

Title IX Versus Canadian Human Rights Legislation: How the United States Should Learn from Canada's Human Rights Act in the Context of Sexual Harassment in Schools

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Abstract

This article critically examines the success of Title IX in eradicating sexual harassment in educational settings following the Supreme Court decisions in *Gebser v. Lago* and *Monroe v. Davis*. Regrettably, the high bar for recovery established by these cases, in addition to poor administrative enforcement of Title IX, have eroded the legislation’s ability to maintain discrimination-free schools. After examining how the Canadian human rights model operates in the context of sexual harassment in educational settings, the United States should refer to the Canadian model to improve its own system. Specifically, the United States should streamline and simplify its administrative enforcement of Title IX and articulate clearer legal standards for injunctive relief as opposed to recovery of compensatory damages.

“For centuries, students were sexually harassed, but the law offered neither a label nor a remedy.”¹ Even though the United States now has a legal remedy for sexual harassment in schools, it has failed to deal adequately with the problem.² This failure “compromises students’ educational experience and legitimates sexual abuse.”³ In order to achieve equal opportunity in the classroom, and gender equality for all citizens, the United States must offer meaningful protection from harassment to its youth.

I. Introduction

Congress enacted Title IX of the Education Amendments of 1972⁴ with the noble aim of eliminating sex discrimination in educational programs receiving federal funding.⁵ Under Title IX, sexual harassment is considered discrimination on the basis of sex, and is therefore also prohibited in education programs receiving federal funding.⁶ Unfortunately, Congress’ good intentions have not resulted in a reduction of reported incidents of sexual harassment in educational programs in the United States.⁷ On the contrary, sexual harassment in schools is often tolerated or condoned.⁸

¹ Deborah Rhode, *Sex in Schools: Who’s Minding the Adults?*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 290 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004).

² *Id.* at 291.

³ *Id.*

⁴ 20 U.S.C. § 1681(a) *et seq.* (1972).

⁵ See generally *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

⁶ See 20 U.S.C. § 1681(a); see also *Gebser v. Lago*, 524 U.S. 274 (1998).

⁷ American Association of University Women, *Hostile Hallways: Bullying, Teasing and Sexual Harassment in School* (2001), available at www.aauw.org/research/girls_education/hostile.cfm (last visited Oct. 11, 2005) [hereinafter *Hostile Hallways*]. The 2001 study cited above was conducted by the American Association for University Women and investigated sexual harassment in secondary schools in order to compare the present situation with the results obtained from their initial study in 1993. *Id.* The overwhelming conclusion of the study is that sexual harassment still exists at a high level in American schools. *Id.*

⁸ See Rhode, *supra* note 1, at 290. Rhode argues that the challenge is to “increase the accountability throughout the educational process.” *Id.*

There are a myriad of reasons to account for the lackluster performance of Title IX in the context of sexual harassment in schools. Notably, recent Title IX sexual harassment jurisprudence has set legal standards for recovery of compensatory damages so high that plaintiffs are often deterred from initially filing cases.⁹ Unsurprisingly, if sexual harassment victims are not filing cases, effective redress of sexual harassment in schools is consequently frustrated. In addition, when discussing the remedy provided to victims of sexual harassment in schools, recent case law is focused almost exclusively on compensatory damages. This focus undermines an opportunity to provide proactive compliance enforcement, such as declaratory or injunctive relief, to schools that fail to implement educational programs, policies, or grievance schemes to reduce hostile environments in schools.¹⁰ Finally, the administrative enforcement scheme of Title IX is ineffectual and fails to provide any real teeth to Congress' statutory mandate of discrimination-free educational environments.¹¹

In Canada, on the other hand, sexual harassment is a violation of the dignity- and equality-based human rights codes.¹² Violations of these codes are tried under special human rights tribunals, which are flexible adjudicatory bodies

⁹ See discussion *infra* Part II.C.3-4.

¹⁰ *Gebser v. Lago Vista Independent School Dist. (Gebser v. Lago)*, 524 U.S. 274, 288 (1998), provided a legal standard for recovery of compensatory damages, but did not address or clarify a legal standard for other equitable relief. This is somewhat ironic, considering that the majority stated in *Gebser* that Title IX focuses more on protecting individuals from discriminatory practices carried out by recipients of federal funds than on compensating victims of discrimination. *Id.* at 274. See also discussion *infra* Part II.C.

¹¹ See generally American Association of University Women, *License for Bias: Sex Discrimination, Schools, and Title IX*, Legal Advocacy Fund (2000) [hereinafter *License for Bias*].

¹² See generally Chantal Richard, *Surviving Student to Student Sexual Harassment: Legal Remedies and Prevention Programmes*, 16 DALHOUSIE L.J. 169 (1997), for a discussion of Canadian Human Rights Legislation and its application to sexual harassment litigation.

that have broad authority to remedy violations and implement programs to aid in preventing future harm.¹³

The Canadian system is arguably better at effectively redressing human rights violations compared to the analogous system in the United States. The legal standard of recovery for discrimination (including sexual harassment) in an educational setting in Canada is clearly articulated, and is the same for both injunctive and compensatory damages.¹⁴ This Canadian standard does not set the bar for plaintiffs nearly as high as the analogous compensatory damage standard in the United States.¹⁵ On a broader level, the Canadian Human Rights administrative and judicial enforcement systems are streamlined to handle all human rights violations at both the provincial and federal levels.¹⁶ This streamlined system arguably translates into more efficient and effective redress and prevention of violations.¹⁷ Canadian jurisprudence has also repeatedly emphasized that the human rights codes are to be interpreted broadly in order to most effectively carry out their purpose of equal opportunity and freedom from discrimination.¹⁸

The United States should refer to the Canadian human rights model when addressing change in its Title IX program. While it is not possible for the United States to rewrite its civil rights laws to mirror those of Canada, domestic courts should explore legal standards and avenues for relief that better effectuate the purpose of Title IX.¹⁹ This purpose would be better served, for instance, if the standard of recovery for

¹³ *Id.* See also discussion of Canadian sexual harassment suits *infra* Part III.D.

¹⁴ See discussion *infra* Part III.C.

¹⁵ Compare cases cited *infra* Parts II.C and III.C.

¹⁶ See discussion *infra* Part III.C.

¹⁷ See generally Erika Chamberlain, *A Classical Perspective on the Modern Workplace: The Aristotelian Conflict in Sexual Harassment Litigation*, 15 CAN. J.L. & JURIS. 3, 4 (2002).

¹⁸ See discussion *infra* Part III.B.

¹⁹ Interview with Jennifer Drobac, Professor, Indiana University School of Law-Indianapolis, in Indianapolis, IN (Feb. 2, 2006) [hereinafter Drobac interview].

injunctive relief was clearly articulated as a negligence standard, as opposed to the higher standard currently in place for compensatory damage relief.²⁰ The United States should also learn from the streamlined administrative enforcement of Human Rights Codes in Canada, and restructure and equalize civil rights enforcement agencies in the United States so that sexual harassment in any context or setting is redressed with uniform effectiveness and authority.²¹

This article will first define the problem of sexual harassment in schools. It will then examine how sexual harassment litigation in both the United States and Canada has evolved from each country's respective civil and human rights laws. The article will further examine how each system addresses, administratively and judicially, complaints of sexual harassment in schools or other educational settings. Finally, it will compare the two systems, and draw conclusions and recommendations from those findings.

II. The United States

A. Sexual Harassment in U.S. Schools

Regrettably, most girls and young women suffer some form of sexual harassment while they are in school.²² In a study administered by the American Association of University Women, a survey of more than 2,064 high school students found that roughly 80% had experienced some form of sexual harassment while in school.²³ Eighty-three percent of the girls responded that they had been targets of harassment in school.²⁴ In addition, the vast majority of harassment reported was committed by other students.²⁵

While it is clear that many students report that they have suffered sexual harassment in schools, it is not clear that all parties involved characterize the harassment as

²⁰ See discussion *infra* Part II.C.4.

²¹ Drobac interview, *supra* note 19.

²² Hostile Hallways, *supra* note 7.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

problematic.²⁶ Part of the sexual harassment problem in schools may be due to reluctance among some teachers and parents to view peer or student-to-student sexual harassment as a genuine problem; instead these parties argue that regulating “natural” young male behavior somehow diminishes a young boy’s freedom to experience his childhood.²⁷

In order to make any headway in solving the sexual harassment problem in schools, outdated attitudes, such as “boys will be boys,” must be dispelled.²⁸ Sexual harassment in any setting and at any age level is inappropriate and harmful to its victims.²⁹ The idea that this type of boys’ behavior is somehow natural and must be tolerated is illogical in considering other behavior that is not tolerated.³⁰ Pamela Price, a pioneering attorney specializing in sexual harassment practice, stated:

The concern appears to be that if we intercede in the developing sexual identities of adolescents, or unduly interfere in their sexual

²⁶ Rhode, *supra* note 1, at 292.

