SEEKING A SUPERIOR INSTITUTIONAL LIABILITY STANDARD UNDER TITLE IX FOR TEACHER-STUDENT SEXUAL HARASSMENT

NEERA RELLAN STACY*

INTRODUCTION

Once a court finds that a teacher has sexually harassed a student, it must decide whether the school should bear liability for the teacher's harassment. While most agree that the teacher should be held liable for his actions, many courts disagree as to the liability of the institution that employs the teacher. When should a school district be held accountable for a teacher's misconduct? Title IX of the Education Amendments of 1971 "[u]nquestionably . . . place[s] on [educational institutions] the duty not to discriminate on the basis of sex." Sex-based discrimination resulting from sexually harassing conduct by a teacher may manifest itself in various forms: For example, a teacher may make sexual comments, leer, or inappropriately touch a student; he may make offensive sexual advances toward a student; he may solicit or coerce sexual acts from a student by promising to grade the student highly if the student complies or by threatening to fail the student if she does not; and he may rape a student. Although Title IX allows a student to bring a claim against a school for such abusive misconduct by a teacher, no definitive legal standard for assessing liability currently exists. In addition, the standards that are applied to-

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Although this Note uses the masculine form when referring to the teacher as harasser, it does not mean to presume that the harasser must always be male. Likewise, the female pronoun is used when referring to the harassed student, although the student may be male.

For the purposes of this Note's discussion of Title IX institutional liability, the terms "institution," "school," "school district," and "school board" are meant to be synonymous.

20 U.S.C. §§ 1681-1688 (1994). Title IX 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." Id. § 1681(a).


The Supreme Court has yet to address directly questions of institutional liability in the teacher-student context. See, e.g., S.B.L. v. Evans, 80 F.3d 307, 309 (8th Cir. 1996) (noting that Supreme Court has not established standard for institutional liability under
day by most courts are inadequate: They fail to provide schools with sufficient incentives to create effective preventive and monitoring measures against harassment, and they fail to provide students who have been sexually harassed with appropriate relief under Title IX. A superior standard is needed.

Each of the standards currently applied to sexual harassment claims under Title IX varies in the level of knowledge that school officials must possess for the school itself to be held liable for a teacher's sexually harassing conduct. Consequently, a court's decision regarding the requisite level of knowledge for institutional liability directly impacts whether students receive the legal protection intended by Title IX both in terms of redress of past abuse and deterrence of future abuse.6 This Note examines which of three levels of “knowledge” is an appropriate prerequisite to institutional liability. The first level requires proof that the institution not only knew of but also participated in the harassing conduct.7 This standard provides students with almost no protection, either in the form of relief or prevention of future harassment. The second level requires the student to show that the school had knowledge (or should have had knowledge) of the teacher's harassing conduct yet did nothing to curtail it. This requirement informs much of the standard for employer liability under Title VII of the Civil Rights Act of 1964—-the statute under which an employee may sue her employer for sexual harassment. Such a standard provides somewhat more protection than the first. Finally, under the third level, knowledge is irrelevant because the teacher's harassing conduct is imputed to the institution. Whether this standard is based on agency principles, as adopted by this Note, or is one of strict liability, it provides students with the greatest and most appropriate level of protection by helping to ensure that abused students receive adequate relief and by creating greater incentives for schools to deter future abuse.

Title IX). Note that the question of institutional liability only arises after sexual harassment has been established. In order to establish such a claim, the Equal Employment Opportunity Commission (EEOC) Guidelines emphasize assessing the “record as a whole” and “the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.” 29 C.F.R. § 1604.11(b) (1995).

6 See infra note 28 and accompanying text.

7 This appears to be the institutional liability standard under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7 (1994), for discrimination not involving harassment. For discussion regarding the use of Title VI as an interpretive guide for claims under Title IX, see infra Part I.B.

Confusion persists among lower courts concerning what standard to apply for determining institutional liability under Title IX: the Title VII standard (because Title VII proscribes sexual harassment), the Title VI standard (because Title VI covers the educational context), or some other standard (because it better achieves the goals intended by Title IX). This Note argues that neither Title VII nor Title VI should be the interpretive guide for deciding whether an institution is liable for the sexually harassing conduct of a teacher. Given that Title IX applies to a context different from that of Title VII (classroom versus workplace and child versus adult) and conduct different from that of Title VI (sexual harassment versus racial discrimination), Title IX deserves its own distinct standard of institutional liability—one that can provide students with a better level of protection and relief. This Note proposes the use of common law agency principles to define and develop this standard.

Part I describes the purposes of Title IX and explores the problems of using the liability standards of either Title VII or Title VI. This Part focuses on employer liability under Title VII and its application to Title IX because courts use Title VII to a greater extent than Title VI when interpreting Title IX. It argues that although portions of employer liability under Title VII—those based on agency law—may be appropriately transferable to a standard of institutional liability under Title IX, caution should be exercised when embracing Title VII as “the” standard due to the great differences in context and relationship encompassed by the two statutes: The teacher-student relationship is fundamentally different from the employer-employee

9 See, e.g., Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427 (E.D. Mo. 1996) (noting that courts “have adopted several different approaches,” including “knowledge or direct involvement by the school district,” Title VII employer liability standards, and strict liability).


11 This Note focuses on sexual harassment of students by teachers in the context of elementary school through high school. Harassment in a college setting, peer harassment, and teacher-to-teacher harassment are beyond the scope of this Note because they raise different and distinct questions from the present context. The standard of institutional liability proposed in this Note, therefore, may not be appropriate in those settings.

12 See Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (applying Title VII to Title IX claim because conduct proscribed is same and abundance of case law exists under Title VII).

Employer liability under Title VII is developed to a much greater extent than institutional liability under Title VI. For this reason, while Title IX was conceded “patterned after Title VI,” appellate courts use Title VII to assist in the interpretation of Title IX claims. See id. In the context of this Note, Title VI is primarily used to portray the confusion in the courts, the lack of a uniform standard under Title IX, and the haphazard application of standards that may or may not be suited to the context at issue.
relationship; the function of the school environment differs from that of the workplace; and the compulsory element of education has no counterpart in the work environment. Thus, the level of protection required to prevent a child from being sexually abused by a teacher at school is not coextensive with that required to protect an adult from harassment by a supervisor in the workplace. As Part I shows, Title VII standards simply were not designed to deal with the unique problems raised by the elementary school through high school setting.

Part II discusses the development of agency law in the federal sector and contends that the use of agency principles is appropriate in the context of sexual harassment of a student by a teacher because it provides students an optimal level of protection, as is warranted under Title IX. Moreover, using agency law to interpret institutional liability offers a sound, coherent principle that is consistent with existing Title IX jurisprudence. While agency law is no stranger to quid pro quo claims, its acquaintance with hostile environment harassment has yet to become commonplace.

Part II explores the use of agency law under hostile environment and quid pro quo claims and argues that both types of sexual harassment should be treated similarly. By following Title VII, courts currently faced with teacher-student sexual harassment impose greater liability on a school when the teacher conditions a grade or benefit during the commission of his abuse (quid pro quo harassment) than when tangible rewards or punishments are not involved (hostile environment harassment). Such a liability rule creates an inequitable and undesirable anomaly. For instance, in one case, a high school student alleged, inter alia, that her teacher/sports coach “subjected her to coercive intercourse” on three occasions. In another case, an eleven-year-old, sixth-grade student alleged, inter alia, that her student teacher had “approached [her] from behind on the playground [and] fondled her buttocks.” In both cases the claims were deemed to be of the hostile environment sort since neither plaintiff claimed that the teacher conditioned a benefit or detriment upon receipt or refusal of the sexual advances. Had a benefit/detriment such as a grade ac-

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13 Quid pro quo claims encompass those for which a teacher conditions a grade or other benefit upon receipt of sexual favors. See infra note 59 and accompanying text.
14 A teacher creates a hostile environment if, through explicit or inexplicit sexual conduct, he interferes with the student's learning environment. See infra note 64 and accompanying text.
17 Regarding the claim in Franklin, see infra note 181 and accompanying text; see also Oona R.-S., 890 F. Supp. at 1467 & n.13 (stating that “actions like those allegedly taken” by student teacher create hostile environment).
companied the same conduct, a court would label the abuse as quid pro quo and impute liability to the school under agency principles. Instead, characterization as a hostile environment claim relieves the school of any legal responsibility for the teacher's misconduct unless the plaintiff proves that the school "knew or should have known" of the harassment and failed to take appropriate remedial action. Assessing both types of claims under agency reasoning cures Title IX jurisprudence of this vitiating effect.

In addition, Part II asks whether knowledge of the teacher's behavior should be a requisite for finding institutional liability and argues that it should not. Conditioning liability upon knowledge provides an incentive for the school to "clos[e] [its] eyes to the problem" of sexual harassment committed by its teachers: See no evil, escape liability. Part II suggests that the appropriate standard for imposing institutional liability is found in Restatement (Second) of Agency section 219(2)(d), which would impose liability upon a school if the teacher "was aided in accomplishing the tort by the existence of the agency relation."

Part III examines whether the application of Restatement (Second) of Agency section 219(2)(d) is tantamount to strict liability. Although the use of agency law, as interpreted by this Note, may yield the same result as a rule of strict liability, this Note argues that agency law will provide a more acceptable standard because it is a more logical fit in the context of teacher-student harassment and does not "sound" as harsh as strict liability. Since courts have applied agency law to quid pro quo claims under Title IX, its extension to the hostile environment realm is more palatable than the imposition of strict liability, even if the effect is identical. Given the dependency a student has on a teacher—the "fiduciary-type" trust, if you will—and the devastating effects sexual harassment can have on a student, a robust standard of liability is warranted. Part III contends that the current "standard" fails to combat the problem of sexual harassment in schools and suggests an approach that would force schools to be

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18 See infra notes 58-61 and accompanying text.
19 See infra notes 62-70 and accompanying text for an explanation of Title VII's knew-or-should-have-known standard and infra notes 111-19 and accompanying text for a discussion of its effect on Title IX jurisprudence.
21 Restatement (Second) of Agency § 219(2)(d) (1957); see infra Part II.C.1.
22 More than one lower court has found that strict liability is the appropriate liability standard with respect to teacher-student sexual harassment. See Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1429 (E.D. Mo. 1996) (high school context); Leija, 887 F. Supp. at 953-54 (elementary school context).
proactive in dealing with sexual harassment and thus provide greater protection to students.

I

INSTITUTIONAL LIABILITY UNDER TITLE IX

Sexual harassment in elementary, junior high, and high schools is a serious problem. A national survey of more than 1600 students in grades eight through eleven revealed that roughly eighty percent of the students surveyed believed they had experienced some form of sexual harassment in school, either by teachers, school officials, or peers. Such results are intolerable, given that students have a "personal right" to be free from sexual discrimination in their educational environment. Congress designed Title IX not only to avoid the use of federal funds to support discriminatory behavior by institutions but also to protect students from being subjected to such behavior.

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24 See Mary Jordan, Sex Harassment Complaints Starting in Grade School: Taunts, Intolerance on the Rise, Survey Finds, Wash. Post, June 2, 1993, at A1 (reporting that survey conducted by Louis Harris & Associates for American Association of University Women (AAUW) found that 85% of girls and 76% of boys believed they had been sexually harassed).


26 See supra note 3.

27 See 117 Cong. Rec. S39,252 (1971) (statement of Sen. Erlenborn) ("[Title IX] is simply an extension of an existing policy not to fund programs with taxpayers' funds which deny any individual equal protection.").

28 See Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) ("Title IX . . . sought to accomplish two related, but nevertheless somewhat different, objectives. First, . . . to avoid the use of federal resources to support discriminatory practices; second, . . . to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on [Title IX and Title VII]"; Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 951-52 (W.D. Tex. 1995) ("Without question, one of the core objectives of Title IX is to provide relief to young girls sexually abused by their male teachers at schools receiving federal funds."); 118 Cong. Rec. S5806-07 (1972) (statement of Sen. Bayh) ("[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training").
A school, "in exchange for use of federal funds, render[s] itself poten-
tially liable" for a student's claim of sexual harassment by a
teacher.  

An institution may be found liable for the sexual harassment of a
student by a teacher either directly or vicariously. First, it may be
directly liable for failing to meet the statutory regulations of Title IX.
Under Title IX's regulatory scheme, for example, a federally funded
institution is required to establish a publicized policy against discrimi-
nation along with a grievance procedure. The institution may also
be directly liable for hiring a teacher with a history of prior discrimi-
natory behavior of which the institution knew or should have
known. Second, the institution may be vicariously liable as the em-
ployer of the harassing teacher. However, the primary question of
whether knowledge of the harassment, "either actual or imputed, is a
prerequisite to liability" has yet to be answered.

