Sexual harassment is a form of sex discrimination which violates Section 703 of Title VII of the Civil Right Act of 1964, as amended, 42 U.S.C. 2000e, et seq., and Minnesota Statutes, Chapter 363, the Minnesota Human Rights ActSexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when

1. Submission to that conduct or communication is a term or condition, either explicitly or implicitly, or of obtaining or retaining employment, or of obtaining an education; or
2. Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or
3. That conduct or communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education, or creating an intimidating, hostile or offensive employment or education environment.

violation of this policy for any student or employee to harass another student or employee. The policy should also specifically enumerate what constitutes sexual harassment.⁹⁷ In the development of these policy statements, input should be sought from all aspects of the school community: students, parents, staff, and administration. It is not enough that administrators sit behind closed doors and decide what behaviors constitute sexual harassment for high school students. They must involve all the parties concerned with the issue.

Once the policy is developed, effective communication of that policy is necessary. The mere printing of a policy in a handbook does not constitute putting the school community on notice. The policy must be publicized, disseminated, and highlighted. It should be posted in highly visible areas and be discussed in homerooms or in designated classes during the first week of school. Ideally, all students would receive age-appropriate information including a copy of the district's policy with its purpose, instructions on what to do if sexually harassed, clear delineations of sanctions against anyone found to have been a perpetrator of sexual harassment, information on consequences of frivolous accusations, and a safe and supportive forum for discussion on the issue.⁹⁸

Along with communication of the policy, discussion should take place which would allow for minimal education of students on the issue. Ideally, classroom instruction would occur to ensure that students learn how to deal with sexual harassment and how to treat each other with courtesy and respect. Equally important with student instruction is staff development. Training at teacher workshops is crucial for employees to broaden their knowledge of sexual harassment and to identify when it is happening in the school environment and to respond appropriately.

INDEPENDENT SCHOOL DISTRICT 911, SEXUAL HARASSMENT AND SEXUAL VIOLENCE 1-2.

97. See, e.g., INDEPENDENT SCHOOL DISTRICT 709 at 1-2; INDEPENDENT SCHOOL DISTRICT 911 at 2. One policy uses the following definition:

Sexual harassment may include but is not limited to a. verbal, written/graphic harassment or abuse; b. subtle pressure for sexual activity; c. inappropriate patting or pinching; d. intentional brushing against the individual's body; e. demanding sexual favors accompanied by implied or overt threats concerning an individual's employment or educational status; f. demanding sexual favors accompanied by implied or overt promises of preferential treatment with regard to an individual's employment or educational status; g. any unwelcome touching of a sexual nature.

MINNESOTA STATE HIGH SCHOOL LEAGUE, SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN MSHSL-SPONSORED ATHLETIC AND FINE ARTS ACTIVITIES 53.

98. INDEPENDENT SCHOOL DISTRICT 709, SUPPLEMENTAL POLICY RELATING TO SEXUAL HARASSMENT 1.

When sexual harassment occurs, the school must provide accessible grievance procedures. A school district should consider creating multiple routes for receiving complaints which will provide for safe alternatives for all victims.⁹⁹ The procedure should provide for students to report either verbally or in writing to a teacher, to a counselor, to a building principal, or to a designated person. A short time period, usually 24 hours, must be required for committing the complaint into writing and forwarding it to the district official designated in charge of the policy. Respecting the confidentiality of the complainant and the individual(s) against whom the complaint is filed must be followed as much as possible consistent with legal obligations and the necessity to investigate allegations of the claim and to take disciplinary action.¹⁰⁰

The procedure should provide for an immediate investigation of the complaint and a time limit on when a formal report must be submitted. The investigation, which may consist of personal interviews and any other methods and documents deemed pertinent by the investigator, should consider the surrounding circumstances, the nature of the sexual conduct, relationships between the parties involved, and the context in which the alleged incident(s) occurred.¹⁰¹ Whether a particular action or incident constitutes sexual harassment must be based on all the facts and surrounding circumstances.¹⁰²

Finally, the school needs to offer services and aid to students who have been sexually harassed by a peer. Most important of all, the school district must enforce the established policies with impartiality and consistency including due process for each person involved.¹⁰³ The inappropriate response is to keep the matter "hush-hush" in hopes that it will go away. Swift action sends a strong message.¹⁰⁴

The goal of the district is to provide a learning and working environment for its students and staff free from peer sexual harassment.

99. Decker, *supra* note 94, at 59.

100. INDEPENDENT SCHOOL DISTRICT 709, *supra* note 95, at 3; INDEPENDENT SCHOOL DISTRICT 911, *supra* note 95, at 3.

101. For a comparison with employment guidelines in evaluation whether a hostile environment exists, see *supra* note 83.

102. *Id.*

103. See *Goss v. Lopez*, 419 U.S. 565 (1975) (young people do not shed their constitutional rights at the schoolhouse door).

104. See *supra* note 69 and accompanying text.

Conclusion

When Kathi Vonderharr was experiencing the indignity of being called "slut," "whore," and "bitch" by her peers in the mid-eighties, there was little that she could do to fight back other than to depend on the sensitivity of those in official positions in the school district and to continue as best she could. Although sexual harassment litigation was in full bloom in the employment context and the Supreme Court in *Vinson* had found "hostile environment" sexual harassment illegal, for Kathi the opening of the door of silence that surrounds sexual harassment by peers in the educational setting came too late.

That door was opened wider by the Duluth and Chaska decisions in which peer sexual harassment creating an "offensive environment" was found illegal in high schools and where the school district was liable for failing to take timely and adequate affirmative action to stop the illegal behavior.

Although peer harassment of high school students will undoubtedly be litigated under those theories developed in the employment context of "hostile environment" and "quid pro quo" harassment, two distinctions must be made from employment litigation. First, in peer harassment of high school students rather than the employment "reasonable person" standard a "reasonable student" standard would better provide for the flexibility and fairness necessary in evaluating whether a "hostile environment" existed. Secondly, unlike in the employment context where affirmative policies to prevent sexual harassment before it happens is only encouraged, in the high school setting an affirmative duty must be imposed on school districts.

Not only must school districts react to incidents of sexual harassment but they also must affirmatively attack peer sexual harassment aggressively both before it happens and once it has happened.

For school districts to assume this affirmative duty, it is necessary that they develop policies and procedures that not only protect students from peer harassment once it has happened but that they develop methods to educate the entire school community including students and staff. The school represents a manageable and effective arena for change. It can make a difference in attitudes that will eventually lead to the creation of a respect between all men and women.