²⁷ *Id.*

²⁸ *See id.* at 292-93. “A school should not excuse the harassment with an attitude of ‘that’s just emerging adolescent sexuality’ or boys will be boys,” Office for Civil Rights, *Sexual Harassment: It’s not Academic* (1997), available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html> (last visited Oct. 14, 2005). *See also* Pamela Price, *Eradicating Sexual Harassment in Education*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW 60* (Catherine A. MacKinnon & Reva B. Siegel eds., 2004). Price offers her own history of sexual harassment she experienced while an undergraduate at Yale, in addition to her thoughts on the development of sexual harassment law in the United States. *Id.*

²⁹ *See, e.g.*, Office for Civil Rights, *Sexual Harassment: It’s Not Academic*, available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html> (last visited Oct. 11, 2005). This pamphlet released by Office for Civil Rights, a part of the U.S. Department of Education, serves as a policy guide for school administrators in the United States. *Id.* The pamphlet begins by stating that “[s]exual harassment can threaten a student’s physical or emotional well-being, influence how well a student does in school, and make it difficult for a student to achieve his or her career goals.” *Id.*

³⁰ Price, *supra* note 28, at 62.

behavior, we will somehow warp their notions of sexuality. This concern is writ large in discussions of the application of sexual harassment in education, but appears completely muted when discussing issues of teen pregnancy, date rape, and related problems, where the law interferes aggressively.³¹

Tolerance of boys' sexually harassing behavior further teaches girls that they are powerless to combat harassment, thereby contributing to the overall problem.³² Deborah Rhode, a sexual harassment professor at Stanford University, finds that "[p]arents and teachers either say that girls 'ask for it' or that 'it's just a testosterone thing,' and girls should learn to 'deal with it.'"³³ Forcing girls to cope with harassment may cause them to think that they are somehow responsible for the boys' behavior, further reinforcing gender subordination.³⁴ Moreover, focus should *particularly* be placed on combating sexual harassment behaviors against children and adolescents; they are more vulnerable to attack, and less likely to speak out about offenses due to their lack of experience and maturity.³⁵

³¹ *Id.*

³² Rhode, *supra* note 1, at 292. Rhode states that an assumption exists that "victims are responsible either for provoking sexual abuse or for learning to cope with it." *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See American Academy of Child & Adolescent Psychiatry, *Policy Statement – Sexual Harassment* (Oct. 1992), <http://www.aacap.org/page.wv?section=Policy+Statements&name=Sexual+Harassment> (last visited October 22, 2006). The American Academy of Child & Adolescent Psychiatry observed in a policy statement that "[i]t is common for children and adolescents to conceal [sexual harassment] because they feel afraid, ashamed, vulnerable and humiliated. They may actually believe their own behavior may have precipitated the sexual harassment. These incidents are often not revealed for many years, if ever." *Id.* Furthermore, even looked at from the child nurturance/protectionist camp or the child self-determinist camp, laws should be enforced that prevent sexual harassment in schools. Drobac interview, *supra* note 19. As self-determinists, children should be able to assert their rights under civil rights legislation that *safeguards* them, or *protects* them from sexual harassment. See FRANKLIN ZIMRING, THE

As stated by Price, “[w]hat better place to teach our children how to respect each other than in school?”³⁶

In short, sexual harassment is a serious problem that has yet to be fixed in today’s schools. Harmful ideas and attitudes that trivialize the negative impact sexual harassment has on students further thwart any efforts made toward solving the problem.³⁷ Even so, the United States has attempted to address the problem of sexual harassment in schools through legislation and case law.³⁸

B. The Development of Sexual Harassment Liability Under Title IX

Before the United States attempted to tackle the problem of sexual harassment in schools, it first addressed the broader issue of educationally based gender discrimination. In early 1970, female members of Congress began to push for legislation that would prohibit discrimination on the basis of sex in educational environments.³⁹ The now-famous Title IX was enacted shortly thereafter as part of the Educational Acts of 1972; it provides 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 education program or activity receiving federal financial assistance.”⁴⁰ Sexual harassment in an educational

CHANGING LEGAL WORLD OF ADOLESCENCE (1982) for further discussion of the differences between child protectionists and self-determinists.

³⁶ Price, *supra* note 28, at 62.

³⁷ See generally Rhode, *supra* note 1.

³⁸ See discussion *infra* Part II.B-C.

³⁹ See generally Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (discussing the legislative history behind Title IX). The Court quoted Representative Patsy Mink as stating “Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.” *Id.*

⁴⁰ 20 U.S.C. § 1681(a) *et seq.* (1972).

environment is now considered discrimination on the basis of sex, and is therefore considered a violation of Title IX.⁴¹

Sexual harassment was first recognized as discrimination on the basis of sex by a federal district court in a 1976 Title VII employment case.⁴² In 1977, a federal court, relying on Title VII principles, found sexual harassment to be violative of Title IX.⁴³ However, at the time, a private cause of action was not recognized and the only remedy available was a termination of federal funds.⁴⁴ Two years later, the U.S. Supreme Court recognized a right to pursue a private cause of action for a violation of Title IX.⁴⁵

In 1992, the U.S. Supreme Court definitively held that sexual harassment was indeed a violation of Title IX in the case of *Franklin v. Gwinnett*.⁴⁶ In *Franklin*, the victim was a

⁴¹ See generally *Gebser v. Lago Vista Independent School Dist.* (*Gebser v. Lago*), 524 U.S. 274 (1998).

⁴² See *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.*; *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

⁴³ *Alexander v. Yale*, 459 F.Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

[I]t is perfectly reasonable to maintain that academic achievement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment.

Id. at 4.

⁴⁴ See *Cannon v. Univ. of Chicago*, 559 F.2d 1063 (7th Cir. 1977), *rev'd*, 441 U.S. 677 (1979).

⁴⁵ See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

⁴⁶ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). "Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex." *Id.* at 75. Six years before *Franklin*, the Supreme Court ruled in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that sexual harassment was discrimination on the basis of sex in the employment context under Title VII. While Title VII and Title IX both encompass prohibitions on sexual harassment, albeit in different contexts, it is important to note that the case law for each statute has had its own separate evolution, and each have their own separate legal standards. For a general comparison of the two statutes and their differing sexual harassment legal standards, see C. Scott Williams, *Schools, Peer*

high school student who alleged that a male teacher at her school “subjected her to coercive intercourse,” in addition to other allegations.⁴⁷ Ms. Franklin claimed that the school knew about the abuse and did nothing to stop it.⁴⁸ Instead, school officials dissuaded her from pressing charges against the teacher.⁴⁹ The Supreme Court applied Title VII standards in *Franklin*, finding that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”⁵⁰ It found that “the same rule should apply when a teacher sexually harasses and abuses a student.”⁵¹ The Court also ruled that compensatory money damages were available.⁵²

While a brief history of Title IX case law is helpful in ascertaining the procedural evolution of sexual harassment cases under that statute, the following section will explore the current standard of liability under Title IX for sexual harassment established by the Supreme Court in *Gebser v. Lago Independent School District*.⁵³

C. Current Title IX Sexual Harassment Law

1. Gebser v. Lago

In *Gebser v. Lago Independent School District*, the U.S. Supreme Court set the current legal standard for recovery under Title IX sexual harassment cases.⁵⁴ Gebser, a high school-aged girl, was involved in a long-term sexual relationship with a teacher, Waldrop, over the course of her

Sexual Harassment, Title IX, and Davis v. Monroe County Board of Education, 51 BAYLOR L. REV. 1087 (1999); Justin P. Smith, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace after Faragher and Burlington Industries*. 74 N.Y.U. L. REV. 1786 (1999).

⁴⁷ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. at 63.

⁴⁸ *Id.* at 63-64.

⁴⁹ *Id.*

⁵⁰ *Id.* at 75.

⁵¹ *Id.*

⁵² *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

⁵³ *Gebser v. Lago*, 524 U.S. 274 (1998).

⁵⁴ *Id.*

freshman and sophomore years.⁵⁵ Waldrop initially made sexually related comments to the victim while she was in eighth grade, when she participated in a book discussion club that he led at the local high school.⁵⁶ During the next year, Waldrop escalated his sexual contact with the victim until they were frequently engaging in sexual intercourse during class time.⁵⁷ The relationship ended when a police officer discovered them having sex and arrested Waldrop.⁵⁸

Gebser never reported the relationship to school officials, “testifying that while she realized Waldrop’s conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher.”⁵⁹ Parents of two other students did inform the school principal of Waldrop’s sexually related comments in class.⁶⁰ The principal held a meeting with Waldrop and the parents, and advised Waldrop to be careful with the comments he made in the future.⁶¹ A guidance counselor was also advised about Waldrop’s class comments. However, no other action was taken regarding Waldrop until his employment was terminated following his arrest.⁶²

Gebser and her mother filed suit against the school district and Waldrop under Title IX and 42 U.S.C. § 1983, in addition to other state law claims, seeking compensatory and punitive damages from both defendants.⁶³ The Title IX claim was dismissed against the school district because the district court reasoned that “evidence was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual

⁵⁵ *Id.* at 277-78.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Gebser v. Lago*, 524 U.S. 274, 277-78 (1998).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 278-79.

relationship with a student.”⁶⁴ The Fifth Circuit affirmed on similar grounds.⁶⁵

The *Gebser* Court affirmed the lower court decision finding that in order to recover for sexual harassment suffered in school, the victim must show that a person in a position of authority, with the ability to take corrective action, had *actual knowledge* of the discrimination and was recklessly indifferent to that discrimination.⁶⁶ By far the highest hurdle to overcome under the *Gebser* standard is establishing that the person in the position of authority had actual knowledge or notice of the discrimination.⁶⁷

The majority opinion gave a detailed account of the legislative history and congressional intent behind Title IX, upon which Justice O’Connor relied heavily in framing her opinion regarding the notice standard.⁶⁸ O’Connor, writing for a five-to-four majority, stated that Congress had “two principle objectives in mind: ‘[t]o avoid the use of federal resources to support discriminatory practices’ and ‘to provide individual citizens effective protection against those practices.’”⁶⁹ The Court noted that the statute was modeled after Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in all programs receiving federal funding.⁷⁰ The two statutes operate in essentially the same

⁶⁴ *Id.*

⁶⁵ *Gebser v. Lago*, 524 U.S. 274, 280 (1998).

⁶⁶ *Id.* at 290 (emphasis added).

⁶⁷ For instance, under the Title VII workplace cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), employers are held to strictly liable or negligence standards for actions of sexual harassment committed by their employees. See Smith, *supra* note 46. School administrators, on the other hand, have to actually know about actions of sexual harassment committed by school employees for liability to attach under *Gebser*, 524 U.S. at 290. A possible reason for the differing standards might be that private companies and school districts are two fundamentally different types of financial organizations to hold liable. Drobac interview, *supra* note 19.

⁶⁸ *Gebser*, 524 U.S. at 285.