This Note argues that knowledge should not be required for im-
posing liability on schools. The issue of imputing liability "plagues
courts in all of the broad mass of litigation that fits under the civil
rights rubric." Even when a statute such as Title VII provides "for
some imputed liability under agency principles, . . . it can still be dif-
ficult to know where to draw the line." It is even more difficult
where, like Title IX and Title VI, the statute remains silent on the
issue. While the language of Title IX is brief, it is also expansive: It
requires 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

for later careers."); Schneider, supra note 23, at 552 (stating that Title IX is intended to
ensure quality education by prohibiting sexual discrimination).

(5th Cir. 1994) (en banc)).

30 See Schneider, supra note 23, at 563.

31 For the requirements mandated by Title IX and its implementing regulations, see 34
C.F.R. §§ 106.3-9 (1995); see also Doe 1 v. Covington County Sch. Bd. of Educ., 930 F.
Supp. 554, 570 (M.D. Ala. 1996) ("Title IX and its implementing regulations mandate that
a school system adopt and publish grievance procedures for receiving and investigating
complaints by students and employees of sex discrimination."); Schneider, supra note 23, at
531-32 (noting that regulatory scheme "provides for a system of self-regulation as well as
federal government enforcement" under which institutions must establish policy against
discrimination and grievance procedure).

32 Schneider, supra note 23, at 563.

33 See id. at 564 (noting that Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), is "the
Supreme Court's only pronouncement on the boundaries of indirect liability for the cre-
ation or maintenance of a hostile environment in the Title VII context").

34 Id.


36 Id.

37 See id.
subjected to discrimination under any education program or activity receiving Federal financial assistance."\textsuperscript{38} Although the statutory text does not direct courts to impute liability to the institution, the lack of an express directive does not foreclose the possibility.\textsuperscript{39} Rather, a court must step back from the statutory text and decide whether an imputed liability rule will achieve the purposes intended by Title IX. This Note contends that it will.\textsuperscript{40}

The "evolution of Title IX substantive law has proceeded slowly"\textsuperscript{41} because sexual harassment cases under Title IX are not frequently before the courts.\textsuperscript{42} Since few legal standards have developed under Title IX,\textsuperscript{43} many courts have looked to Title VII, which targets sexual harassment in the workplace, and Title VI, which proscribes racial discrimination in the school context, for guidance in the interpretation of Title IX.\textsuperscript{44}

\textsuperscript{38} 20 U.S.C. § 1681(a) (1994).

\textsuperscript{39} As the majority stated in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), the silence of the statutory text and the lack of legislative history regarding the issue of private remedies under Title IX did not mean that Congress did not intend to create such remedies or that such remedies should not exist. See id. at 71-73; see also Baker, supra note 23, at 303 ("Because the right of an individual to bring suit under Title IX is an implied right of action, the language of the statute as well as the legislative history do not provide any adjudicatory standards." (footnote omitted)).

\textsuperscript{40} For discussion on the appropriateness of applying agency principles to the Title IX context, see infra Part II.B.

\textsuperscript{41} Thomas M. Melsheimer et al., The Law of Sexual Harassment on Campus: A Work in Progress, 13 Rev. Litig. 529, 537 (1994).

\textsuperscript{42} See Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (noting that "issue of sexual harassment in an educational setting as a form of sex discrimination has been less frequently before the courts [than claims under Title VII] and [that] the viability of a sex discrimination claim based on hostile environment sexual harassment under Title IX is a novel question"); see also Baker, supra note 23, at 272 ("[F]ew students have filed [sexual harassment] claims due to jurisdictional hurdles and the lack of a remedy.").

\textsuperscript{43} See Baker, supra note 23, at 272 (noting that reason for meager development is that "so few cases have been litigated under Title IX").

\textsuperscript{44} See, e.g., Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (noting that Second Circuit "has looked primarily" to Title VII, but also to Title VI "in defining the contours of a student's private right of action under Title IX for gender discrimination occurring in college disciplinary proceedings" and that whether Title VII should be applied for sexual harassment claims brought by student has yet to be directly addressed).

One commentator explains that Title VII is more developed than Title IX for four reasons. First, since "students, unlike employees, are by nature transient," they may not pursue claims or may think the institution is more devoted to protecting the permanent teachers rather than the "transient students." Second, students may lack the "financial or other incentives to pursue litigation when harassment occurs." Third, courts have "historically . . . shown reluctance to evaluate the propriety of decisions made by academic institutions." Fourth, "students may lack incentive to challenge sexual harassment because the scope and nature of relief available under Title IX remains unclear." Schneider, supra note 23, at 527-28.
Title IX liability jurisprudence has been further complicated by the Supreme Court's decision in Franklin v. Gwinnett County Public Schools. In that 1992 case, the Court allowed a damage remedy for intentional discrimination under Title IX for the first time. In doing so, the Court relied on its previous decision in Meritor Savings Bank v. Vinson, a case involving a sexual harassment claim in the employment context under Title VII. In Meritor, the Court had stated that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." In Franklin, the Court contended that the "same rule should apply when a teacher sexually harasses and abuses a student," noting that "Congress surely did not intend for federal moneys to be expended to support intentional actions it sought by statute to proscribe."

Although the Franklin Court did not explicitly adopt a rule for institutional liability under Title IX, its reference to Meritor has led many lower courts to utilize Title VII standards when deciding Title IX claims. Yet in Meritor, the Court declined to provide a decisive standard for employer liability under Title VII. Since the Court in Franklin also remained silent on the issue of whether the substantive case law under Title VII should be used to interpret Title IX, courts below disagree over whether Title VII, Title VI, or some other standard such as strict liability is the appropriate guide for assessing sexual harassment claims under Title IX.

46 Prior to Franklin, courts recognized injunctive relief as the primary remedy under Title IX for claims of sexual harassment of a student by a teacher.
48 Id. at 64.
49 Franklin, 503 U.S. at 75.
50 Id.
51 See Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 749-50 (E.D. Va. 1995) ("[M]any lower courts have explicitly turned to Title VII and the broad body of related jurisprudence for guidance in Title IX cases . . . . Moreover, the Franklin court indicated that the overriding principle of Title VII, i.e., the elimination of discriminatory treatment, intimidation and scorn, should extend to Title IX actions brought by students . . . ."); Melsheimer et al., supra note 41, at 541-42 (noting that courts deciding Title IX claims based on teacher-student harassment "have favored application of Title VII principles"); Baker, supra note 23, at 285 (stating that Franklin Court's "direct parallel between a supervisor/subordinate relationship in the workplace and a teacher/student relationship . . . offers strong support for the validity of . . . looking to Title VII cases for guidance in developing sex-based harassment standards for Title IX"); infra note 56 and accompanying text.
52 See Meritor, 477 U.S. at 72 (advising use of agency principles for guidance when assessing employer liability under Title VII); see also infra note 61.
53 See S.B.L. v. Evans, 80 F.3d 307, 309 (8th Cir. 1996) (stating that "lower courts were split on the applicability of the Title VII standard" of employer liability); Bolon v. Rolla
The inconsistent and haphazard adoption of differing standards, especially of Title VII and Title VI, in the Title IX arena has stunted the growth of a dependable standard for assessing institutional liability for acts of sexual harassment in the teacher-student context. Although the Supreme Court has not provided the lower courts with such a standard, it has directed that Title IX be given "a sweep as broad as its language." This directive cannot be achieved by the continued attachment to Title VII and Title VI jurisprudence, since neither provides adequate protection or relief to students who bring Title IX claims against an institution for sexual harassment by a teacher.

A. Title VII and Its Application to Title IX Claims

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... sex." Because the proscribed conduct is identical to that in Title IX, and a greater amount of case law involving sexual discrimination exists under Title VII than Title VI, courts frequently have applied Title VII standards when evaluating institutional liability under Title IX.

Pub. Sch., 917 F. Supp. 1423, 1427 (E.D. Mo. 1996) ("This Court, guided by the Supreme Court's Franklin decision interpreting Title IX, holds that intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior..."); Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993) (contending that no guidance exists on question of whether to use substantive case law under Title VII for Title IX claim brought by student because Supreme Court failed to address issue in Franklin); see also Ward v. Johns Hopkins Univ., 861 F. Supp. 367, 374 n.5 (D. Md. 1994) (noting that since intentional discrimination was made out in Franklin, Court did not address whether new-or-should-have-known standard of Title VII or higher intentional standard of Title VI should apply); Melzheimer et al., supra note 41, at 538-39 (stating that "since Franklin, development of Title IX substantive law has been confined to the lower courts. In these recent cases, the courts have split regarding the applicability of Title VII principles to Title IX claims... ").

54 North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)); see Kadiki, 892 F. Supp. at 754 (arguing that Title IX should be interpreted broadly); see also Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993) ("[T]he statute's heart is a broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions.").


56 See Kinman v. Omaha Pub. Sch. Dist., No. 95-2809, 1996 WL 478853, at *6 (8th Cir. Aug. 26, 1996) (holding that Title VII's institutional liability standards should apply "to hostile environment sexual harassment cases involving a teacher's harassment of a student"); Preston v. Virginia ex rel. New River Community College, 31 F.3d 203, 207 (4th Cir. 1994) (noting that Title VII standards and judicial interpretation "provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX"); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir.) ("Because Title VII prohibits the identical conduct prohibited by Title IX, ... we regard it as the most appropriate analogue when defining Title IX's
Caution must be exercised, however, when embracing Title VII in its full scope as a guide for Title IX because the workplace and school contexts differ so drastically. Furthermore, at times the standards under Title VII have not been coherent or well thought out.\textsuperscript{57}

1. **Standards for Employer Liability Under Title VII**

The standard for employer liability depends upon whether the proffered claim constitutes quid pro quo harassment or creation of a hostile work environment. Generally, while the employer is vicariously liable for quid pro quo harassment, he is liable for a hostile environment claim only if he knew or should have known of the harassment and failed to take prompt and appropriate remedial action.\textsuperscript{58}

Quid pro quo harassment occurs when a "supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply."\textsuperscript{59} Agency principles are used in such an instance to impute liability to the employer, regardless of whether the employer

\textsuperscript{57} See infra Part I.A.3.e.

\textsuperscript{58} See Henson v. City of Dundee, 682 F.2d 897, 905, 909 (11th Cir. 1982) (noting that strict liability standard and agency law are proper for quid pro quo harassment by supervisor, whereas knew-or-should-have-known standard is appropriate for hostile environment harassment); Sarah E. Burns, Issues in Workplace Sexual Harassment Law and Related Social Science Research, J. Soc. Issues, Spring 1995, at 193, 203-04 ("[P]revailing rule is that an employer is liable for the acts of its agents when they were acting within the scope of their authority; accordingly, where a supervisor uses his supervisory power to make a sexual demand on someone under his authority, the employer is liable. Where the conduct did not directly involve the abuse of authority, the employer may be liable for the acts of its employees (supervisory and nonsupervisory) . . . where the employer knew or should have known of the conduct and failed to take prompt and effective remedial action." (citation omitted)). But see Baker, supra note 23, at 286-87 (noting that EEOC Guidelines state that employer is strictly liable for both quid pro quo and hostile environment harassment when harasser is supervisor).

\textsuperscript{59} Lipsett, 864 F.2d at 897; see Henson, 682 F.2d at 909 ("The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this
had knowledge of the harassment. Such direct liability is very close to strict liability: "[T]he employer cannot find shelter in the claim that it neither had notice of, or approved of, the unlawful conduct." Under a hostile environment claim, however, imputing knowledge is not the general rule. Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." A hostile environment is created when the harassing conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The knew-or-should-have-known standard governs such Title VII claims. The employer

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60 See Henson, 682 F.2d at 910 ("Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer, when he makes decisions, his conduct can fairly be imputed to the source of his authority."). Since it is "real people, rather than an institutional employer [who] may condition employment benefits on submission to sexual favors" and it is the employer who delegates authority to a person allowing him to condition such benefits, "courts uniformly hold employers strictly liable for quid pro quo harassment." Frederick J. Lewis & Thomas L. Henderson, Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard, 25 U. Mem. L. Rev. 667, 669 (1995).

61 Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1559 (11th Cir. 1987). Notice is not at issue because the employee's acts are imputed directly to the employer. See id. at 1560 n.10; see also Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431-32 (7th Cir. 1995) (While Judge Posner states that "an employer is not strictly liable ... unless, perhaps, the harassment takes the form ... of an abuse of authority [and that] ... [i]n such cases, a number of courts treat the supervisor as the employer," he also notes that neither Supreme Court nor Seventh Circuit has decided whether this standard is correct.); Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir.) ("Because the quid pro quo harasser ... wields the employer's authority to alter the terms and conditions of employment—either actually or apparently— the law imposes strict liability on the employer."). Bernstein, supra note 23, at 1236 (asserting that courts have agreed with EEOC that corporate employers could be vicariously liable for harassment of subordinates by supervisors).