⁶⁹ *Id.*

⁷⁰ *Id.* See also 42 U.S.C. 2000d *et seq.* (1964). Title VI provides in pertinent part: “No person in the United States shall, on the ground of race,

manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate.⁷¹ In effect, the majority found that the statutes operate as a contract between the government and the recipient of funding.⁷²

Justice O'Connor then distinguished Title VII from Title IX, finding that Title VII is framed in terms of "outright prohibition" of discriminatory conduct rather than the "condition[al]" funding language of Title IX, which instead operates by revoking federal funding to institutions that fail to conform to its standard.⁷³ She further contrasted the statutes, stating that

Title VII applies to all employers without regard to federal funding and aims broadly to 'eradicate discrimination throughout the economy.' Title VII, moreover, seeks to make persons whole for injuries suffered through past discrimination. Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds.⁷⁴

O'Connor distinguished the legislative history, Congressional intent, and statutory framework between Title VII and Title IX to establish the legal standard for recovery for sexual harassment under Title IX – in particular the amount of notice to school officials required to trigger liability.⁷⁵

O'Connor argued that Congress did not intend for constructive notice to trigger liability under Title IX because

color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

⁷¹ *Gebser v. Lago*, 524 U.S. 274, 286 (1998).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 286-287. *See also supra* note 12 and accompanying text.

⁷⁵ *Id.*

of the statute's contractual framework.⁷⁶ O'Connor essentially found that it is reasonable to assume that Congress did not intend for liability to attach in monetary damages for a school's noncompliance with Title IX's conditional funding language.⁷⁷ Furthermore, she found that the statute's construction of allowing agency enforcement does not envision liability under constructive notice or *respondeat superior*. This is due to the agency's inability to initiate enforcement proceedings until it has given notice to recipients of funding that they are not in compliance.⁷⁸ Thus, under this analysis, Justice O'Connor, in order to avoid "frustrating the purposes" of Title IX, distinguished the notice standard for recovery under Title IX from that under Title VII, where violations are either categorized under a strict liability or negligence standard, based upon the status of the harasser.⁷⁹

Justice Stevens, however, writing for the dissent, found that the majority's opinion is not faithful to the class of people Title IX intended to protect.⁸⁰ In particular, Stevens noted that the majority veered from settled principles of agency in distinguishing between recovery under Title VII and Title IX.⁸¹ Stevens observed this distinction negatively, finding that any slight difference in the statutory language is due to the difference between a workplace and a school, not in a Congressional intent to afford less protection to victims under Title IX.⁸² Stevens further found that the majority, in mistakenly focusing on the statute's framework and administrative enforcement scheme, is "[a]s a matter of policy ... rank[ing] the protection of the school district's purse above the protection of immature high school students that [Title IX's] rules would provide."⁸³ In short, the dissent concluded

⁷⁶ *Id.* at 287.

⁷⁷ *Gebser v. Lago*, 524 U.S. 274, 287 (1998).

⁷⁸ *Id.* at 288.

⁷⁹ *See supra* note 67. Again, different notice standards have been established by the courts for harassment that occurs in the workplace as opposed to a school or other educational environment. *Id.*

⁸⁰ *Gebser*, 524 U.S. at 306.

⁸¹ *Id.* at 299 n. 9.

⁸² *Id.*

⁸³ *Gebser v. Lago*, 524 U.S. 274, 306 (1998).

that “few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard.”⁸⁴

Thus, as stated, the majority in *Gebser* held that “a damages remedy will not lie under Title IX unless an official, who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf, has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.”⁸⁵ The Court offered guidance in interpreting the “fails to respond” or “reckless indifference” portion of the standard by comparing it to the deliberate indifference standard under § 1983 claims.⁸⁶ The Court did not, however, elaborate appreciably on what constitutes actual knowledge of discrimination.⁸⁷ At present, lower court decisions are offering different answers to that question.⁸⁸ Some districts have

⁸⁴ *Id.* at 304.

⁸⁵ *Id.* at 290.

⁸⁶ *Id.* Under § 1983 claims, “deliberate indifference” essentially “requires proof of a clearly apparent need for action and a woefully inadequate response, such that one can reasonably assume that the decision makers were deliberately indifferent to the need.” Williams, *supra* note 46, at 1103. See *City of Canton v. Harris*, 489 U.S. 378 (1989), for the Court’s development of the deliberate indifference standard for § 1983 cases. In *Doe v. University of Illinois*, Judge Posner expounded on the meaning of deliberate indifference in the Title IX context, defining it as a situation in which the “school knows about the harassment, knows that it is serious or even dangerous, and could take effective measures at low cost to avert the danger, but decides, consciously and deliberately, to do nothing, although it does not base this decision on an invidious ground such as race or sex.” *Doe v. Univ. of Ill.*, 138 F.3d 653, 680 (7th Cir. 1998) (Posner, C.J., dissenting).

⁸⁷ Perhaps because it was evident that petitioners in *Gebser* conceded that they could not recover under an actual notice standard, the Court did not find it necessary to further define what would specifically constitute actual notice. See *Gebser*, 524 U.S. at 291.

⁸⁸ See *Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004); *Bayard v. Malone*, 268 F.3d 228, 237 (4th Cir. 2001); *P.H. v. The Sch. Dist. of Kansas City*, 265 F.3d 653, 663 (8th Cir. 2001); but see *Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003); *Hart v. Paint Valley School Dist.*, No. C2-01-004, 2002 WL 31951264 (S.D. Ohio Nov. 15, 2002); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 63 (D. Me. 1999).

established a strict construction of the actual notice standard under *Gebser* that finds that a “substantial risk” of abuse does not constitute notice.⁸⁹ Other districts have found that direct complaints by third parties or numerous rumors are enough to generate notice.⁹⁰ Finally, an “appropriate person” that can end the discrimination is generally determined to be, if not at least a principal, a school board member or school superintendent.⁹¹

2. Davis v. Monroe County Board of Education

The legal standard for recovery for sexual harassment under Title IX was reiterated in the Supreme Court case of *Davis v. Monroe County Board of Education*,⁹² decided one year after *Gebser*.⁹³ Perhaps more importantly, *Davis* established that, under *Gebser*, a victim of peer or student-on-student sexual harassment at school may bring an action under Title IX.⁹⁴

In *Davis*, a young girl in the fifth grade was allegedly the victim of a prolonged pattern of harassment by one of her fifth grade classmates.⁹⁵ According to the victim’s mother, the harasser’s conduct included attempts to touch LaShonda’s breasts and genital area, and vulgar statements such as “I want to get in bed with you” and “I want to feel your boobs.”⁹⁶ The harasser also allegedly touched LaShonda in a suggestive manner in the hallway, and directed sexually harassing behavior toward her several times while they were together in

⁸⁹ See, e.g., *Bayard*, 268 F.3d at 237-38.

⁹⁰ See, e.g., *School Admin. Dist. No. 19*, 66 F. Supp. 2d at 63 (finding that actual notice “requires more than a simple report of inappropriate conduct” on the part of a school employee but “the ... standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report from the plaintiff-student”). See also *Johnson*, 267 F. Supp. 2d 679, 688; *Hart*, No. C2-01-004, 2002 WL 31951264.

⁹¹ See *infra* note 128 and accompanying text.

⁹² *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).

⁹³ *Gebser v. Lago*, 524 U.S. 274 (1998).

⁹⁴ *Davis*, 526 U.S. at 633.

⁹⁵ *Id.*

⁹⁶ *Id.*

gym class.⁹⁷ Each of the incidents was reported to the girl's teacher, who assured the mother that the principal of the school was also notified.⁹⁸ According to the mother, her daughter's once high grades fell as a result of the harassment; the victim's father also discovered that his daughter had written a suicide note during the period she was being harassed.⁹⁹

The petitioner brought suit against the Monroe County Board of Education seeking monetary damages and injunctive relief under Title IX after no disciplinary action was taken against the harasser.¹⁰⁰ At both the district court and appellate court levels, the case was dismissed under a theory that peer or student-on-student sexual harassment provides no ground for a private cause of action under Title IX.¹⁰¹

Justice O'Connor, again writing for the majority of the Court, found that an action for peer sexual harassment may be brought under Title IX, but "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."¹⁰² O'Connor found that the harassment suffered by the daughter was actionable, even though it was not committed by a school official. Her harassment created an environment that denied her equal access to educational opportunities, as shown by the victim's decreasing grades, and was not remedied by school officials *who knew about the harm*.¹⁰³

The decision in *Davis* was also a five-to-four majority, with Justice Kennedy (who was part of the majority in *Gebser*) writing the dissent.¹⁰⁴ Kennedy attacked O'Connor's

⁹⁷ *Id.* at 633-34.

⁹⁸ *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 633-634 (1999).

⁹⁹ *Id.* at 634.

¹⁰⁰ *Id.* at 635-636.

¹⁰¹ *Id.* at 636.

¹⁰² *Id.* at 633.

¹⁰³ *Id.* at 652 (emphasis added).

¹⁰⁴ *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654 (1999). Interestingly, or perhaps tellingly, the majority and dissents in *Gebser* and

opinion on several fronts.¹⁰⁵ Notably, Kennedy found that much needed funding for schools would be diverted into compensatory damage payments to victims of peer sexual harassment under Title IX, thus resulting in schools implementing a federally mandated code of conduct, contrary to the principles of federalism.¹⁰⁶ But perhaps more shockingly, Kennedy further suggested that behavior actionable by the majority under *Davis* is perhaps difficult to even define as sexual harassment.¹⁰⁷ Kennedy stated that “[n]o one contests that much of this ‘dizzying array of immature or uncontrollable behaviors by students’ is inappropriate, even ‘objectively offensive’ at times ... It is a far different question, however, whether it is either proper or useful to label this immature, childish behavior gender discrimination.”¹⁰⁸ In essence, the dissent found that *Davis* would result in a floodgate of student-on-student sexual harassment litigation. It believed that a school’s only choice in dealing with such an outcome would be to implement codes of conduct that have no chance in altering normal, immature, childish behaviors that have been wrongfully characterized as “sexual harassment.”¹⁰⁹

O’Connor rebutted much of Kennedy’s criticism by emphasizing that liability can only attach for unreasonable indifference to harassment in light of the known circumstances.¹¹⁰ She also pointed out that schools and school

Davis are reversed, with O’Connor the only justice to remain on the majority side. *Id.*; *Gebser v. Lago*, 524 U.S. 274 (1998).