Although the Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), rejected the notion that "employers are always automatically liable for sexual harassment by their supervisors," the Court "decline[d] the parties' invitation to issue a definitive rule on employer liability, but [agreed] that Congress wanted courts to look to agency principles for guidance in this area." Id. at 72. By the same token, the Court expounded that the "absence of notice to an employer does not necessarily insulate that employer from liability." Id. The court in Lipsett surmised that since Meritor explicitly dealt with a hostile environment claim, it left the absolute liability standard for quid pro quo harassment intact. See Lipsett, 864 F.2d at 901.

62 See, e.g., Henson, 682 F.2d at 905 n.10 (noting that treatment of respondent superior for offensive work environment differs from situation where tangible job detriment results from harassing conduct); id. at 910 (noting that "in the work environment case the plaintiff must prove that higher management knew or should have known of the sexual harassment").

63 Meritor, 477 U.S. at 65.

will not be liable if he was unaware of the supervisor's harassing conduct. In addition, even if the employer was aware (or is deemed to have been aware) of the harassment, as long as he took prompt and reasonable action against it, he escapes liability.\(^{65}\) What constitutes "prompt and reasonable" is a question of fact.\(^{66}\) Although some courts refer to this standard as respondeat superior, Judge Posner asserts that while respondeat superior is a form of strict liability, the standard used for creating a hostile environment under Title VII is simply negligence.\(^{67}\)

While the knew-or-should-have-known standard is currently the rule in a majority of courts, several other courts have determined that it is not the best standard for adjudicating hostile environment claims. Since the Supreme Court "left those waters unchartered" in *Meritex Savings Bank v. Vinson* by failing to provide a definitive employer liability standard for supervisor-created hostile work environments, courts have applied "[a]t least six different standards" in assessing

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\(^{65}\) See *Henson*, 682 F.2d at 910 n.20 ("Under the rule in this case, employer responsibility for the acts of a supervisor in creating an offensive environment is coextensive with its liability for the acts of an employee."); see also Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989) ("[A]n employer is liable for one employee's sexual harassment of another worker if the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action." (emphasis omitted)), aff'd in part, rev'd in part, 900 F.2d 27 (1990) (en banc) (per curiam); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (noting that under knew-or-should-have-known standard, employer must do more than demonstrate existence of policy against harassment to avoid liability).

\(^{66}\) See *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (stating that "[t]he employer acts unreasonably either if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring," and that effectiveness of action taken is question of fact).

\(^{67}\) See id. ("The problem is merely a semantic one; the standard has been mislabeled. . . . It is a negligence standard that closely resembles the 'fellow servant' rule, from the era when industrial accidents were governed by negligence rather than workers' compensation law." (citations omitted)); see also Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431-32 (7th Cir. 1995) (Posner, J.) (stating that "it is clear, the criterion for when an employer is liable for sexual harassment is negligence, just as under the old common law of industrial accidents"); *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1009 (7th Cir. 1994) (noting that negligence standard is appropriate for hostile environment claim in context of coworker harassment); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 & n.5 (10th Cir. 1990) (contending that knew-or-should-have-known standard is negligence standard, which is also standard of Restatement (Second) of Agency § 219(2)(b), and has been mislabeled respondeat superior).
such claims. These range from the knew-or-should-have-known standard to strict liability. Given the current situation, an employer’s liability “depends as much on the fortuitous, but otherwise irrelevant, geographic location of the alleged harassment as on the employer’s good faith efforts to prevent and remedy such behavior.”

The Second and Tenth Circuits, for instance, have rejected the knew-or-should-have-known standard, preferring application of agency principles to hostile environments created by supervisors.

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68 Lewis & Henderson, supra note 60, at 670.
69 See id. Frederick J. Lewis and Thomas L. Henderson did a survey of the various forms of liability applied by each circuit. They found that the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits use the knew-or-should-have-known standard when a supervisor creates a hostile environment. See id. at 675. However, while the First, Fourth, Fifth, and Eighth Circuits generally apply this standard “across the board,” for example, the Second, Tenth, and Eleventh Circuits do not strictly adhere to it. See id. at 676. Instead, they may employ the more stringent standard based on agency law—namely, § 219(2)(d)—which mandates absolute liability for situations in which the supervisor is “found to have invoked his authority while perpetrating the harassment.”

A strict liability standard is employed “primarily” by the Seventh Circuit. Under this rule, the employer will be strictly liable for hostile environments created by supervisors who “possess[ ] the authority to hire, fire, or promote.” Id. at 633.

Another standard, labeled the “scope of employment” theory, has been applied by the Sixth Circuit. Under this theory, a court determines whether the harassment “fell within the scope of employment” by examining factors such as when and where the harassment occurred and whether it was foreseeable. The court then examines[s] the amount of authority that the supervisor possessed over the plaintiff.” Id. at 631. This examination mirrors that under strict liability in that if the supervisor has the authority to hire or fire the plaintiff, the employer will be held liable. However, it is not as stringent because the employer may avoid liability if it is found to have “adequately and effectively” responded upon notice of the harassment. Id. at 681-82.

70 Id. at 670.
71 In Karibian v. Columbia University, 14 F.3d 773 (2d Cir.), cert. denied, 114 S. Ct. 2693 (1994), the court stated that since plaintiff’s supervisor had (at least apparent) authority to “alter [her] work schedule and assignments, and to give her promotions and raises (subject to approval),” id. at 775, Columbia University could not escape liability by claiming it did not have notice of the hostile environment created by one of its supervisors, see id. at 780. The court did make a distinction concerning “low-level” supervisors. In those cases, where such a supervisor “does not rely on his supervisory authority to carry out the harassment,” the knew-or-should-have-known standard and not § 219(2)(d) of the Restatement (Second) of Agency applies. Id. For an in-depth discussion of Restatement (Second) of Agency § 219 (1957), see infra Part II.C.1.

72 In Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987), the court contended that “lack of notice” is not an absolute defense. Id. at 1418. The court, guided by § 219(2) in its assessment of notice and employer liability, remanded the hostile environment claim. Unfortunately, the court did not reach the issue on remand since the plaintiff failed to prove the existence of a hostile environment. See Hicks v. Gates Rubber Co., 928 F.2d 966, 973 (10th Cir. 1991) (finding it “unnecessary to [decide] whether Gates is liable under agency principles since Hicks failed to prove her sexual harassment claim”).

The Tenth Circuit did address the question of employer liability in Hirschfeld v. New Mexico Corrections Department, 916 F.2d 572 (10th Cir. 1990). While the court identified § 219(2)(d) as a possible basis for employer liability for which notice is not required, it found for the defendant, holding that because there was no evidence that the harasser had
Both circuits have found guidance from section 219(2)(d) of the Restatement (Second) of Agency in their assessments of employer liability. Under this section, notice to the employer (or the employer's knowledge) of the harassing conduct is not required as a prerequisite for liability. The Second Circuit, in relying on section 219(2)(d), stated that an employer is liable if the harassing supervisor "capitalize[s] upon his authority over [a plaintiff's] employment to force her to endure" sexually harassing behavior and concluded "[i]t would be a jarring anomaly to hold that conduct which always renders an employer liable under a quid pro quo theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatory abusive work environment." As noted above, the Tenth and Second Circuits' approach of using agency law for hostile environment claims under Title VII is currently in the minority.

2. Inconsistent Adoption of Title VII Analysis by Courts Assessing Title IX Claims

Numerous courts interpret institutional liability claims under the employer liability standards of Title VII. However, the Title VII standards are themselves unclear, and jurisdictions conform to conflicting standards. It is not surprising, therefore, that a coherent standard has failed to emerge under Title IX jurisprudence.

The inconsistent application of Title VII standards is illustrated by Hastings v. Hancock, where the district court claimed that the "well-defined" law of the Tenth Circuit required the use of agency principles to assess hostile environment claims. In addressing the liability of a beauty school for sexually harassing conduct by its director, the court adopted the use of section 219(2)(d) as applied in Hirschfeld v. New Mexico Corrections Department. The Hirschfeld
court, however, noted that "it would be too broad a reading of section 219(2)(d) ... to hold that an employee was aided in accomplishing the [sexual harassment] in that he would not have been there but for his job." Nonetheless, the Hastings court, in denying defendant's motion for summary judgment, concluded the relationship of the director with the school went beyond "mere existence of his job." The school owners' knowledge played no part in the Hastings court's analysis. The owners of the school did not, in fact, "know" of the director's conduct, and there were no allegations that they "should have, in the exercise of reasonable care, known of the alleged acts." Many other courts applying Title VII employer liability would have granted summary judgment for the defendants based on this information alone.

The disarray in the use of Title VII by courts developing substantive law under Title IX is increased by courts that find the application of Title VII inappropriate. The lack of consensus, especially in the area of hostile environment claims, lends credence to the belief that Title VII is deficient as the sole guide for establishing institutional liability under Title IX.

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80 Hastings, 842 F. Supp. at 1319-20 (citing Hirschfeld, 916 F.2d at 579).
81 Id. at 1320.
82 Id. at 1319.
83 See, e.g., Deborah O ex rel. Thomas O v. Lake Cent. Sch. Corp., No. 94-3804, 1995 WL 431414, at *4-*5 (7th Cir. July 21, 1995) (unpublished disposition) (holding school not liable for sexual acts between 17-year-old student and band director in absence of evidence proving school knew or should have known of alleged harassment; once school received notice, it properly investigated); Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 752-55 (E.D. Va. 1995) (stating in student's claim of sexual harassment by professor that, as in Title VII, for hostile environment claims plaintiff must show defendant knew or should have known and failed to take appropriate steps, but that strict liability is proper for quid pro quo claims since professor is analogous to supervisor); see also Ward v. Johns Hopkins Univ., 861 F. Supp. 367, 374-77 (D. Md. 1994) (noting that Tenth Circuit uses Title VII for assessing Title IX claims, stating that plaintiff female employees must show constructive or actual knowledge by university to impute liability, and noting that question of whether university "knew or should have known" is one of fact).
84 See Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1428 (E.D. Mo. 1996) (contending that "strict adherence to the Title VII standards" leads to "illogical" results in context of teacher-student sexual harassment in high school); Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 950 (W.D. Tex. 1995) (stating that Fifth Circuit directs that Title IX claims be analyzed under Title VI rather than Title VII); see also Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988) (stating in case in which plaintiff was both employee and student that court's "present holding—that the Title VII standard ... should apply to claims of sex discrimination arising under Title IX—is limited to the context of employment discrimination").
3. Factors Rendering the Employer Liability Standard Under Title VII an Inappropriate Institutional Liability Standard Under Title IX

The differences between Title IX and Title VII outweigh the similarity such that care should be taken when applying the substantive law of one to define the legal standards of the other. Although Title VII is a logical choice for developing substantive law under Title IX based on the similarity of proscribed conduct and the substantial amount of available Title VII case law, there are great differences in context between the situation of a supervisor harassing an employee and a teacher harassing a student. There are six reasons for requiring a stricter standard of liability for institutions in the educational context than that required for employers in the workplace: 1) the unique nature of the teacher-student relationship; 2) the function and importance of a discrimination-free learning environment; 3) the compulsory attendance requirement imposed on elementary through high school students; 4) the limited protection for students and the lack of incentives for schools resulting from adoption of Title VII's knew-or-should-have-known standard; 5) the uneven development of Title VII jurisprudence; and 6) the differences in scope between Title VII and Title IX.

This does not mean that Title VII is entirely inapplicable. For instance, the use of agency principles for assessing employer liability under Title VII is appealing. Although similar principles may be desirable under Title IX, the employment of such principles need not be


While the Ninth Circuit has yet to establish binding precedent in the area of sexual harassment claims under Title IX, the Supreme Court has provided some guidance . . . that this Court must follow . . . .

. . . .

While not explicitly addressing the relationship between Title VII analysis and Title IX . . . the Supreme Court . . . turned to Title VII law to explain its ruling on Franklin's harassment claim . . . .

Id. at 1291-92.

86 See Baker, supra note 23, at 290 (contending that "[d]ifferences between the educational and employment environments justify holding educational institutions to higher standards than employers").