¹⁰⁵ *Davis*, 526 U.S. at 654-86.

¹⁰⁶ *Id.* at 657-658. But how would a judicially enforced federal code of conduct here be substantially different in principle from the code of conduct imposed upon the states by *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰⁷ *Id.* at 673.

¹⁰⁸ *Id.* (internal citations omitted).

¹⁰⁹ *Id.* at 686.

¹¹⁰ *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 648-649 (1999). Some, however, find that O’Connor’s characterization of the indifference standard in terms of reasonableness in peer sexual harassment cases only further muddies that element of the analysis. See Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TULANE L. REV. 387, 427-428 (2002). Professor Davies notes that lower courts analyze the requirement differently; she argues that requiring a

officials, by their very nature, have some authority over the behavior of children in their programs.¹¹¹ O'Connor writes: "the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."¹¹²

While the dissent in *Gebser* initially presented many of the criticisms of the Court's interpretation of Title IX, many legal observers and scholars went on to further suggest that the Court's opinions in both *Gebser* and *Davis* do little to protect students from sexual harassment, particularly from their peers.¹¹³ Furthermore, even as Kennedy argued that the majority's opinion in *Davis* will open the floodgates of litigation, the converse result appears more likely, as the strenuous legal standards for recovery under Title IX for sexual harassment present a high barrier for recovery to potential plaintiffs.¹¹⁴

3. Criticism of the Law in the United States

The bottom-line criticism of the Title IX sexual harassment standard under *Gebser* is that it is crafted in a way that fails to both effectively remedy past harm and prevent future harm.¹¹⁵ Sexual harassment professor Deborah Rhode found that the *Gebser* decision was simply a "step in the wrong direction."¹¹⁶ Rhode noted that under the employment cases of *Faragher*¹¹⁷ and *Burlington Industries*,¹¹⁸ an employer can be held liable for a supervisor's conduct, even if the employer did not have direct knowledge of the conduct in

conscious decision not to address complaints of harassment in order to meet that element is a mistake. *Id.* *Davis* finds that the factual situations and circumstances surrounding sexual harassment in schools call for a wider definition of indifference than a conscious decision to ignore the harassment. *Id.*

¹¹¹ *Davis*, 526 U.S. at 646.

¹¹² *Id.*

¹¹³ See discussion *infra* Part II.C.3.

¹¹⁴ See *Gebser v. Lago*, 524 U.S. 274, 306 (1998) (Stevens, J., dissenting); *Davis*, 526 U.S. at 654 (Kennedy, J., dissenting).

¹¹⁵ See generally Rhode, *supra* note 1.

¹¹⁶ *Gebser*, 524 U.S. at 297.

¹¹⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

¹¹⁸ *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

question.¹¹⁹ Under *Gebser*, however, she found that adult school employees, such as teachers and janitors, have more protection from sexual harassment than students.¹²⁰

Rhode also noted that the decision in *Gebser* not only fails to promote adequate harassment policies, its “actual notice” standard actually encourages schools to turn a blind eye to harassment.¹²¹ As Rhode stated, “[w]hen ignorance is bliss, and a defense to legal judgments, why should schools establish effective complaint strategies? The less the school knows, the less its risk of liability.”¹²² While Rhode acknowledged that O’Connor did not wish to press the decision any further because of the agency enforcement scheme of Title IX, Rhode observed that ignorance as a legal strategy could hardly have been the outcome desired by the *Gebser* majority.¹²³

In discussing *Davis*, Rhode found that at least the Supreme Court did better than some lower court decisions that denied individual recovery under Title IX for peer sexual harassment altogether.¹²⁴ Like *Gebser*, however, *Davis* still creates incentives for school districts to avoid knowledge of sexual harassment that might subject them to liability under Title IX.¹²⁵ Rhode further noted that the current system is even more problematic, as it relies on students coming forward to administrators about sexual harassment they may have suffered.¹²⁶ Students are far too reluctant to readily complain to anyone about something so sensitive, especially something that could lead to embarrassment and humiliation by other students.¹²⁷ Lower court rulings have compounded this

¹¹⁹ Rhode, *supra* note 1, at 297.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 298.

¹²⁴ *Id.* See *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 638 (1998), for a description of the circuit splits in the lower courts regarding liability under Title IX for peer sexual harassment.

¹²⁵ Rhode, *supra* note 1, at 298.

¹²⁶ *Id.*

¹²⁷ *Id.*

difficulty by requiring students to give notice to a school board member or a senior supervisor with authority to ensure Title IX compliance, instead of a teacher with whom they may be more comfortable and open.¹²⁸ Rhode concluded by advocating a system more like that found in employment law. This system, also advocated by Justice Ginsburg in her dissent in *Gebser*, could hold school administrators and officials liable under Title IX, even if they lack specific knowledge, unless the school had an effective grievance policy in place to report and redress sexual harassment complaints.¹²⁹

Pamela Price found similar problems with Title IX sexual harassment jurisprudence.¹³⁰ Price summed up her experience as follows:

What I have found in my law practice and in ... teaching is that many school districts still don't have Title IX officers, don't have grievance procedures, and some don't even know what Title IX is. With so little knowledge, and no experience in enforcing the law, it is still 1977 in most parts of America.¹³¹

¹²⁸ *Id. See, e.g.,* Floyd v. Walters, 171 F.3d 1264, 1265 (11th Cir. 1999) (holding under remand from the U.S. Supreme Court that the two defendants who were given notice of sexual misconduct in the case were not school officials with authority to “end the discrimination,” and therefore could not be considered appropriate persons under *Gebser*); Canutilla Ind. Sch. Dist. v. Leija, 101 F.3d 393, 401 (5th Cir. 1996) (finding under Title IX, pre-*Gebser*, that an appropriate person for purposes of notice would be someone in a “management-level position”). The court did not expound on the question of “whether the appropriate (or lowest level) management-level person to be notified is a Title IX coordinator, vice-principal, principal, superintendent, or school board member.” *Id.*

¹²⁹ *Id.* Justice Ginsburg, writing a concurrence with the dissent in *Gebser*, addresses the issue of affirmative defenses in Title IX actions, finding that if a school district may avoid Title IX liability if it can demonstrate that it properly established, under the Department of Education Guidelines, an effective grievance and reporting policy. *Gebser v. Lago*, 524 U.S. 274, 304 (1998).

¹³⁰ Price, *supra* note 28, at 61.

¹³¹ *Id.*

4. *Where Are All the Cases?*

The negative treatment of the *Gebser* standard by legal scholars is further supported by the post-*Gebser* dearth of Title IX sexual harassment suits, settlements, or verdicts.¹³² Anecdotally, a plaintiff's attorney who won a rare verdict for a student sexual harassment victim was quoted in the *Detroit Free News* as stating, "Most of the cases never make it to the jury because of the deliberate indifference standard ... You have to show ... the district should have known the students' rights are being violated and they did nothing or had a policy of doing nothing."¹³³

Moreover, a LexisNexis search revealed only 63 Title IX sexual harassment cases after June 22, 1998, the date *Gebser* was decided.¹³⁴ Of those cases, 35 were disposed of on either summary judgment or dismissal in favor of the defendant(s).¹³⁵ Seventeen of those dismissals or summary

¹³² For example, a simple search of jury verdicts on the free verdict database website *www.morelaw.com* revealed only two verdicts and one settlement for cases of sexual harassment under Title IX between 1996 and 2005 (search performed Jan. 31, 2006) [hereinafter Morelaw.com search].

¹³³ Marisa Schultz, *Transfer Didn't Stop Warren Molester; The Decision Cost the School District \$2.1 Million, a Rare Win in a Sexual Abuse Case*, THE DETROIT NEWS, April 24, 2005, at Front; pg. 12A. Schultz also wrote that this verdict was:

the largest against any school district in a federal lawsuit alleging teacher sexual misconduct, according to sample data going back to 1985 by Jury Verdict Research, a Horsham, Pa.-based firm that tracks and analyzes personal injury litigation. The organization's database has more than 245,000 verdicts and settlements. Suing a district directly has been successful only in a number of educator abuse cases nationwide. The research firm has tracked 18 similar cases in the last two decades.

Id.

¹³⁴ *Gebser v. Lago*, 524 U.S. 274 (1998). A search performed in LexisNexis on February 1, 2006, using the search phrase ("Title IX" and "sexual harassment" and "Gebser" and "actual notice" and CORE-TERMS (sexual harassment)) yielded a total of 63 cases. On the same day, a search performed using the search phrase (CORE-TERMS (sexual harassment) and CORE-TERMS (hostile work environment) and Title VII) yielded 1,597 cases [hereinafter LexisNexis search].

¹³⁵ *Id.*

judgments were based on a lack of actual notice under *Gebser*.¹³⁶ The majority of the other dismissals were based on either a failure to meet the *Davis* peer sexual harassment hostile environment standard (nine) or a failure to meet the deliberate indifference standard (seven).¹³⁷ Two verdicts for the defense were upheld on appeal¹³⁸ while only one verdict for the plaintiffs was affirmed.¹³⁹ Conversely, an analogous search for Title VII hostile work environment sexual harassment cases within the same time period yielded 1,597 results.¹⁴⁰

Another reason plaintiffs may fail to bring cases is the ambiguous legal standard for equitable relief versus damages under Title IX in sexual harassment cases.¹⁴¹ When the Court established the actual notice standard for *Gebser*, it only referred to compensatory damages in crafting its standard.¹⁴² However, the Court never delineated whether the actual notice standard applied to equitable relief as well as compensatory damages.¹⁴³ Thus, even now, though equitable relief is available under Title IX, it has not firmly been established whether the legal standard for such relief is actual notice, or some lower standard.¹⁴⁴ The situation is made more unclear by the assertion of the U.S. Department of Education's Office of Civil Rights (OCR), the administrative body charged with implementing and enforcing Title IX, that:

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Pociute v. W. Chester Univ.*, 117 Fed. Appx. 832 (3rd Cir. 2004); *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2nd Cir. 1998).

¹³⁹ *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000).

¹⁴⁰ See LexisNexis search, *supra* note 134.

¹⁴¹ The Supreme Court first decided in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that a plaintiff has a private right of action under Title IX; the Court then decided in *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992), that Title IX also recognizes a damages remedy. See discussion *supra* Part II.B. See *infra* Part II.C.4 for explanation of the ambiguity of the legal standards.

¹⁴² See *Gebser*, 524 U.S. at 283-84.

¹⁴³ *Id.*

¹⁴⁴ See *Frederick v. Simpson College*, 160 F. Supp. 2d 1033 (Dist. Ct. S. Iowa 2001) (discussing the murkiness of the standard for equitable relief under Title IX sexual harassment claims).

While recognizing the requirement of actual notice for private actions seeking money damages, OCR continues to assert that for regulatory purposes and for private actions for injunctive and other equitable relief, a school has notice if a responsible employee knew, or in the exercise of care should have known, of the harassment.¹⁴⁵

Thus, even if a plaintiff were *only* seeking injunctive relief, such as implementation of a sexual harassment policy or training and grievance procedures, the ambiguity created by *Gebser*, and the subsequent failure of the Supreme Court to clarify its standard in relation to the OCR, could effectively deter a plaintiff from bringing a case at all.¹⁴⁶

Thus, while a (rare) verdict can make an individual plaintiff whole, the present system does little to effectuate the purposes of Title IX.¹⁴⁷ Because plaintiffs are deterred from bringing *any* sort of suit, in damages or for equitable relief, school districts are not consequently compelled to be compliant with Title IX policies.¹⁴⁸ Furthermore, the Court's high standard for damages recovery in *Gebser* suggests a concern on the part of the Court that high damage awards could strip precious funds from other needy students in the school districts.¹⁴⁹ Therefore, as more focus shifts to preventing financial loss for school districts, less focus is

¹⁴⁵ Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997, revised 2001) available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited Jan. 31, 2006) [hereinafter *The Guidance*].

¹⁴⁶ I thank Professor Jennifer Drobac for helping me to clarify this point. See also Frederick, 160 F. Supp. 2d 1033.

¹⁴⁷ See generally *Gebser*, 524 U.S. at 306 (Stevens, J. dissenting); Rhode, *supra* note 1.

¹⁴⁸ See Rhode, *supra* note 1.

¹⁴⁹ Justice Kennedy's dissent in *Davis* suggested that extending the actual notice standard to peer sexual harassment cases was a step too far; he predicted a flood of cases that would empty school districts' bank accounts. *Davis*, 526 U.S. at 654 (Kennedy, J., dissenting).

invested in the most efficient manner of implementing prevention strategies and stopping harassment.¹⁵⁰

D. Administrative Enforcement of Title IX in the United States

The OCR is charged with the responsibility of Title IX administration and enforcement.¹⁵¹ The OCR informs school districts of their obligation under Title IX – to have a sexual harassment policy, inform students and staff of that policy, and have published grievance procedures in the event that the policy is violated.¹⁵² The OCR's publication, *Sexual Harassment Guidance*, gives examples of what constitutes quid pro quo sexual harassment and hostile environment sexual harassment.¹⁵³ The OCR also released a pamphlet entitled *Sexual Harassment: It's not Academic*, which explains schools' obligations under Title IX in a format easier for students, parents, and teachers to understand.¹⁵⁴ The pamphlet refutes the notion that "boys will be boys," stating:

A school should not excuse the harassment with an attitude of 'that's just emerging adolescent sexuality' or 'boys will be boys,' or ignore it for fear of damaging a professor's reputation. This does nothing to stop the sexual harassment and can even send a message that such conduct is accepted or tolerated by the school. When a school trains its staff, makes it clear that sexual harassment will not be tolerated, and appropriately responds when harassment occurs, students will see the school as a safe place where everyone can learn.¹⁵⁵

¹⁵⁰ See Rhode, *supra* note 1.

¹⁵¹ The Guidance, *supra* note 145.

¹⁵² *Id.*

¹⁵³ *Id.* An example of quid pro quo sexual harassment in an educational environment would be a teacher or professor asking for sexual favors in exchange for a higher grade. *Id.*

¹⁵⁴ Office for Civil Rights, *Sexual Harassment: It's not Academic* (1997), available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html> (last visited Oct. 14, 2005).

¹⁵⁵ *Id.*

The pamphlet also notes that sexual harassment prevention is important at all educational levels.¹⁵⁶

The OCR's website provides information about how to file a complaint: the complaint must be made in writing (online is acceptable), contain a description of the charges, and be filed within 180 days of the alleged discrimination.¹⁵⁷ The OCR will then investigate properly filed complaints; complaints that contain sufficient evidence of noncompliance will generally result in an agreement of compliance between the OCR and the school.¹⁵⁸ If a school fails to come into compliance after an agreement was made with the OCR, and future agreements are also to no avail, the agency may proceed with administrative enforcement procedures.¹⁵⁹ These include either termination of funding or referral to the Department of Justice for judicial enforcement.¹⁶⁰

The OCR's yearly report to Congress publishes a limited number of statistics, including the number of complaints, or "receipts," the agency received during that year.¹⁶¹ The 2004 Report noted that the agency received 283 sex-based complaints, including sexual harassment, which accounted for 6% of the total complaints received.¹⁶² The vast majority of complaints, 52%, were disability-based.¹⁶³ These numbers suggest a vast disparity in the reported amount of harassment occurring in schools and the amount of harassment complaints received. While it is true that reported incidents of harassment could be resolved by school or state agencies, thus negating the need for OCR regulation, at least one study

¹⁵⁶ *Id.*

¹⁵⁷ Office for Civil Rights, *Complaint Resolution Procedures*, available at <http://www.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited Feb. 2, 2005).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Office for Civil Rights, *Annual Report to Congress FY 2004* (2004), available at http://www.ed.gov/about/reports/annual/ocr/annrpt2004/report_pg4.html (last visited Feb. 2, 2006).

¹⁶² *Id.*

¹⁶³ *Id.*

suggests that the OCR is doing a poor job of rooting out harassment in schools.¹⁶⁴ The study notes that the OCR's statute of limitations on complaints is six months – a much shorter time than complainants have when filing in state or district court.¹⁶⁵

Moreover, lack of knowledge of Title IX or OCR regulations is not grounds for an extension of filing time.¹⁶⁶ Furthermore, while the OCR has power to refer cases to the Department of Justice for judicial enforcement, a Title IX case has never been referred.¹⁶⁷ Poor enforcement by the OCR is particularly tragic because the Supreme Court has stressed the importance of administrative remedies to allow a school to come into compliance before it will impose a last-resort remedy like fund termination.¹⁶⁸

Unlike the OCR, the Equal Opportunity in Employment Commission (EEOC), the administrative body that is charged with enforcing Title VII in the workplace,¹⁶⁹ seems to enjoy relative success in achieving its goals.¹⁷⁰ While

¹⁶⁴ License for Bias, *supra* note 11.

¹⁶⁵ *Id.* There is no statute of limitations provided under Title IX. *See, e.g.,* Curto v. Edmundson, 392 F.3d 502, 504 (2nd Cir. 2004). “Title IX does not contain a statute of limitations. Accordingly, for claims such as these to which the four-year federal catch-all statute of limitations in 28 U.S.C. § 1658(a) is inapplicable, see *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), we must apply ‘the most appropriate or analogous state statute of limitations,’ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987).” *Id.* The Court notes that the circuits have generally used state personal injury statutes of limitation for Title IX claims. *Id.*

¹⁶⁶ *See* License for Bias, *supra* note 11, at 52.

¹⁶⁷ U.S. Commission on Civil Rights, *Office of Civil Rights Evaluation, Draft Report for Commissioners’ Review, Ten-Year Checkup: Have Federal Agencies Responded to Civil Rights Recommendations?* Vol. IV at 29 (May 2004), available at <http://www.usccr.gov/pubs/10yr04/10yr04.pdf>.

¹⁶⁸ *Cannon v. University of Chicago*, 441 U.S. 677, 705 n. 38 (1979).

¹⁶⁹ *See* EEOC website, <http://www.eeoc.gov> (last visited Feb. 2, 2005).

¹⁷⁰ For example, the EEOC, in association with state agencies, was able to resolve 13,786 charges (the EEOC’s terminology for complaint), and obtain 1,646 settlements in Title VII sexual harassment enforcement proceedings. *See* Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 – FY 2004, available at <http://www.eeoc.gov/stats/harass.html> (last visited Feb. 2, 2006). The OCR, on the other hand, only received a

the OCR has only referred two cases to the Department of Justice for judicial enforcement, the EEOC has the power to file suit; in 2004, the EEOC filed 280 Title VII suits in court.¹⁷¹ This disparity is possibly due to the relative priorities of the political parties in office, or simply the greater perceived importance of eliminating sexual harassment in the workplace.¹⁷²

Because sexual harassment case law has effectively neutralized the promise of Title IX, “the victims whom it was intended to protect are being victimized a second time by the judicial system.”¹⁷³ Likewise, the poor performance of the OCR in actually enforcing and implementing Title IX in U.S. schools has further eroded the promise of discrimination-free learning environments.¹⁷⁴ For these reasons, the United States should look to the Canadian model of civil rights legislation and enforcement for ideas about how to improve domestic judicial and administrative enforcement of Title IX.

III. Canada

A. *The Problem in Canada*

Culturally speaking, Canada is very similar to the United States, and, not surprisingly, also suffers from a high

total of 5,044 complaint receipts, 283 of which were sex-based. *See* Office for Civil Rights, *Annual Report to Congress FY 2004*, *supra* note 161.

¹⁷¹ *See* EEOC, *EEOC Litigation Statistics, FY 1992 through FY 2004*, available at <http://www.eeoc.gov/stats/litigation.html> (last visited Feb. 3, 2006).