87 See Hirschfeld v. New Mexico Corrections Dept', 916 F.2d 572, 579-80 (10th Cir. 1990) (using § 219(2)(d) of Restatement (Second) of Agency to interpret employer liability under Title VII); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418 (10th Cir. 1987) (noting that lack of actual or constructive knowledge is not absolute defense under § 219(2)(d)); Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1559 (11th Cir. 1987) (discussing and adopting interpretation of Title VII employer liability as direct liability); Henson v. City of Dundee, 682 F.2d 897, 910 n.21 (11th Cir. 1982) (stating that while common law agency rules are not always applicable to Title VII, they are appropriate for quid pro quo harassment).
identical. This Note argues that Title IX jurisprudence should borrow the agency analysis used in Title VII for quid pro quo harassment and extend that analysis to hostile environment claims\(^8\) to create a universal and student-protective standard of institutional liability under Title IX.

a. *Difference in Relationship.* "The very fact that Title IX deals with children in the classroom instead of adults in the workplace is perhaps the most compelling reason for a different analysis."\(^9\) The teacher-student relationship involves a "kind of trust and dependency" that is not characteristic of the employer-employee relationship.\(^9\) The employer-employee relationship has "no special legal connotation outside the area of contracts, while the relationship between school authorities and a student is 'custodial and tutelary.'"\(^9\) The teacher or school is permitted to supervise and control a student in ways an employer could not supervise or control an adult employee. Therefore, the principles protecting "adult employees from harassment are not logically or easily transferable" to those that must protect students from sexual harassment in school.\(^9\)

One commentator has noted that a difference in the teacher-student relationship as compared to the employer-employee relationship can be illustrated by a "flow of services" argument.\(^9\) While teachers provide services to students for which the students (or their parents) pay, either through tuition or taxes, the "flow of services" runs in the opposite direction in the employment context.\(^9\) The significance of this difference is in the way it "shapes" the purpose of each relationship. A teacher's primary goal is to educate the student, whereas the employer's goal is to succeed in his business.\(^9\) Sexual harassment in schools "fundamentally frustrates and interferes with the purpose of the teacher-student relationship."\(^9\) Although sexual harassment in the workplace does interfere with an employee's per-

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\(^8\) See generally infra Part II.
\(^9\) Schneider, supra note 23, at 529 n.19, 552 (describing teacher-student relationship as that of fiduciary and beneficiary).
\(^9\) Id.
\(^9\) Baker, supra note 23, at 290.
\(^9\) See id. (noting that sexual harassment in this context "defeats the purpose of the educational environment").
\(^9\) See id. at 290-91.
\(^9\) Id. at 291.
formance, it does not frustrate the very purpose of the employer-employee relationship.\textsuperscript{97}

Due to the special teacher-student relationship, which is critical to the quality of education students receive, "zealous protection" is needed to ensure against sexual discrimination in the educational environment.\textsuperscript{98} Furthermore, differences in age and experience are generally more pronounced between students and teachers than between employees and employers. The resulting unequal balance of power "places students in a more vulnerable position than employees."\textsuperscript{99} Such factors require imposing a higher standard of conduct upon the teacher and the school regarding their relations with the student than that imposed on an employer.\textsuperscript{100}

\textit{b. The School Environment.} The function and importance of the school environment differs from that of the workplace. In the school context, an environment free from sexual harassment is essential for the student to achieve her full intellectual and social development and for the institution to perform its duty as educator and guardian.\textsuperscript{101}

This is not to diminish the desire and need for a discrimination-free workplace. However, while an employer makes no pretenses that he is obligated to serve as the employee's guardian,

"[p]arents . . . and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that [the school] will undertake the role of guardian that parents might not otherwise relinquish, even temporarily."\textsuperscript{102}

\textsuperscript{97} See id. Baker also notes that the hostile environment theory "is particularly appropriate in an academic setting where a nondiscriminatory environment is essential to intellectual growth." Id.


\textsuperscript{99} Baker, supra note 23, at 292.

\textsuperscript{100} See Patricia H., 830 F. Supp. at 1293 (calling for higher standard in school context due to difference in relationship).

\textsuperscript{101} See Schneider, supra note 23, at 551 (urging that "[a] sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program").

\textsuperscript{102} Patricia H., 830 F. Supp. at 1293 n.6 (quoting Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992), cert. denied, 506 U.S. 1087 (1993)).
The employer has neither an identical duty to supervise and care for the employee nor custody over the employee. A school, in contrast, is given the responsibility to look after students who are minors and thus assumes a higher duty of supervision and care than the employer. The Fifth Circuit, in fact, has held that a student has a "firmly established constitutional right . . . to be free from sexual molestation by a state-employed schoolteacher"; this right places on school officials, at the very least, a duty to protect students from a teacher's sexually harassing conduct of which they are or should be aware. The difference in function between schools and employers justifies requiring a higher standard of liability to be placed on a school to ensure a learning environment free of sexual harassment.

c. Compulsory Attendance. Children do not have as much choice regarding their education as adults have regarding their employment. In most states, students between the ages of seven and sixteen are required by law to attend school. This requirement "remove[s] . . . children from the protection of their parents." As noted above, this removal places the responsibility on the school to act as guardian. As a result of compulsory education, a student may not be in a position to escape harassment due to a shortage or an absence of alternatives regarding which school she may attend. Even if she has the opportunity to change schools, she may lack the resources to take advantage of such an alternative. In addition, uprooting a sexually harassed student from her friends and school is undesirable given the psychological effects it may produce and is an

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103 See Baker, supra note 23, at 291 (noting that "[c]ourts have held teachers and school districts liable for physical injury to children resulting from negligent supervision," and that employers do not have "the same duty to supervise").
104 Doe, 975 F.2d at 138.
105 See id. at 147. In Doe, plaintiff claimed her biology teacher/coach sexually molested her during her freshman and sophomore years in high school. See id. at 141. Even though administrators were presented with evidence of the situation, they refused to take action because the defendant did not complain of the harassment until her sophomore year and because at first she had denied its existence. See id. at 139-41. The court explained that the duty on officials to take action arises from the compulsory attendance statutes since they take children from the arms of their parents and place them in the care of the school. See id. at 144 n.6.
106 See Sherer, supra note 23, at 2156-57 (noting that while choice to be employed is largely voluntary, education is mandatory resulting in greater restriction on mobility of student).
107 See Baker, supra note 23, at 292.
108 Melsheimer et al., supra note 41, at 543.
109 See Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1428 (E.D. Mo. 1996) ("[T]he fact that students are required to attend certain levels of school places a high duty on public school districts to protect the interests of the children.").
ineffective method of combating the problem of sexual harassment in schools.\textsuperscript{110}

d. Effect of Title VII's Knew-or-Should-Have-Known Standard. While the imputed liability standard under Title VII for quid pro quo harassment may provide the protection desired in the school context, Title VII's knew-or-should-have-known standard for hostile environment claims does not. The reason for requiring different standards for quid pro quo and hostile environment harassment under Title VII does not transfer appropriately to an educational setting. Adoption of the knew-or-should-have-known standard in the educational context only serves to deprive students of the protection deserved and intended by Title IX by allowing schools to ignore the problem so as to escape liability, thereby depriving schools of any incentive to tackle sexual harassment effectively and proactively.

The Eleventh Circuit in \textit{Henson v. City of Dundee}\textsuperscript{111} explained the rationale for the difference in treatment of hostile work environment claims by stating that the "acts of supervisors, coworkers, or even strangers to the workplace" equally can render a work environment offensive; since the "capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual," creation of a hostile environment cannot be fairly imputed to the employer.\textsuperscript{112} This is not so in the context of teacher-student harassment. The capacity of a teacher to create a hostile school environment necessarily stems from the authority the school confers upon him and the power dynamics inherent in the relationship between teacher and student.\textsuperscript{113} Therefore, when determining the liability for a hostile environment created by a teacher, both the unique teacher-student relationship and the function of the educational environment must be considered.

As a practical matter, given that the "very nature of sexually abusive conduct is that it occurs or at least is attempted under cover of

\textsuperscript{110} A high school student could even be forced to leave school altogether if Title IX does not adequately protect against sexual harassment by a teacher. For example, in Deborah O ex rel. Thomas O v. Lake Central School Corp., No. 94-3804, 1995 WL 431414, at *1 (7th Cir. July 21, 1995) (unpublished disposition), a 17-year-old high school student left school and completed her education through homebound instruction and correspondence courses because of alleged sexual misconduct by her band director.

\textsuperscript{111} 682 F.2d 897 (11th Cir. 1982).

\textsuperscript{112} Id. at 910. For a contrary view regarding hostile environments created by supervisors under Title VII, see supra notes 68-74 and accompanying text.

\textsuperscript{113} See Bolon, 917 F. Supp. at 1429 (stating that "teachers use the authority vested in them by the school to further their illegal conduct" whether they create hostile environments or engage in quid pro quo harassment); cf. supra text accompanying note 74.
secrecy, . . . [a] school district or its officials will thus hardly ever ‘know’ of the conduct and will not likely be in a position to ‘should have known’”\textsuperscript{114} unless the abused student herself informs the school of the harassment. She may be unwilling to do so for various reasons. A student, due to a lack of maturity, may not be as likely as an adult employee to provide notice of any sexually abusive conduct. She may be embarrassed or fear that she did something wrong and so “deserved” the sexual abuse. In addition, students in elementary through high schools are vulnerable to peer pressure and are sensitive to how they are perceived by their peers. If a student did reveal her experience and it became public, she is likely to face “stigmatization and reprisals” from her fellow students.\textsuperscript{115} Moreover, the “fiduciary type of role that a teacher plays may increase the student’s reluctance to go public.”\textsuperscript{116} Young students, who have been taught to respect their teachers, may feel especially inhibited from revealing the occurrence of misconduct for fear of disobeying or disappointing their teachers and/or parents.\textsuperscript{117}

Furthermore, under a knew-or-should-have-known standard, the school—whether it has received notice or not—may refuse to acknowledge the existence of sexual harassment and claim that it did not know of the harassment, thus insulating itself from liability.\textsuperscript{118} The rule provides little incentive for the school to actively investigate signs of potential harassment because doing so would indicate some level of knowledge, thereby increasing the likelihood of a possible damage judgment against the school. For this reason, conscientious school officials may be deterred from involving themselves. Such a liability rule ultimately works to relieve the school of its responsibility for ensuring a discrimination-free environment, and, therefore, its application would frustrate the intended force of Title IX.\textsuperscript{119}

\textsuperscript{114} Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 953 (W.D. Tex. 1995); see Bolon, 917 F. Supp. at 1429 (noting that Title VII’s knew-or-should-have-known standard is “particularly unworkable” because sexual misconduct by teachers “will almost always occur secretly”).

\textsuperscript{115} Baker, supra note 23, at 281.

\textsuperscript{116} Schneider, supra note 23, at 529 n.19.

\textsuperscript{117} See Leija, 887 F. Supp. at 954 (addressing argument that young students, “taught to respect their teachers and follow their teachers’ requests, often do not know what to do when abuse occurs, no matter how many group counseling sessions a school might conduct on the subject”).

\textsuperscript{118} See id. at 953 (noting that knew-or-should-have-known standard provides incentive for school to “close[ ] its eyes to the problem”); see also Bolon, 917 F. Supp. at 1429 (contending that it is “extremely difficult” to “determin[e] what and when a school district ‘knows’ under the ‘knew or should have known’ standard”).

\textsuperscript{119} See Leija, 887 F. Supp. at 952 (stating that public and Congress have “zero tolerance” for sexual abuse of young girls, so Title IX must “reach[ ] this conduct with the full weight of its purpose”).
One could even argue that Title IX places upon schools a “non-delegable duty of nondiscrimination”\(^\text{120}\) regarding situations in which teachers sexually harass elementary through high school students.\(^\text{121}\) According to this theory, a school exposes itself to liability for a teacher’s discriminatory acts because it \textit{cannot} be relieved of the responsibility of ensuring a discrimination-free classroom by granting such authority to teachers. Inquiry into whether a school knew or should have known of the abuse is irrelevant. Regardless of the type of claim alleged—quid pro quo or hostile environment—liability for a teacher’s misconduct is properly imputed to the school.\(^\text{122}\)

\textbf{e. Development of Title VII Jurisprudence.} In addition to the negative effect that Title VII’s knew-or-should-have-known standard as applied to hostile environment claims may wield on institutional liability—that is, allowing a school to escape liability simply by averting its eyes to the problem—blindly riding the coattails of Title VII jurisprudence would be unwise because the uneven development of Title VII jurisprudence fails to address the special concerns that exist in the educational context.\(^\text{123}\) Two examples illustrating the problems with applying Title VII jurisprudence to Title IX contexts are its definition of “unwelcome” sexual harassment and the question of notice for hostile environment claims.

First, sexual harassment under Title VII is defined in pertinent part as “\textit{[u]nwelcome} sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”\(^\text{124}\) A plaintiff

\(^{120}\) Schneider, supra note 23, at 567.

\(^{121}\) Cf. id. at 567-68 (noting that argument can be made for imposing nondelegable duty on universities).

\(^{122}\) For discussion of nondelegable duty, see infra note 187.