¹⁷² This disparity seems embodied in the simple fact that almost everyone has heard of the EEOC, and almost no one has heard of the OCR. Drobac Interview, *supra* note 19. The relative ease in locating the EEOC website probably also helps it more easily disseminate information; it is located at simply www.eeoc.gov. In order to find the OCR website, one must wade through three Department of Education webpages. *See* www.ed.gov. Even if one finds the OCR website, its format is much more difficult to read and navigate than the EEOC site. *See* www.eeoc.gov and <http://www.ed.gov/about/offices/list/ocr/index.html>.

¹⁷³ Price, *supra* note 28, at 63.

¹⁷⁴ *See* License for Bias, *supra* note 11.

rate of sexual harassment in its schools.¹⁷⁵ For example, in a study conducted in Ontario secondary schools, a reported 80% of female students had been sexually harassed.¹⁷⁶ However, Canada's system of human rights legislation for resolving anti-discrimination violations, such as sexual harassment, operates differently than the civil rights legislation system in the United States.¹⁷⁷

B. The Operation of Human Rights Legislation in Canada

In Canada, sexual harassment is considered discrimination on the basis of sex under human rights legislation passed by the Canadian parliament in 1977.¹⁷⁸ The resulting Canadian Human Rights Act (HRA) has as its purpose "that people should not be placed at a disadvantage simply because of their age, sex, race, or any other ground covered by the Act."¹⁷⁹ The legislation was passed "to ensure equality of opportunity and freedom from discrimination in federal jurisdiction."¹⁸⁰

Canadian human rights legislation functions differently than civil rights legislation in the United States. For example, in the United States, one may bring a workplace sexual harassment claim under the federal Title VII cause of action whether it arises in the public (local, state, or federal) or private sector.¹⁸¹ In Canada, however, human rights legislation operates at both the federal and provincial levels, each having

¹⁷⁵ Toronto, Ontario Secondary School Teacher's Federation, *The Joke's Over – Student to Student Sexual Harassment in Secondary Schools* (1995) at 3.

¹⁷⁶ *Id.*

¹⁷⁷ See *infra* Part III.B for a discussion of Canadian human rights system.

¹⁷⁸ See Canadian Human Rights Act, 1985, R.S. c. h-6, available at http://www.chrc-ccdp.ca/about/human_rights_act-en.asp (last visited Oct. 11, 2005) [hereinafter Commission website]. Under the HRA, the Canadian Human Rights Commission "accepts harassment complaints based on 11 grounds: race, colour, national or ethnic origin, age, religion, sex, marital status, family status, mental or physical disability, pardoned conviction, and sexual orientation." *Id.* (emphasis added).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 57 (1986), where the plaintiff sued her private employer under Title VII.

separate jurisdiction over the cases that arise therefrom.¹⁸² The Canadian HRA only applies to individuals working for either the federal government or a private company regulated by the federal government.¹⁸³ It also applies to anyone who receives goods and services from any of those sectors.¹⁸⁴ Similarly, each province has its own human rights law, usually called a code or an act (or, in Quebec, a charter), that covers other types of organizations not included under federal legislation.¹⁸⁵ For instance, schools, retail stores, restaurants, and most factories are covered by provincial human rights law, as are provincial governments themselves.¹⁸⁶

Unlike the broadly differing views in the United States regarding the proper Congressional intent and interpretation of American civil rights legislation,¹⁸⁷ Canadian judicial decisions have firmly established a broad interpretation of human rights legislation.¹⁸⁸ The reasoning behind this broad application may lie in the constitutional or quasi-constitutional nature of the legislation. For example, in the case of *Ontario Human Rights Commission and O'Malley v. Simpson-Sears*

¹⁸² United Nations Association in Canada, Canada and Human Rights Website, <http://unac.org/rights/actguide/canada.html> (last visited Oct. 11, 2005) [hereinafter Canada and Human Rights website].

¹⁸³ *Id.* See Commission website, *supra* note 178, for a detailed list of entities governed by the federal HRA. Thus, cases against schools would fall under the jurisdiction of provincial human rights laws. *Id.*

¹⁸⁴ See Canada and Human Rights website, *supra* note 182.

¹⁸⁵ *Id.* See, e.g., Ontario Human Rights Code, R.S.O. 1990, c. H.19. Each province, in addition to the federal Canadian government, also operates a website that, in general, explains in layperson terms the individual Human Rights Codes, the rights governed by them, and how to lodge an individual complaint if rights have been violated. See, e.g., The Ontario Human Rights Commission website, at <http://www.ohrc.on.ca/english/code/index.shtml> (last visited Feb. 3, 2006).

¹⁸⁶ See Canada and Human Rights website, *supra* note 182.

¹⁸⁷ For differing views on the construction of protections offered under civil rights law (specifically Title IX) in the United States, one only need look to the majority and dissent decisions in *Gebser*, 524 U.S. 274 or *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).

¹⁸⁸ See, e.g., Beverley McLachlin, *Introduction to the 1999 Legal Report*, available at http://www.chrc-ccdp.ca/publications/1999_lr/introduction-en.asp (last visited Oct. 12, 2006). Ms. McLachlin is the Chief Justice of the Supreme Court of Canada.

Ltd.,¹⁸⁹ Justice McIntyre of the Canadian Supreme Court stated:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purposes of the enactment ... and to give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.¹⁹⁰

C. Canadian Administrative and Judicial Enforcement of Human Rights Legislation

When federal and provincial Canadian human rights legislation was created, special administrative commissions were also created at both the federal and provincial levels to administer and enforce the acts.¹⁹¹ These human rights commissions bridge the gap between constitutional human rights theory¹⁹² and application by establishing practical steps and legal channels for solving human rights violations.¹⁹³ The Canadian Human Rights Commission (HRC) administers the

¹⁸⁹ Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, 546-47.

¹⁹⁰ *Id.* See also Gould v. Yukon Order of Pioneers, [1996] S.C.R. 571 (“this Court has repeatedly stressed that it is inappropriate to solely rely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature”).

¹⁹¹ See United Nations Association in Canada, Canada and Human Rights website, *supra* note 182.

¹⁹² See, e.g., Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., U.N. Doc. (1948).

¹⁹³ See Canada and Human Rights website, *supra* note 182.

federal HRA.¹⁹⁴ The HRC is the Canadian equivalent of the various federal United States' civil rights agencies, such as the EEOC and the OCR.¹⁹⁵ Each province also has its own corresponding commission to administer that province's human rights code.¹⁹⁶ As stated by the federal Canadian HRC:

The Commission administers the Canadian HRA ... and ensures that the principles of equal opportunity and non-discrimination are followed in all areas of federal jurisdiction. This includes ... helping parties to resolve complaints of discrimination in employment, investigating complaints of discrimination, developing and conducting information programs to promote public understanding of the Act and the role and activities of the Commission.¹⁹⁷

When the federal Canadian HRA was passed, a special Human Rights Tribunal ("Tribunal") was also created to have sole jurisdiction over the judicial adjudication of human rights violation cases.¹⁹⁸ The Tribunal's mission is "[t]o provide Canadians with an improved quality of life and an assurance of equal access to the opportunities that exist in our society through the fair-minded and equitable interpretation and enforcement of the Canadian Human Rights Act."¹⁹⁹ The Tribunal receives its mandate and funding directly from Parliament and operates as an independent agency separate

¹⁹⁴ See Commission website, *supra* note 178.

¹⁹⁵ See generally *id.*

¹⁹⁶ See, e.g., Quebec Human Rights Commission website, *Commission des droits de la personne et des droits de la jeunesse*, <http://www.cdpcj.qc.ca> (last visited March 6, 2006).

¹⁹⁷ Commission website, *supra* note 178.

¹⁹⁸ Canadian Human Rights Tribunal, <http://www.chrt-tcdp.gc.ca>.

¹⁹⁹ *Id.* The Tribunal also interprets the Canadian Employment Equity Act. Referenced here is the *federal* Tribunal. Provincial tribunals operate in a similar manner; however, the laws and procedures for each province would need to be consulted to determine the intricate workings of the different provincial tribunals.

from the HRC.²⁰⁰ The Tribunal operates in a similar fashion to a court, but “as an administrative tribunal, the [Tribunal] has more flexibility than regular courts. This allows those who appear before it a chance to present their cases in more detail without having to follow strict rules of evidence.”²⁰¹ All cases are referred to the Tribunal through the HRC, which is the starting point for *all* human rights violation complaints.²⁰² The HRC may decide to act as the victim’s attorney (sometimes in a limited capacity) at a case before the tribunal; otherwise, the victim is required to represent himself or herself either without counsel or with the representation of an independent attorney.²⁰³ If one of the parties opposes the outcome of the case before the Tribunal, an appeal may be filed to the Canadian Federal Courts.²⁰⁴

While the above explanation of the federal Tribunal is helpful in understanding how human rights tribunals are conducted in Canada, schools are covered under the provincial human rights codes.²⁰⁵ Thus, to lodge a complaint regarding sexual harassment in an educational setting, a Canadian complainant would work through a similar complaint process set up within his or her own province’s human rights code.²⁰⁶ The scope of this article does not permit a recitation of how each province’s complaint and resolution process works. However, the complaint process established by the Ontario Human Rights Commission (“Commission”) will be discussed briefly to give an idea of how a typical school sexual harassment complaint would be lodged in Canada.

In order to lodge a complaint in Ontario, the complainant must first call a telephone hotline and speak with Commission staff to see if the alleged discrimination falls

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Canadian Human Rights Tribunal, <http://www.chrt-tcdp.gc.ca>.

²⁰⁵ *See supra* note 183.