\(^{123}\) See Melsheimer et al., supra note 41, at 542 (“While ... courts refer to the substantive law of Title VII for analysis of Title IX claims, unsettled Title VII issues may also hinder the development of Title IX substantive law.”); see also Bustos v. Illinois Inst. of Cosmetology, Inc., No. 93CS980, 1994 WL 710830, at *5 n.2 (N.D. Ill. Dec. 15, 1994) (“The issue of personal liability under Title VII is far from settled in [the Seventh Circuit].”); Dickinson v. McCarty, No. 93-8210-CIV. 1994 WL 706979, at *5 (S.D. Fla. Aug. 2, 1994) (noting that law of individual liability under Title VII is in “state of flux”); Burns, supra note 58, at 200-01 (noting that legal standard of proof, while “accepted without much controversy” for quid pro quo claims, is “less clear for the hostile work environment claim”).

Judge Posner notes that while “a number of courts treat the supervisor as the employer” in cases of quid pro quo harassment, and thus hold the employer strictly liable, “[n]either the Supreme Court nor [the Seventh Circuit] has had occasion to decide the question.” Baskerville v. Culligan Int’l Co., 50 F.3d 428, 431-32 (7th Cir. 1995). If Title VII evolves as the “guide” for Title IX, and the Supreme Court decides, for instance, that the current employer liability standard for quid pro quo harassment is incorrect, Title IX would also be bound by that ruling. Tailoring a standard suited for Title IX would prevent such dependence on the uncertain development of Title VII.

must plead the element of "unwelcomeness" in order to make out a sexual harassment claim. This element is not desirable as part of the definition of sexual harassment under Title IX, particularly in the elementary through high school context. If Title VII principles are adopted in the Title IX context, unwelcomeness and the problems it presents tag along.

Any definition under Title IX of sexual harassment must "consider the unique problems posed by the educational environment." This Note takes the position that in the context of elementary school through high school, any sexual relations between a teacher and student is sexual harassment per se and a violation of the teacher's professional responsibility. As one commentator has noted, "unwelcomeness was included in the definition of workplace sexual...

125 See Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (noting that "[i]n order to constitute harassment, this conduct must be unwelcome").

126 It is even questionable whether unwelcomeness should be part of the Title VII definition of sexual harassment. See Baker, supra note 23, at 295 (raising issue that "the appropriateness of requiring a complaining employee to prove the unwelcomeness of sexual conduct is open to dispute"). Such an inquiry, however, is beyond the scope of this Note.

127 See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (noting that unwelcomeness inquiry "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact"); Lipsett v. University of P.R., 864 F.2d 881, 898 (1st Cir. 1988) (noting that Supreme Court's directive in Meritor that fact finder must hold advances to be unwelcome "leaves open the question of whose perspective—that of the harasser or that of the victim—should be used in assessing 'unwelcomeness'"); Burns, supra note 58, at 196 (contending that unwelcomeness requirement is criticized as "having the effect of putting the victim on trial, much as a consent defense in rape cases does").

128 For example, in Deborah O ex rel. Thomas O v. Lake Central School Corp., No. 94-3804, 1995 WL 431414, at *1 (7th Cir. July 21, 1995) (unpublished disposition), Deborah, a 17-year-old student, claimed she was "stalked, sexually harassed, and raped" by her band director. The court, in affirming summary judgment for defendants below, found that not only did Deborah fail to prove the school knew or should have known of the harassment, but also that the question does not arise unless she can also prove that the stalking, sexual harassment, and rape alleged were unwanted. See id. at *4. One commentator argues that the "asymmetry of power between faculty members and their minor students" compels against forcing a student to prove that the advances were unwelcome. Baker, supra note 23, at 295.

129 Schneider, supra note 23, at 534.

130 The controversy regarding teacher-student sex was the focus of a recent broadcast of the television magazine Day & Date. As discussed in the broadcast, in some states, Nevada for instance, sexual relations between a teacher and student are not considered illegal due to the age of consent. Becky Mouser, a 17-year-old high school student, had sex with her basketball coach because she was "too afraid to tell [him] no." The harassing teacher admitted he had violated his duty of professional responsibility toward Becky. However, "legally the...school board [did not] have to do anything [about the situation]. In Nevada, it is not a crime for a teacher to have sex with a student if the student is 16." Despite Becky's mother's pleadings for justice, the school district refused to take any action whatsoever. This Note agrees with "parents in New York and Nevada and other states [who] want tougher laws making teacher-student sex a crime regardless of the student's age." Day & Date (CBS television broadcast, Jan. 12, 1996) (on file with author).
harassment on the assumption that discrimination law was not intended to require an employer to police the truly consensual social relations of its employees." 131 This rationale is inapplicable to the school context since any sexual relations, consensual or not, are inappropriate in the teacher-student relationship. 132

Moreover, requiring proof that the conduct was "unwelcome" assumes that sexual conduct between students and teachers is welcome unless and until an objection is made. 133 This assumption infuses the academic environment with a power relationship that should not be present in such a setting and is not conducive to creating an environment free of sexual coercion. 134

Second, whether notice 135 should be required under Title VII hostile environment claims is an open question. While the general rule appears to be that notice is a requirement, the Supreme Court has yet to decide the issue. 136 Notice was first required in the context of sexual harassment among coworkers. 137 As discussed earlier in this section, the expansion of notice to hostile environments created by supervisors does not properly translate to teacher-student sexual harassment. 138

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131 Burns, supra note 58, at 196.
132 Such a rule protects both student and teacher since it puts all parties on notice that any sexual conduct constitutes harassment under Title IX. The student is protected because such a definition makes it easier to prevail on a Title IX claim, and the teacher is protected from a student who has "consensual sex" but later cries harassment. For a different approach, see Baker, supra note 23, at 290 (suggesting that, at very least, institutions and not students should have burden of proving welcomeness of conduct and that there be strong presumption against "appropriateness of sexual conduct between students and teachers").
133 See id. at 295.
134 See id. Furthermore, the unwelcomeness requirement has often been criticized for being based on an "outdated stereotype that women misuse legal protections against sexual invasions in order to accuse the innocent." Id. at 294.
135 The notice concept is nearly identical to "knowledge" as it has been applied in this context. The question of whether the institution had "notice" (actual or constructive) of the sexual harassment is coextensive with the question of whether it knew or should have known of the harassing conduct.
136 See supra note 61 & notes 62-74 and accompanying text; see also Baker, supra note 23, at 288 (observing that while most courts adopt requirement of knowledge, "[t]here is no consensus on the standard of employer liability for hostile environment harassment by a supervisor").
137 See Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (noting that under "fellow servant" rule of 1800s, "employer, provided it has used due care in hiring the offending employee in the first place, is liable for that employee's torts against a coworker only if, knowing or having reason to know of the misconduct, the employer unreasonably fails to take appropriate corrective action").
138 See supra notes 111-19 and accompanying text.
f. Scope of Title VII and Title IX. Differences in scope between the two statutes compel distinct formulations of liability standards. Therefore, while Title VII may provide appropriate substantive principles to use in employment discrimination cases under Title IX, it may not be suited for claims of teacher-student harassment. The fact that institutions must establish a grievance procedure to deal with complaints of sexual discrimination under Title IX, and that no such requirement exists under Title VII, for example, "suggest[s] that Congress perceived a need for broader protection against discriminatory behavior in the academic context than in the employment context." Judge Furgeson, in Leija v. Canutillo Independent School District, stated that the "real differences in language and scope between the two statutes... lead [the] court" to reject the Title VII reasoning of Meritor and impose strict liability on the school district for the sexual abuse of a second-grader by a teacher. While most courts have not been so bold as to develop a distinct standard for interpreting Title IX claims, some have opted to use Title VI as the choice du jour.

B. Title VI as an Interpretive Guide to Title IX

Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Although there is little substantive case law regarding institutional liability under Title VI, because Title IX was patterned after the statute and tracks its language, some courts have contended that Title VI analysis should be used to interpret certain types of Title IX

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139 See, e.g., Leija Order, No. EP-93-CA-478-F, slip op. at 2 (W.D. Tex. Sept. 6, 1995) (on file with author) (stating that "Title IX is broader in scope than Title VII because it covers students as well as employees"); Howard v. Board of Educ., 876 F. Supp. 959, 974 (N.D. Ill. 1995) (concluding that agency principles of Title VII are inapplicable to Title IX because language of Title IX fails to include "employer" or "agent"); cf. Mennone v. Gordon, 889 F. Supp. 53, 57 (D. Conn. 1995) (concluding that Title VII is inappropriate for determining proper defendants under Title IX due to differences between statutes).

140 See supra note 84.

141 See supra note 31 and accompanying text.

142 Schneider, supra note 23, at 545; see Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1428 (E.D. Mo. 1996) ("Unlike employers, school districts make express assurances to prohibit sex discrimination in exchange for the acceptance of federal funds.").


144 Id. at 954; see also Bolon, 917 F. Supp. at 1429 (following Leija's lead by adopting strict liability standard for teacher-student sexual harassment in high school context).

claims, such as gender discrimination and individual liability.\textsuperscript{146} However, a court has yet to employ the Title VI standard of institutional liability to a Title IX claim based on teacher-student sexual harassment.\textsuperscript{147} The following brief discussion of Title VI illustrates why such a possibility would frustrate the purposes of Title IX.

Title VI case law requires a standard that would provide even less relief to a sexually abused student than Title VII—a Title VI standard, in fact, would provide no relief to an abused student. In \textit{Guardians Ass'n v. Civil Service Commission of New York},\textsuperscript{148} the Supreme Court, in a plurality opinion, held that discriminatory intent on the part of the institution must be proved by a Title VI plaintiff in order to obtain damages.\textsuperscript{149} Thus, a sexually harassed student would have to prove that the school not only knew or should have known of the harassment, but also directly participated in or intended such conduct.\textsuperscript{150} As discussed in Part I.A.3, a school is unlikely to "know" or be found to be in a position where it "should have known" of the sexual harassment committed by a teacher.\textsuperscript{151} The probability of finding that a school actually directly participated in or intended such harassment is next to zero.

Even courts, such as the \textit{Leija} court, that apply Title VI to other claims under Title IX concede that this liability standard would lead to injustice and inadequate protection for students. In \textit{Leija}, Judge Furgereson rejected the plaintiff's desire to incorporate Title VII agency principles, stating that the Fifth Circuit "has held in clear language that Title IX is to be analyzed under Title VI... [and] not under Title VII,"\textsuperscript{152} but distinguished the case from \textit{Guardians Ass'n} to avoid conforming to the stricter standard. He found that the \textit{Guardians Ass'n} standards were not applicable because that case involved uninten-

\textsuperscript{146} See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979) (using Title VI analysis to imply right of action under Title IX because Title IX was patterned after Title VI and uses identical language and because both provide same mechanism for terminating federal funds of discriminating institutions); Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993) (affirming district court's application of Title VI standards to gender-based employment discrimination claim under Title IX); Bustos v. Illinois Inst. of Cosmetology, Inc., No. 93C5980, 1994 WL 710830, at *2 (N.D. Ill. Dec. 15, 1994) (applying Title VI standard to Title IX claim of individual liability).

\textsuperscript{147} See also Melsheimer et al., supra note 41, at 541-42 (contending that courts favor application of Title VII principles for adjudicating claims brought by students alleging sexual harassment by teachers).

\textsuperscript{148} 463 U.S. 582 (1983) (plurality opinion).

\textsuperscript{149} See id. at 610-11.


\textsuperscript{152} Id. at 950.
tional discrimination and the *Leija* claim was one involving intentional discrimination. Judge Furgeson went on to impute the intentional discrimination of the harasser to the school district, asserting that "unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative." Other courts choose to use Title VI for defining certain standards under Title IX and Title VII for defining others. In *Bustos v. Illinois Institute of Cosmetology, Inc.*, the court used Title VI to determine individual liability under Title IX but turned to Title VII to analyze the school's liability for the hostile environment claim. Given the differences between these two statutes and Title IX, they are imperfect models for assessing institutional liability when a teacher sexually harasses a student. A great impetus, therefore, exists to create a distinct and superior Title IX standard, tailored to the statute's unique needs and goals, which will free courts from having to choose among Title VI, Title VII, or some other standard and to defend their decisions with inconsistent and poorly supported rationales.

II

**Institutional Liability Based on Principles of Agency Law: A Superior Standard**

Common law agency principles provide a superior standard for institutional liability that is not based on either Title VII or Title VI. Even though the common law of agency developed for the protection of particular relationships having nothing to do with the teacher-student relationship, this Note argues that "context," not simply "circumstance," should open the door for the use of agency law in the federal sector in general and in Title IX cases in particular. Title VII adopted agency law because the circumstance of workplace harassment fit the relationship toward which agency principles were initially directed—master-servant, employer-employee. Given the structure of the relationships and the allocation of power and authority among stu-

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153 See *Leija Order*, No. EP-93-CA-478-F, slip op. at 5 (W.D. Tex. Sept. 6, 1995) (on file with author) (noting that "Guardians Ass'n is inapposite to this case").