²⁰⁶ *Id.*

under the Ontario Code.²⁰⁷ The complainant is then sent a form to complete, along with instructions regarding completion of that form.²⁰⁸ If the Commission accepts the complaint and then receives an answer from the respondent, it will attempt to settle the dispute through mediation with the parties.²⁰⁹ If mediation is unsuccessful, the Commission will conduct an investigation and enter into a binding conciliation process with the parties.²¹⁰ If this proves unsuccessful, the Commission will decide whether to refer the matter to the Ontario Human Rights Tribunal.²¹¹ Unlike the federal Commission, the Ontario Commission is an impartial body; though it will present evidence from its investigation before the tribunal, it will not represent either party (even though each party is entitled to his or her own legal counsel).²¹²

D. The Evolution of Sexual Harassment Law in Canada

In Canada, as in the United States, sexual harassment is legally considered discrimination on the basis of sex.²¹³ The Supreme Court of Canada established this holding in *Janzen v. Platy Enterprises Ltd.*²¹⁴ In *Janzen*, the complainants were subjected to constant physical and verbal sexual abuse while

²⁰⁷ Ontario Human Rights Commission, *The Complaint Process*, available at <http://www.ohrc.on.ca/english/complaints/index.shtml> (last visited Feb. 3, 2006).

²⁰⁸ *Id.*

²⁰⁹ *Id.* A complaint may not be accepted if it is untimely (occurring six months after the alleged incident(s)) or it is made in bad faith, is frivolous, not within the Commission's jurisdiction, or could be better brought under another piece of litigation. *Id.* Complainants may file a reconsideration for commission decisions not to accept a complaint. *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* If the matter is not referred, either party may motion the Commission to reconsider that decision. *Id.*

²¹² *Id.*

²¹³ See discussion of case law establishing this principle, *infra* Part III.D. This article will examine the evolution of sexual harassment law in Canada in both the workplace and in schools. Because all sexual harassment complaints fall under the human rights legislation, there is no parallel development of sexual harassment law in Canada based on different statutes, as exists in the United States. *Id.*

²¹⁴ *Janzen v. Platy*, [1989] S.C.R. 1252.

working as waitresses for the defendant; they consequently self-terminated their employment after complaints to their supervisor failed to ameliorate the situation.²¹⁵ The Supreme Court of Canada decided the *Janzen* case under the Canadian human rights laws shortly after the U.S. Supreme Court determined that sexual harassment is considered sexual discrimination under Title VII.²¹⁶

While the *Janzen* decision represented a positive course for human rights advocates in Canada, it created confusion in the lower courts regarding the human rights tribunals' exclusive jurisdiction over human rights cases.²¹⁷ The Supreme Court of Canada clarified the human rights tribunals' jurisdiction over sexual harassment cases in *Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduria*,²¹⁸ holding that violations of human rights legislation may not be brought as civil actions, but only under the jurisdiction of human rights tribunals.²¹⁹ Therefore,

²¹⁵ *Id.*

²¹⁶ *Id.*; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The *Janzen* Court, however, did not accept the American Court's differentiation between quid pro quo and hostile environment discrimination. *Janzen v. Platy*, [1989] S.C.R. 1252. The court stated:

I do not find this categorization particularly helpful. While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before sexual harassment was widely viewed as actionable, in my view there is no longer any need to characterize harassment as one of these forms. The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.

Janzen, [1989] S.C.R. at 1284.

²¹⁷ See *Chamberlain*, *supra* note 17, at 4. *Chamberlain* notes that plaintiffs initially brought cases under civil tort law, in addition to human rights law.

Id.

²¹⁸ *Board of Governors of Seneca College of Applied Arts and Tech. v. Bhaduria*, [1981] 124 D.L.R. (3d) 193.

²¹⁹ *Id.*

in Canada, human rights cases only enter the traditional court system through appeal from a final tribunal decision.²²⁰

Before examining sexual harassment discrimination under Human Rights Legislation in the context of schools, the Canadian courts first examined school board liability for discrimination of students based on race in *Ross v. New Brunswick School District No. 15 and Attis*.²²¹ In *Ross*, the Supreme Court of Canada held that a school district has a duty to provide a discrimination-free learning environment and therefore may be held liable for discriminatory behavior (in this case racial discrimination) of a school employee.²²² In *Ross*, the court found that when the school district failed to meaningfully discipline a racist teacher, it created a poisoned environment characterized by a lack of equity and tolerance.²²³ The court further stated that “[a] school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty.”²²⁴ Likewise, the Canadian courts went on to find that a university could similarly be held liable for the sexual harassment of one of its students by a professor under the Newfoundland Human Rights Code.²²⁵

Perhaps the most prominent sexual harassment case in Canada presently is *North Vancouver School District No. 44 v. Jubran*.²²⁶ This case was initially decided by the British Columbia Human Rights Tribunal, but was subsequently appealed to the British Columbia Court of Appeal.²²⁷ As the case involves peer sexual harassment, albeit based upon sexual orientation, it has been styled by at least one Canadian

²²⁰ See *supra* text accompanying note 204.

²²¹ *Ross v. New Brunswick School District No. 15 and Attis*, [1996] S.C.R. 825.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Memorial University v. Rose* [1990] 80 Nfld. & P.E.I.R. 97 (Nfld. S.C.T.D.).

²²⁶ *Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733.

²²⁷ *Id.*

solicitor as the Canadian *Davis* test case for peer sexual harassment.²²⁸

In *Jubran*, the victim filed a complaint with the British Columbia Human Rights Commission after he was repeatedly harassed, both physically and verbally, because his peers perceived him as a homosexual.²²⁹ In secondary school, from eighth grade to twelfth grade, Jubran was “taunted with homophobic epithets and was physically assaulted, including being spit upon, kicked and punched by other students.”²³⁰ Even though the school recognized this behavior as harassment and disciplined a few of the perpetrators, it failed to effectively remedy the situation, as the harassment continued throughout Jubran’s high school career.²³¹

The court, employing a broad interpretation of the British Columbia Human Rights Code, held that even though Jubran was not a homosexual, harassment that was homophobic in nature was discriminatory.²³² The court ordered that the school district pay Jubran compensatory damages, in addition to ordering the school district to “cease its contravention of the Code and refrain from committing the same or similar contravention.”²³³

It is important to note that cases brought on a theory of sexual orientation harassment, such as *Jubran*, properly belong and are relevant to a discussion about gender-based

²²⁸ J. Paul R. Howard, *School Board Liability for Student-Peer Harassment and Discrimination: “Deliberate Indifference” and Beyond?*, available at <http://www.shibleyrighton.com/showarticle.asp?lawyer=9> (last visited Feb. 3, 2006). The author of this short internal article, a lawyer with the firm of Shibley Righton, LLP in Toronto, Ontario, and a special lecturer in education law at the Faculty of Law, University of Windsor, noted the Canadian courts’ “current willingness to broaden the scope of school board liability for the misconduct, crimes or other legal wrongs committed by individuals.” *Id.* See *Jacobi v. Griffiths* [1999] D.L.R. 174 (4th); *Bazley v. Curry* [1999] D.L.R. 174 (4th).

²²⁹ *Jubran*, B.C.J. No. 733 at 2.

²³⁰ *Id.* at 2, 10-16.

²³¹ *Id.* at 17-19.

²³² *Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 at 2.

²³³ *Id.* at 23.

sexual harassment.²³⁴ Again, as is the case with gender-based sexual harassment, orientation-based harassment is not just the notion of “boys being boys.”²³⁵ In fact, the Canadian HRA explicitly provides protection against discrimination based on sexual orientation.²³⁶ Both of these forms of harassment are

²³⁴ Just last year, in fact, one of the rare verdicts in a Title IX sexual harassment action (one of the two found under the Morelaw.com search, *supra* note 132) was brought under a peer sexual orientation-based harassment theory. *See* *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299 (Dist. Kan. 2005). A case was also brought under § 1983 for peer harassment based on sexual orientation that survived a summary judgment motion from defendants. *See* *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

²³⁵ *See generally* Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000). Unfortunately, while a valid topic, a full discussion of sexual orientation-based harassment in the context of schools is beyond the scope of this article. However, it should also be noted that sexual harassment directed at males based on perceived homosexual orientation has as its basis harassment based on perceived feminine traits. Drobac interview, *supra* note 19. Thus, this particular kind of harassment is in a way closely related to traditional female sexual harassment. *Id.* The court's instructions in *Theno* are particularly enlightening on this point:

Title IX prohibits discrimination ‘on the basis of sex,’ which means gender-based harassment. Harassment is not discrimination based on sex merely because the words or gestures used have sexual content or connotation or are based upon sexual orientation or perceived sexual orientation.

The harassment must be not merely tinged with offensive sexual connotations, but must actually constitute harassment based on gender. To constitute gender-based harassment under Title IX, the harasser must be motivated by Mr. Theno's gender or his failure to conform to stereotypical male characteristics. If you find that the harassers were so motivated, then you may conclude that the harassment was based on his gender.

Theno, 394 F. Supp. 2d at 1302.

²³⁶ *See* Canadian Human Rights Commission, *Grounds for Discrimination and Harassment*, available at http://www.chrc-ccdp.ca/discrimination/sexual_orientation-en.asp (last visited Feb. 2, 2006). The provision was added to the HRA in 1996, nearly two decades after its addition was originally proposed. *Id.* Sexual orientation protection also exists at the

rooted in the harassers' expression of power and control over their victim. While harassment based on sexual orientation, perceived or not, may not seem like regular gender-based sexual harassment, it certainly has the same deleterious effects on its victims.²³⁷

*E. The Benefits of the Placement of Sexual Harassment
Discrimination under Human Rights Legislation in Canada*

The Canadian Supreme Court's holding in *Bhadoria* squarely placed sexual harassment cases under the jurisdiction of human rights tribunals rather than the private civil litigation sphere.²³⁸ According to Erika Chamberlain, professor of law at University of Western Ontario, this categorization has created a tension concerning the proper jurisdictional home for sexual

provincial level in Canada. *See, e.g.*, The Quebec Charter of Human Rights and Freedoms, R.S.Q.C-12, ch. I.1, § 10 (2006) (Can.).