155 See *Bustos v. Illinois Inst. of Cosmetology, Inc.*, No. 93C5980, 1994 WL 710830, at *2 (N.D. Ill. Dec. 15, 1994) (stating that "[a]lthough Title VII caselaw is helpful in determining the scope and nature of violations under Title IX," Title VI is appropriate for assessing individual liability under Title IX).


157 See id. at *2-*3.
dents, teachers, and educational institutions, Title IX provides a context under which agency analysis is at least as, if not more, applicable.

A. The Common Law of Agency and the Federal Sector

A "federal common law of agency" appears to be emerging. The Supreme Court in *Meritor Savings Bank v. Vinson* in effect acknowledged the existence of such a law. In addition, federal courts are recognizing the appropriateness of applying common law principles of agency to certain federal law claims.

In *American Society of Mechanical Engineers (ASME), Inc. v. Hydrolevel Corp.*, for instance, the Supreme Court held a nonprofit organization liable under the Sherman Act for the acts of its agents. The Court affirmed the Second Circuit, which "after surveying the law of agency and the policies underlying the antitrust laws... concluded that ASME could be held liable if its agents had acted within the scope of their apparent authority." The Court further confirmed that the theory of apparent authority "has long been the settled rule in the federal system," and that federal courts have imposed liability to principals for deeds of agents acting with apparent authority in a great variety of areas.

The development of agency law in the federal sector, however, is different from the "common law of agency" that has developed under state law. Federal public policies, such as antidiscrimination and others directed at achieving some social good, drive the development of "federal" agency law. These policies represent goals that Congress believed could or should be achieved through federal legislation and that agency reasoning works well to advance.

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159 See id. at 69-73 (agreeing with EEOC recommendation of drawing upon common law agency principles to assess employer liability under Title VII).
161 See id. at 558-59 (affirming that use of agency principles is consistent with purposes of antitrust laws).
162 Id. at 565.
163 According to the Restatement (Second) of Agency § 8 (1957), "[a]pparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."
164 *ASME*, 456 U.S. at 567.
165 See id. at 568 (citing, for example, Dark v. United States, 641 F.2d 805 (9th Cir. 1981) (federal tax liability); Holloway v. Hoverd, 536 F.2d 690 (6th Cir. 1976) (federal securities fraud); Kerbs v. Fall River Indus., Inc., 502 F.2d 731 (10th Cir. 1974) (same)).
166 The *ASME* Court found, for example, that the use of agency in the context of a Sherman Act violation advances Congress's goal of encouraging competition. See id. at 570, 573 n.11 (noting that apparent authority theory is consistent with congressional intent and "desire that the antitrust laws sweep broadly").
B. Why Apply Agency Law to Title IX Claims?

Title IX strives to eliminate sexual harassment by teachers in schools and to offer relief to sexually harassed students. Because of the special teacher-student relationship and the unique function of the school environment, for example, the current standards employed by courts fail to achieve Congress's mandate of protection and relief. The use of agency principles to develop a standard for institutional liability, however, not only furthers these goals by providing adequate protection to the student but also relieves the current dependence by many courts on Title VII and Title VI jurisprudence. Moreover, a uniform standard based on agency law, as described in Part II.C, will provide notice to institutions, potential harassers, and victims regarding where they stand if such harassment occurs.

Absence of the word "employer" or "agent" in the statutory language of Title IX is not a dispositive ground for denying the use of agency principles. Silence in text and scant legislative history are weak reasons to reject a body of principles that may effectively achieve the purposes set forth in the statute. As at least one court has reasoned, "given the purpose of Title IX and Congress' mandate that Title IX be broadly interpreted, it is essentially inconsequential that Title IX does not expressly adopt agency principles." The school context and the nature of the teacher-student relationship, the fact that courts have applied agency principles of Title VII when determining institutional liability under Title IX, and a fair reading of Franklin v. Gwinnett County Public Schools provide an adequate foundation for the validity of applying agency principles to sexual harassment in the elementary through high school context.

First, the school context is well suited for the use of agency principles. The relationship between a teacher and a student is analogous to that between an agent and a third party. The teacher (agent) is empowered by the school (principal) to exercise authority over the

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167 See supra notes 27-28 and accompanying text.
168 See supra notes 35-40 and accompanying text.
169 Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 754 (E.D. Va. 1995). But see Floyd v. Waiters, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (noting that while common law agency principles are applicable to Title VII, they are not applicable to Title IX due to language of statute); see also Howard v. Board of Educ., 876 F. Supp. 959, 974 (N.D. Ill. 1995) (following analysis in Floyd in declining use of agency for Title IX claim; asserting that Congress could have included agency language in Title IX but chose not to). Note, however, that the court in Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993), found the reasoning in Floyd unpersuasive, and chose to adopt agency principles to find institutional liability under Title IX.
student (third party).\textsuperscript{172} When this authority enables the agent to harm the third person, the principal may well be held liable for such harm.\textsuperscript{173} As one commentator has noted, "[b]y harassing students, teachers . . . are exercising actual or apparent authority over students given to them by the educational institution to directly deprive students of their right to a productive educational climate."\textsuperscript{174} In other words, the school delegates to teachers the power to control the learning environment and should bear liability under agency law for misuse of that power.\textsuperscript{175} Since the teacher-student relationship so easily lends itself to analysis under agency law, courts must go beyond the language of the statute and concentrate on the context of the relationship.

Second, some lower courts have already utilized agency principles as applied under Title VII claims to analyze Title IX claims.\textsuperscript{176} Therefore, application of agency principles to Title IX claims is not inconsistent with the development of Title IX jurisprudence thus far. This Note, however, urges courts to step back from the Title VII standards and focus primarily on the agency analysis.

Although there are a few cases in which lower courts have refused to use Title VII agency principles to interpret Title IX violations, these cases may be disregarded for two reasons: None of them involves teacher-student harassment in the elementary through high school context, and the reasoning employed in each case runs afoul of

\textsuperscript{172} Cf. Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1559 (11th Cir. 1987) (observing that agency principles require holding employer liable because employer's designation of authority empowers supervisor).

\textsuperscript{173} Cf. Restatement (Second) of Agency § 219(1) cmt. a (1957) (noting that rationale for holding principal liable for torts against third parties by agents is based on assumption of control).

\textsuperscript{174} Baker, supra note 23, at 305.

\textsuperscript{175} See Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1428-29 (E.D. Mo. 1996) (stating that liability should be imputed to school district because teachers use "authority vested in them by the school to further their illegal conduct").

\textsuperscript{176} See Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 754 (E.D. Va. 1995) (contending that academic aspects of university equal "operations" under Title IX and that authority to manage is delegated to professors; where professors exploit authority over "operations" by sexually harassing students, Title IX must be available to impose liability on "employer" or congressional intent is thwarted); Hastings v. Hancock, 842 F. Supp. 1315, 1320 (D. Kan. 1993) (noting agency as potential basis of school's liability due to harassment of student by teacher); see also Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1465 (N.D. Cal. 1995) (arguing that since Franklin "implicitly holds that intentional discrimination is an element of a claim that a school district has violated a plaintiff's rights under Title IX, at least where that student seeks to obtain damages against the district for harassment engaged in by an employee," the school district "will be found to have intentionally discriminated when one of its employees sexually harasses and abuses a student").
Congress's intent to provide adequate relief and protection to students.\footnote{One court rejected the use of agency law in a situation where a security guard harassed a student, noting that even if agency principles were applicable, the school board would not be liable because the acts of the security guard were "personal." Floyd v. Waiters, 831 F. Supp. 867, 876 (M.D. Ga. 1993). A second court held that in the context of teacher-to-student harassment, vicarious liability was inappropriate absent knowledge. Howard v. Board of Educ., 876 F. Supp. 959, 974 (N.D. Ill. 1995) (concluding that agency law is inapplicable to Title IX). A third court, following the reasoning of the two above, held that "agency principles do not apply to Title IX" in a claim brought by a college student alleging sexual harassment by a professor. Slaughter v. Waubonsee Community College, No. 94-C2525, 1995 WL 579296, at *3 (N.D. Ill. Sept. 29, 1995). But see Kadiki, 892 F. Supp. at 752 (applying agency principles of Title VII for Title IX claim brought by college student; noting that "knowledge of any quid pro quo harassment of a student by a professor should be imputed to his employer").}

For instance, the court in \textit{Floyd v. Waiters},\footnote{831 F. Supp. 867 (M.D. Ga. 1993).} the first to deny the use of agency law, contended that "common-law agency principles do not apply" because "Congress defined 'program or activity' [under Title IX] to mean ... 'operations of ... a school system.' This definition does not include the agents of such an entity."\footnote{Id. at 876.} This Note finds such reasoning unpersuasive. Such a literal and narrow reading of Title IX would render the statute ineffective in its fight against sexual harassment in schools and ignore the Supreme Court's directive that Title IX be given a broad "sweep."\footnote{See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982); see also Kadiki, 892 F. Supp. at 754 (refusing to follow \textit{Howard} because its definition of "program or activity" is too narrow; further stating that in university setting, Congress concerned by "unduly narrow[\textsuperscript{2}]" application by recent court decisions (citing Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988), reprinted in 20 U.S.C. § 1687, Findings of Congress (1994))); Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993) (finding \textit{Floyd} unpersuasive); Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 952 (W.D. Tex. 1995) (urging that Title IX must reach sexual abuse of young girls by teachers "with the full weight of its purpose").}

Third, the Supreme Court's decision in \textit{Franklin} can be read to authorize the use of agency principles for Title IX claims where a teacher harasses a student. \textit{Franklin} appears to involve hostile environment harassment since the record fails to indicate that the teacher conditioned any benefit or detriment on the student's reaction to the harassment.\footnote{See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 63 (1992) (recounting allegations that teacher/sports coach engaged student in "sexually-oriented conversations in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man"; that teacher "forcibly kissed [student] on the mouth in the school parking lot"; and that teacher interrupted student in class, requested that she be excused, and then "took her to a private office where he subjected her to coercive intercourse"); see also Melsheimer et al., supra note 41, at 544-45 ("[I]t can be inferred from the facts that Franklin suffered a hostile environment."); Baker, supra note 23, at 283 (stating that \textit{Franklin} involved hostile environment claim).} The record does reflect that the school administration
was aware of the harassing teacher's conduct, took no action to stop the teacher, and discouraged the plaintiff from pressing charges.182

Under Title VII analysis, the school district would have been subject to liability under the knew-or-should-have-known standard. The Court, however, while drawing on its decision in Meritor to confirm that such sexual harassment constitutes intentional discrimination,183 made no reference to Title VII's knew-or-should-have-known standard in finding liability. Instead, "the Franklin Court seems to have implied that, under the agency principles suggested in Meritor, it would impose liability on school districts for intentional discrimination committed by the district's agents, [and] not for the failure of school officials to stop the discrimination."184 While not expressly stated in the case, it can be argued that Franklin authorized the existence of respondeat superior for cases of intentional discrimination such that an institution will be found to have intentionally discriminated when its agent has done so.185

C. Application of Agency Principles to Title IX

Restatement (Second) of Agency section 219(2)(d)—which holds the principal liable for an agent's torts either if apparent authority exists or if the agent was "aided in accomplishing the tort by the existence of the agency" relationship186—offers the level of protection and relief intended by Title IX.187 This Note further argues that agency principles should be applied equally to quid pro quo and hostile envi-

182 See Franklin, 503 U.S. at 63-64.
183 See id. at 75 (noting Court's statement in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), that "when a supervisor sexually harasses a subordinate . . . that supervisor 'discriminate[s]' on the basis of sex," and finding that same rule applicable when teacher sexually harasses student (quoting Meritor, 477 U.S. at 64)).
184 Melsheimer et al., supra note 41, at 545; see Doe v. Methacton Sch. Dist., No. CIV.A.94-0244, 1995 WL 549089, at *1 (E.D. Pa. Sept. 12, 1995) (allowing junior high student to amend complaint to include Title IX claim against school district by noting that Franklin appears to impose liability under agency principles for intentional discrimination by agent/teacher).
185 See Melsheimer et al., supra note 41, at 545; see also Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427 (E.D. Mo. 1996) ("This Court, guided by the Supreme Court's Franklin decision interpreting Title IX, holds that intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior, regardless of whether claim is hostile environment or quid pro quo.").
186 Restatement (Second) of Agency § 219(2)(d) (1957).
187 In general, Restatement (Second) of Agency § 219 describes situations in which a third person may hold a principal liable for the torts of his agent. Section 219(1), providing that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment," fails to illuminate the search for an appropriate standard under Title IX since a teacher who harasses a student is not acting within the scope of employment. See Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 953 (W.D. Tex. 1995) ("No teacher who sexually abuses a student acts in the scope of his authority.").
environment harassment without the requirement of knowledge on the institution's part. If knowledge were required, the standard would no longer be one of "true" agency under section 219(2)(d).