²³⁷ The court in *Jubran* recognized the negative effects of this particular kind of harassment above and beyond mere bullying. *Jubran*, B.C.J. No. 733. Referring to the Tribunal's finding that harassment based on perceived homosexuality was discrimination based on sexual orientation the court stated:

While the students may have used the terms 'homo' and 'queer' interchangeably with 'dork' or 'geek,' without reference to sexual orientation, the terms 'queer,' 'homo,' and 'faggot' clearly carry homosexual overtones. The students acknowledged that the words often related to sexual orientation, were pejorative, and were intended to carry a sting. While not every action directed toward Mr. Jubran was accompanied by a homosexual statement or epithet, I agree with Mr. Jubran's counsel, who argued that, for the most part, the name-calling had 'at its basis a sense of his difference which was described frequently in homophobic terms.' Whether or not the name-calling was intended to hurt is irrelevant, since it is the effect of the conduct, or action, not the intent of the harassers, that is relevant in determining whether discrimination has occurred. *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536.

Id. at 3.

²³⁸ Board of Governors of Seneca College of Applied Arts and Tech. v. *Bhadoria*, [1981] 124 D.L.R. (3d) 193.

harassment cases.²³⁹ Chamberlain argues that tension is created because sexual harassment encompasses elements of both distributive and corrective justice.²⁴⁰ Chamberlain finds that the “former views sexual harassment as an issue of sexual equality, properly addressed by the human rights system with its public process and broad remedial powers.”²⁴¹ “The latter describes it as a private injury that should be litigated through the adversarial system and compensated by damages.”²⁴²

Ultimately, Chamberlain finds that sexual harassment cannot completely fit neatly into either a distributive or corrective justice theory. However, she does conclude that sexual harassment properly belongs under the distributive theory because, even if it cannot afford victims the same level of compensation as the private civil tort system, the human rights tribunals have broader remedies available to them than at common law.²⁴³ These remedies, including education and affirmative action programs, help redress the historical harm that sex stereotypes have caused; they also help improve the situation of women and those facing sexual orientation discrimination in general.²⁴⁴

Furthermore, while tribunals have the authority to order compensatory damages awards, the major focus of tribunal remedies is on the use of broad remedial powers to remove discriminatory environments and prevent future harm.²⁴⁵ As evidenced in the Nova Scotia Human Rights Act, a board of inquiry can order “any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of person or make compensation therefore.”²⁴⁶ For example, in ordering the school to “cease its contravention” of

²³⁹ Chamberlain, *supra* note 17, at 3.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 4.

²⁴³ *Id.* at 20.

²⁴⁴ *Id.*

²⁴⁵ Chamberlain, *supra* note 17, at 19.

²⁴⁶ Nova Scotia Human Rights Act, R.S.N.S. 1989, c. 214, s. 34(8), as amended by S.N.S. 1991, c. 12.

the act, the *Jubran* Tribunal set up a monitoring program with the school and the British Columbia Human Rights Commission.²⁴⁷

Additionally, in recognizing the sensitive nature of many discrimination complaints, human rights tribunals are more flexible and informal in their proceedings than regular courts.²⁴⁸ This aspect of the proceedings assists those bringing sexual harassment claims in general, and may in particular be of assistance to younger students bringing a complaint, who may be more intimidated by a full court proceeding.²⁴⁹ In sum, human rights tribunals have procedures in place that allow them to better handle discrimination and harassment complaints.

IV. Comparison of Canadian and American Systems

A. Administrative Enforcement

While the American OCR and the Canadian Commissions perform similar functions in administratively enforcing anti-sexual harassment discrimination laws in schools, the Canadian Commissions are organized in a more logical and efficient manner. While the American system has several different agencies that enforce civil rights legislation in different contexts,²⁵⁰ the Canadian human rights commissions bring all discrimination complaints under one umbrella, either in the provincial or the federal system.²⁵¹ This system arguably makes it easier for victims of discrimination

²⁴⁷ *Jubran*, [2002] B.C.H.R.T.D. No. 10.

²⁴⁸ See Human Rights Tribunal website, *supra* note 198.

²⁴⁹ See generally *id.*

²⁵⁰ For example, at the federal level the EEOC enforces Title VII in the workplace (see www.eeoc.gov); HUD's Office of Fair Housing and Equal Opportunity enforces the Fair Housing Act (see <http://www.hud.gov/offices/fheo/index.cfm>); and the OCR enforces Titles VI and IX in education (see *supra* Part II.D). States also have their own anti-discrimination agencies. See, e.g., Indiana Civil Rights Commission, <http://www.in.gov/icrc/>. If you are a victim in the United States, unless you are an expert, it seems unlikely that you would know where to file your complaint without at least some preliminary research.

²⁵¹ See *supra* Part III.C.

to know where to file a complaint, as there is only one agency involved regardless of the context of the discrimination. Moreover, whereas the different anti-discrimination agencies of the United States are at the whim of the priorities of the political groups in office, Canadian commissions, which are organized into one anti-discrimination enforcement group, may wield more combined power in achieving their goals.²⁵² This concept is evidenced by the noticeable disparity in the name recognition value and power wielded between the EEOC and the OCR, even though each agency was created to combat the same evil, only in different settings.²⁵³

B. Judicial Enforcement

In the United States, students may bring suit to recover damages and injunctive relief under Title IX for sexual harassment suffered in schools.²⁵⁴ However, many victims are arguably deterred from filing claims because either the standard of recovery for damages is extremely high or the standard of recovery for injunctive relief has not clearly been articulated.²⁵⁵ Alternatively, in Canada, civil human rights suits do not exist because Canadians address human rights complaints in special human rights tribunals, which are a completely separate system from normal civil litigation.²⁵⁶ Thus, the human rights tribunals, though impartial, are in a particularly good position to properly adjudicate discrimination complaints because their sole jurisdiction and experience is in human rights law.²⁵⁷

Furthermore, student sexual harassment complainants may not be as inhibited from filing suits in Canada because the standard for recovery against a school board in a tribunal setting is less onerous. Specifically, a Canadian complainant

²⁵² Drobac interview, *supra* note 19.

²⁵³ See discussion of the EEOC and OCR *supra* Part II.D.

²⁵⁴ See *supra*, Part II.B.

²⁵⁵ See, generally, *Gebser v. Lago*, 524 U.S. 274 (1998) (Stevens, J., dissenting); Rhode, *supra* note 1.

²⁵⁶ See Canadian Human Rights Tribunal website, *supra* note 198.

²⁵⁷ See Chamberlain, *supra* note 17.

must show that the school board failed to provide an educational environment that was free from discriminatory harassment.²⁵⁸ If this legal standard is met, both injunctive and compensatory relief may be granted.²⁵⁹ In addition, Canadian complainants do not have to choose whether to file a civil action or an administrative complaint; the system is streamlined to funnel all complaints through the Commission for administrative remedy or resolution at a tribunal.²⁶⁰ Thus, complainants are not forced to make some kind of strategic decision regarding how they will proceed with their complaint.

V. Conclusion and Recommendation

Even though Title IX has had more than 30 years to eliminate discrimination on the basis of sex in America's schools,²⁶¹ the present system in the United States offers students who suffer in-school sexual harassment little recourse if their school has no sexual harassment grievance policy in place, or if that policy is ineffective.²⁶² While the Supreme Court decisions in *Gebser* and *Davis* were progressive in recognizing that recovery is available in both student-teacher and student-student sexual harassment situations, the legal standards of recovery established by those cases detract from other possible remedies that might better effectuate the goals of Title IX.²⁶³ Likewise, while the OCR is in a position to enforce the implementation of Title IX sexual harassment compliance, it has largely failed to do so.²⁶⁴ Thus, sexual harassment continues to exist at high levels in American schools because Title IX has been emasculated by poor administrative and confusing judicial enforcement.²⁶⁵

²⁵⁸ *Jubran*, B.C.J. No. 733 at 2; *see also Ross*, 1 S.C.R. 825.

²⁵⁹ *See Chamberlain*, *supra* note 17, at 19.

²⁶⁰ Remember that in the United States, victims may choose either to file a complaint with the OCR, file a civil suit, or both. *See supra* Part II.D.

²⁶¹ Title IX was enacted as part of the Education Amendments of 1972. *See* 20 U.S.C. § 1681(a) *et seq.* (1972).

²⁶² *See License for Bias*, *supra* note 11.

²⁶³ Drobac interview, *supra* note 19.

²⁶⁴ *See License for Bias*, *supra* note 11.

²⁶⁵ Drobac interview, *supra* note 19.

In fixing this problem, the United States should look to the Canadian Human Rights system of anti-discrimination enforcement. The United States should streamline its numerous anti-discrimination agencies, thereby enabling them to more proficiently resolve harm and eliminate discrimination.²⁶⁶ While President George W. Bush recognized that federal agencies in the business of national security and law enforcement belong under one organizational umbrella,²⁶⁷ an analogous push has never been made to bring together the agencies that enforce civil rights laws.

The United States legislature and/or courts should also articulate a less rigorous standard of recovery under Title IX for sexual harassment plaintiffs seeking injunctive or declaratory relief.²⁶⁸ The present direction of the case law, where focus is almost entirely placed on seeking compensatory damages, muddies the issue.²⁶⁹ While it is important to compensate victims, it is arguably more important to hold schools accountable for Title IX requirements.²⁷⁰ Unfortunately, under the present system, where the spotlight is on judicially preventing financial liability and therefore protecting the school board purse, school boards are under little pressure to enact Title IX sexual harassment reporting, education, and grievance policies.²⁷¹

In sum, a clearly articulated reasonableness or negligence standard for injunctive relief against school boards would allow a plaintiff to more easily and quickly force his or her school into compliance.²⁷²

²⁶⁶ *Id.*

²⁶⁷ The Department of Homeland Security was created in 2002, after the terrorist attacks of September 11, 2001. See George W. Bush, *The Department of Homeland Security* (June 2002), available at <http://www.dhs.gov/interweb/assetlibrary/book.pdf> (last visited March 6, 2006).

²⁶⁸ Drobac interview, *supra* note 19.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See, generally, Rhode, *supra* note 1.

²⁷² Drobac interview, *supra* note 19.