1. Restatement (Second) of Agency Section 219(2)(d)

The language of section 219(2)(d) encompasses two separate ideas: apparent authority of the harasser and the agency relationship's role in aiding harassment. While an argument exists for using the apparent authority theory to determine institutional liability under Title IX, a stronger one exists for relying upon the latter notion.

The problem with an apparent authority analysis in the context of sexual harassment of a student by a teacher is that authority must exist in the eyes of the student. In other words, a reasonable student must believe that the school has authorized the teacher to commit such an act.\footnote{88} Although a case can be made that a "reasonable" six-

Section 219(2) is more helpful. It deals with situations in which a master may be liable for torts of servants acting outside the scope of their employment—that is, for acts committed for the servant's own benefit. These include acts where:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2) (1957).

Section 219(2)(a) can be discarded as easily as § 219(1). In addition, § 219(2)(b) fuels the negligence standard developed under Title VII. The school would only be subjected to liability if it failed to adequately take remedial action once given notice of the harassment. As discussed in Part II, see supra notes 111-19 and accompanying text, this would, in essence, render any school judgment-free, because a school will "hardly ever 'know' ... [or] be in a position to 'should have known'" of the harassing conduct. Leija, 887 F. Supp. at 953.

Section 219(2)(c) may be useful since one could argue that elementary, junior high, and high schools have a nondelegable duty to protect their students. See supra text accompanying notes 120-22. Although notes to the Restatement use the term "non-delegable duty" mainly in discussing workplace safety, see Restatement (Second) of Agency, Introductory Note to Title C: Non-Delegable Duties of Master 435, 435 (1957), analogy can be drawn to the school context. The words "non-delegable duty" do not imply that there are duties which cannot be "discharged by appointing others to perform them. They describe duties the performance of which can properly be delegated to another person, but subject to the condition that liability follows if the person to whom the performance is delegated acts improperly with respect to it." Id. Therefore, if the school imparts to its teachers the duty of providing a discrimination-free environment, and a teacher departs from such delegation, the school may be subject to liability.

This Note finds § 219(2)(d) to be the most promising for creating a standard of institutional liability under Title IX.

\footnote{88} See William L. Cary & Melvin A. Eisenberg, Cases and Materials on Corporations 11 (7th ed. 1995) ("An agent has apparent authority to act in a given way on a principal's behalf in relation to a third party ... if the words or conduct of the principal would lead a reasonable person in [the third party's] position to believe that the principal had author-
year-old may not comprehend whether the acts of a harassing teacher may or may not be authorized by the school, a high school student certainly realizes that sexual harassment is never authorized. Therefore, imposing liability due to apparent authority would only serve to create proof problems concerning the “reasonableness” of the student’s belief, because student plaintiffs would be forced to compromise their intelligence by claiming that they believed that such acts were authorized. The apparent authority theory is therefore inappropriate.\textsuperscript{189}

The second idea—that the agency relationship aids the harasser—provides a more appropriate ground for imposing liability.\textsuperscript{190} It is the school’s hiring of a harassing teacher that enables the abuse of students in school. In this regard, the relationship between teacher and school allows a teacher to sexually abuse students in two ways. First, a teacher occupies a position of power over students, and the power of that position is sanctioned and enforced by the school.\textsuperscript{191} This position aids the teacher in his commission of sexual harassment. Second, it is more than the “mere existence” of his job as teacher that aids in perpetration of sexual abuse.\textsuperscript{192} The very nature of the job embodies a fiduciary-type trust and dependency. Students, particularly those in elementary school, look to teachers for guidance and
approval. The power relationship is accentuated by the age difference between student and teacher and the roles the teacher must play—educator, guardian, role model, mentor, and even parental figure. A teacher is armed with ample direct authority over his students—including what grades they receive. The school imparts to its teachers the right to monitor and affect the day-to-day lives of the students. This delegation of control over the student, along with the unique teacher-student relationship, provides a basis for imposing liability on schools for the sexual misconduct of their teachers.193

2. Quid Pro Quo and Hostile Environment Claims Under Section 219(2)(d)

Agency principles translate easily to quid pro quo claims—those that involve using one's authority to condition a benefit or detriment,194 as when a teacher tells a student that she will receive an "A" if she sleeps with him. Liability is fairly imputed under section 219(2)(d) to the institution, regardless of notice, because the teacher uses his authority and position to harass the student.195

Hostile environment claims can similarly be assessed under section 219(2)(d). The institution will be liable when a teacher is found to have created an unbearable learning environment for the student. In such an instance the teacher uses and is aided by his position as teacher to sexually harass the student—just as under quid pro quo harassment.

The court in Leija v. Canutillo Independent School District196 noted that agency principles do not provide adequate relief to students sexually abused by their teachers because liability will not be imputed unless knowledge is made out.197 However, the court neglected to consider the use of section 219(2)(d), which can overcome this hurdle. If the plaintiff presents a viable claim of sexual harassment under quid pro quo or hostile environment theories, and the

194 See supra notes 59-61 and accompanying text.
195 See Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 754 (E.D. Va. 1995) (noting that educational institution is liable whether it knew or not under quid pro quo Title IX claim); Schneider, supra note 23, at 572 (stating that no knowledge is required for quid pro quo claim because professor exercises authority that flows from his position); cf. Henson v. City of Dundee, 682 F.2d 897, 910 n.21 (11th Cir. 1982) (using § 219(2)(d) for quid pro quo claim under Title VII).
197 See id. at 953-54 (arguing that § 219(2)(b), the negligence standard, "ha[s] limits because of the nature of suits like these" and noting that liability should be imputed under strict liability because school will hardly ever know of harassment).
teacher is found to have abused his fiduciary-type duty toward the student, liability should be imputed to the institution under Title IX whether or not it had notice of the harassing conduct. 198 Both types of claims should be treated under the same standard 199—that is, the agency law principle found in section 219(2)(d).

Requiring notice for one and not the other is, in essence, making a judgment that the creation of a hostile environment is not as devastating or injurious to the abused student as quid pro quo harassment. Such judgments and the resulting bifurcated rule of liability for the sexual harassment of students by teachers are foolish. 200

For example, consider scenario one: An English teacher demands that a ninth-grade student meet him after class. The student, having been taught to listen to and follow a teacher's instructions, obeys. Once alone with the student, the teacher proceeds to inquire about the student's sexual experiences. He tells her how beautiful she is and that he would like to get to know her better. He then begins to touch her inappropriately. Finally, he tells her not to say a word of their encounter to anyone because other students in the class may get jealous. These "secret meetings" occur on several occasions. Each time the teacher invents some pretext of wanting to go over the poem or short story the student has handed in for her homework assignment. Each time the meetings involve more touching, until finally the teacher coerces the student to engage in intercourse.

Now, consider scenario two: The events occur just as in scenario one except the teacher advises the student that if she does not consent to the sexual advances, she will receive a "D" in his course. Should the neglect of conditioning a benefit or detriment in scenario one be sufficient to relieve the school of any legal responsibility over this teacher's conduct, whereas in scenario two the school will face liability for the teacher's actions? Courts implementing the current bifurcated

198 The discussion regarding similar treatment of quid pro quo and hostile environment harassment focuses on the liability stage in the adjudicatory proceedings, after plaintiff has proved the existence of harassment. The requirements concerning what type of proof is needed to establish such a violation of law is beyond the scope of this Note. See supra note 5.


200 There is a valid reason for requiring notice for harassment among peers: A peer is not an agent for the institution. See Doe v. Petaluma City Sch. Dist., No. C93-00123, 1996 WL 432298, at *13 (N.D. Cal. July 22, 1996) (adopting Title VII's knew-or-should-have-known standard in the context of peer harassment claim); cf. 29 C.F.R. § 1604.11(d) (1995) (requiring notice for harassing conduct between fellow employees under Title VII). However, since a teacher is an agent of the institution, this reason is inapplicable in the context of teacher-student harassment.
standard answer in the affirmative. The school escapes liability in sce-

nario one even though the conduct of the teacher is effectively the

same as in scenario two. The psychological impact on the harassed

student can be equally severe in both scenarios.\textsuperscript{201}

Rather than focusing on whether a benefit or detriment has been

conditioned upon the commission of the harassment, the focus should

be on the teacher's conduct. The school's liability should not turn on

whether the teacher preyed on the student's young age, confusion,

and desire not to disappoint him in order to commit the sexual abuse

on the one hand, or whether he threatened a reprisal such as a bad

grade in his class or suspension so as to force compliance on the other

hand.\textsuperscript{202}

After all, a teacher's responsibilities "do not begin and end with

the power"\textsuperscript{203} to give out grades. He is "charged with the day-to-day

supervision" of his students, including the responsibility of providing a

"safe, productive" learning environment.\textsuperscript{204} Thus, "[t]here is no rea-

son why the abuse of the latter should have different consequences

than abuse of the former. In both cases it is the authority vested in

the [teacher] by the [school] that enables him to commit the

wrong."\textsuperscript{205}

A rule requiring notice for hostile environment harassment sim-

ply permits its commission because schools will lack incentive to deal

with such conduct.\textsuperscript{206} They will be concerned only with ensuring the

prohibition of quid pro quo harassment. In effect, rogue teachers will

be given full reign over creating hostile learning environments.

Finally, it is not always easy to distinguish between quid pro quo

and hostile environment harassment in the school context. As a re-

sult, a bifurcated standard of liability is difficult to apply.\textsuperscript{207} Quid pro

quo and hostile environment harassment represent two ends of the

201 See Baker, supra note 23, at 306 n.163 (arguing that hostile environment harassment

can be just as harmful as quid pro quo harassment in educational environment).

202 See supra text accompanying notes 15-20.


ing that notice should not be required for hostile environment claims under Title VII).

204 Id.

205 Id. at 76-77 (Marshall, J., concurring) (employer liability context); see Bolon v. Rolla


argument for treating quid pro quo and hostile environment similarly for employer liability

"is even more convincing in Title IX cases involving teachers and students because of the

extreme and inherent inequities in age and power"); cf. supra notes 71-74 and accompany-

ing text.

206 See supra Part I.A.3.d.

207 See Baker, supra note 23, at 306.
continuum—not two ends of an extreme. In the educational context especially, the two ends merge quite effortlessly.

For instance, it can be argued that the “primary benefit that a student receives” by attending school is the learning environment itself. Consider a student whose grades dramatically fall in school after she has been harassed by her teacher. Since she cannot allege that the teacher conditioned her grade in his class on her compliance to his advances, a court finds the abuse to be of the hostile environment sort, and the school is spared liability. However, it does not follow that the student’s overall grades did not fall because of the abuse she faced at the hands of her teacher. Is quid pro quo the better label for the harassment suffered by this student? As illustrated above, dichotomy in labeling, although convenient, is unfair to the abused student. Simply because a teacher demands sexual favors for grades from one student, yet “merely” gropes another, does not mean the former student should be allowed redress from the institution while the latter is not.

It may be argued, however, that imputing liability in hostile environment claims may lead to heightened efforts by institutions that may adversely affect classroom pedagogical decisions. In reality, however, such a concern is greater in the context of colleges and uni-

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208 Note that in defining sexual harassment under Title VII, the EEOC describes three different types of harassment:

Unwelcome sexual advances ... constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.


209 Baker, supra note 23, at 306 (stating that classroom environment and teacher-student relationship is “integral to grades and advancement” and is “critical to the educational process”); see id. at 295-96 (“[T]he moment a teacher makes sexual demands of a student, the student is [immediately] denied the benefit of an educational environment free from sexual coercion, a benefit which all students should be able to expect.”).

210 Such labeling, however, may be useful in distinguishing situations of teacher-student harassment, which may be considered on the whole as a type of quid pro quo harassment, from peer harassment, which fits neatly into the hostile environment category.

211 For instance, a student may claim the creation of a hostile environment based on an English teacher's reading of certain poetry in class; or on the continued sexually discriminatory remarks made by a teacher; or on the showing of certain films that explicitly depict the anatomy. How will the proposed liability rule affect a teacher's autonomy over his style of teaching? On the one hand, it may have no effect because the issue of a school's liability will not arise unless the claim of sexual harassment has succeeded in the first instance. If the claim does succeed, then the reasons for imputing liability as discussed above still hold since sexual harassment, regardless of its form, must be proscribed. On the other hand, such a rule may provide schools with a justification to eliminate all controversial and
universities, as much of the elementary through high school curriculum is predetermined by the state. This Note contends that the concern, although present in the elementary school through high school level, is outweighed by the countervailing need to eliminate the "classic" types\(^2\) of quid pro quo and hostile environment harassment in schools and that "[a]cademic freedom . . . should never be used to shield illegal, discriminatory conduct."\(^2\)

3. A School's Knowledge of Harassment Under Section 219(2)(d)

Once it is decided that quid pro quo and hostile environment harassment should be treated under the same standard, the question remains as to whether knowledge should be required under that standard.\(^2\)\(^4\) Since the proposed analysis is under the agency principle formulated in section 219(2)(d), notice is and should be irrelevant.\(^2\)\(^5\) Under this rule, the knowledge and intent of the harasser is what is imputed to the institution.

Aside from adherence to section 219(2)(d), policy reasons exist for not requiring knowledge as a prerequisite for institutional liability. Requiring notice, for example, provides an incentive for the school to remain purposely ignorant of harassing conduct so as to ensure against liability.\(^2\)\(^6\) Such a rule runs counter to the purposes of Title IX. While decreasing possible relief to a sexually abused student, it

creative teaching. Thus, tension exists between providing incentive for schools to be proactive in their fight against discrimination while upholding academic freedom in curriculum.

\(^2\) Classic\(^\text{\textsuperscript{2}}\) types of harassment as referred to in this Note include the teacher conditioning a grade or other tangible benefit—such as advancement to degrees, degrees themselves, or being chosen to play on a sports team—on the performance of acts of a sexual nature by or toward the student; and improper remarks, conversations, or acts of a sexual nature directed toward the student by the teacher that are pervasive or severe such that the student's ability to learn is disrupted. By no means are these examples exhaustive. They are simply used as illustrations to depict traditional examples of quid pro quo and hostile environment harassment in the school context.

\(^2\)\(^1\) Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 755 n.8 (E.D. Va. 1995); see also Baker, supra note 23, at 312 ("The decision to harass a student, or to allow harassment to persist, is not an academic decision, and [thus] prohibiting harassment should not significantly interfere with the autonomy of teachers.").

\(^2\)\(^4\) See Schneider, supra note 23, at 564 (noting that question as to whether institutional knowledge is prerequisite for vicarious liability is open).

\(^2\)\(^5\) See Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (noting that for respondeat superior, knowledge is irrelevant); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418 (10th Cir. 1987) (using § 219(2) to reject defendant's claim of lack of notice as absolute defense for Title VII hostile environment claim).

\(^2\)\(^6\) See supra notes 114-19 and accompanying text; cf. ASME, Inc. v. Hydrolevel Corp., 456 U.S. 556, 573 (1982) (noting that organization could avoid liability by "ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents"). But cf. Schneider, supra note 23, at 569-70 (noting that in college context notice requirement may serve to encourage students to complain of harassing behavior).
may even serve to foster a greater level of harassment in schools—at least in the hostile environment area. The rule based on section 219(2)(d) therefore does not require that the school have notice of the harassing conduct to be subject to liability.

III

RAMIFICATIONS OF USING AGENCY PRINCIPLES TO FIND INSTITUTIONAL LIABILITY UNDER TITLE IX

The rule this Note proposes under Restatement (Second) of Agency section 219(2)(d) produces a result similar to a rule of strict liability. Although this is nothing new in the realm of quid pro quo harassment, it may elicit heated responses in the area of hostile environment harassment. As discussed in Part II, however, the reasons for separate rules regarding these types of harassment disappear in the context of teacher-student harassment in elementary through high schools, and the use of agency law is thus justified in this setting. Moreover, such a rule is needed in the school environment both to provide adequate relief to a student who has been sexually harassed by her teacher and to protect all students from the likelihood of sexual abuse in the future.

Regardless of whether the rule is based on agency law or strict liability, the resulting effect is well desired and true to the goals of Title IX. While this Note argues for agency law because it reaches the desired result and does so in a principled manner consistent with much of Title IX jurisprudence, two lower courts recently have imposed a strict liability standard for teacher-student sexual harassment, one in the elementary school context, the other in the high school

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217 Cf. ASME, 456 U.S. at 591 n.17 (Powell, J., dissenting) (noting that "[i]n practice, a rule of apparent authority can be a rule of strict liability").

218 See, e.g., Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 752-54 (E.D. Va. 1995) (agreeing that strict liability standard is proper for establishing institutional liability in quid pro quo cases, but stating that knew-or-should-have-known standard is to be used in assessing hostile environment claims); supra notes 60-61 and accompanying text.

219 See supra Part II.C.2-3; cf. supra text accompanying note 74.

220 Judge Furgeson, in Leija v. Canutillo Independent School District, 887 F. Supp. 947 (W.D. Tex. 1995), imposed strict liability on a school district in a Title IX case brought by the parents of a second-grade student who had been sexually abused by her teacher. See id. at 954 ("[A]t least in regard to teacher-student sexual abuse cases, Title IX should be held to impute the intentional discrimination of a teacher to a school district under strict liability principles.").

Judge Furgeson urged that unless acts of employees of a school district "are fully and strictly imputed to the district, Title IX becomes potentially inoperative," because "only the school district can be liable under Title IX" and "only intentional acts of discrimination are reached by Title IX" and "intentional acts can be committed only by the district's employees who will never have authorization to act" in a discriminatory manner. Id. at 953.
context. Given the severity of the sexual harassment problem and the devastating effects on the harassed student, the standard set forth under section 219(2)(d)—albeit tantamount to strict liability—is a meaningful and effective way to comply with Congress’s intent to provide a remedy to abused students for the intentional sexual harassment by teachers in schools.

The proffered rule may be justified in various ways. First, "the risk of harm is better placed on a school district than on a . . . student." The school is in a better position to deal with the overall problem since it has authority to hire faculty and establish preventive and monitoring procedures to combat sexual harassment. More importantly, the school has a duty under Title IX to prevent the occurrence of sexual harassment. The school, therefore, and not the student should bear the expense in cases where the court finds that harassment has taken place.

Second, a rule close to strict liability exerts greater pressure on the school to deal with the problem of teachers sexually harassing students before the harassment transpires. It "heightens the vigilance" of school districts and alerts all employees at all levels to this problem. After all, the "best tool" for eliminating sexual harassment—a tool that a school district possesses—is prevention. As Judge Furgeson

To combat the federally funded institution’s fear of sky-high damages, Judge Furgeson suggested that damages awarded in teacher-student sexual harassment cases under Title IX be limited. See id. at 955 ("Just as child abuse should not occur, school districts should not be subjected to potential insolvency when it does occur."). On September 6, 1995, Judge Furgeson certified the case for interlocutory appeal so that the legal issue of institutional liability could be resolved at the circuit level "to bring uniformity to Title IX adjudications." Leija Order, No. EP-93-CA-478-F, slip op. at 7 (W.D. Tex. Sept. 6, 1995) (on file with author).

In Bolon v. Rolla Public Schools, 917 F. Supp. 1423 (E.D. Mo. 1996), Judge Perry concluded in a situation involving sexual misconduct by a teacher toward a 16-year-old student, see id. at 1427, that school districts are strictly liable "when a teacher or other agent of the school district intentionally discriminates against a student on the basis of sex," id. at 1429. Although the case at issue involved quid pro quo harassment, Judge Perry insisted that "[i]f Title IX is to have any effect," strict liability should be the standard regardless of whether a teacher created a hostile environment or engaged in quid pro quo harassment. Id. On March 6, 1996, Judge Perry certified the case for interlocutory appeal. See id. at 1423, 1433-34.

In such cases, the school has per se failed to fulfill its duty.

Leija, 887 F. Supp. at 955. But cf. Schneider, supra note 23, at 568 (noting that strict liability may punish university for something it is trying to eradicate).

in *Leija v. Canutillo Independent School District* asserts,

[t]he young student, vulnerable in every way, should not be the only effective line of defense or the policing authority. The job of the student, especially the elementary student, is to learn in a trusting environment. As much as possible should be done to achieve this goal and to eliminate any interference with this goal.\textsuperscript{226}

A rule approximating strict liability will encourage schools to educate, monitor, and train their employees so as to prevent or immediately correct occurrences of sexual harassment.\textsuperscript{227} A school may take a variety of actions to achieve this end: it may affirmatively promote awareness of the problem, develop sanctions and effective grievance procedures, and inform students and teachers of such procedures, to name a few.\textsuperscript{228}

Third, while the current negligence standard associated with hostile environment claims—that is, the knew-or-should-have-known rule—leads to underdeterrence and inadequate relief,\textsuperscript{229} the proposed form of imputed liability will lead to a more adequate level of deterrence and relief. While it is true that the potential for personal civil liability for the harassing teacher may deter some inappropriate conduct, if the school district also may be held liable, it is more likely that schools will create and enforce effective policies against sexual harassment and that a student who has indeed been sexually harassed will be able to recover from the school under Title IX.\textsuperscript{230}

Since the suggested standard based on section 219(2)(d) resembles strict liability in its effect, it will encounter similar criticisms. For instance, skeptics may contend that the rule, while providing relief to

\textsuperscript{226} Leija, 887 F. Supp. at 955.

\textsuperscript{227} See Baker, supra note 23, at 306 (arguing that rule of strict liability will provide incentive to schools to stop harassment before it begins).

\textsuperscript{228} Cf. 29 C.F.R. § 1604.11(f) (1995) (describing actions employers can take to prevent sexual harassment in workplace).

\textsuperscript{229} See *Leija*, 887 F. Supp. at 953 (noting that negligence standard fails to proscribe violations and provide sufficient deterrent effect due to fact school will rarely have knowledge of or be in position to have knowledge of conduct); see also supra notes 111-19 and accompanying text.

\textsuperscript{230} Cf. ASME, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (noting that while imposing liability on agents themselves has some deterrent effect, "If, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future").

In addition, Title IX is directed toward liability of institutions and not individuals. See Lipsett v. University of P.R., 864 F.2d 881, 901 (1st Cir. 1988) (contending that in implying cause of action under Title IX, Supreme Court has only considered actions against educational institutions); Doe v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 566 (M.D. Ala. 1996) (finding that "individual defendants may not be held personally liable under Title IX"); Dickinson v. McCarty, No. 93-8210-CIV, 1994 WL 706979, at *4 (S.D. Fla. Aug. 2, 1994) (noting that Title IX actions are only available against institutions and not their employees).
a harassed student, will not lead to greater protection of students through prevention of sexual abuse by teachers because schools will lack incentives to confront the problem. No matter what they do, they will face liability; so why do anything?

The argument that schools will take action and provide greater protection to students than under the current knew-or-should-have-known standard rests on two theories. First, a conscientious school district will not sit back and wait to be sued. Rather, it will work proactively to implement programs and monitoring systems in order to prevent sexual harassment from occurring in the first instance, thereby reducing the chance of future liability and large damage awards against it. In the long run, the incidence of sexual harassment in schools will decrease, and both students and schools will benefit. Second, under the current knew-or-should-have-known rule, when faced with a complaint of sexual harassment, the school actually has an incentive to coldly refuse to help the student by failing to acknowledge the claim so as to escape the possibility of liability. Imputing liability under section 219(2)(d) eliminates this moral hazard. As a result, students will ultimately receive the two-fold benefit contemplated by Title IX: protection from sexual abuse by teachers due to the decreased chance of occurrence and relief from the school in situations where preventive methods failed and the student suffered harassment.\textsuperscript{231} The current system fails on both counts.\textsuperscript{232}

Furthermore, concerns regarding the potential increase in the number of suits and exorbitant damages are unwarranted. While this rule does allow for liability in cases for which, in practice, the current "standard" rendered a school district exempt (cases of hostile environment harassment), it does little to alter the existing rule of liability for quid pro quo harassment. Justifications for bringing the hostile environment claims under the umbrella covering quid pro quo harassment are based on fairness and common sense as discussed in Part II.C.2.\textsuperscript{233} Moreover, "[g]iven that the overwhelming majority of teachers are above reproach in this area, the problem for school districts should

\textsuperscript{231} Schools will make a cost-benefit analysis regarding whether they should implement training and monitoring programs to combat sexual harassment or simply pay damages when sued. The hope of the proposed rule is that given the cost of litigation and the likelihood of exorbitant damages, schools will live up to their responsibility of ridding the learning environment of sexual harassment as dictated by Title IX. See Susan L. Wright, Note, \textit{Franklin v. Gwinnett County Public Schools:} The Supreme Court Implies a Damages Remedy for Title IX Sex Discrimination, 45 Vand. L. Rev. 1367, 1378 (1992) (noting that decision in \textit{Franklin} allowing for compensatory damages under Title IX may subject federally funded institutions to "massive financial liability").

\textsuperscript{232} See supra text accompanying notes 111-19.

\textsuperscript{233} See especially supra notes 200-13 and accompanying text.
not be institutionally threatening as far as the number of potentially abusive activities is concerned."  

Finally, an argument that the school is federally funded and thus should not have to bear such liability is without merit. Title IX itself subjects federally funded schools to the possibility of liability, and the Supreme Court in Franklin v. Gwinnett County Public Schools explicitly held that damages are available against schools that condone intentional discrimination. Fear concerning the amount of damages does merit some consideration, however. But while a massive judgment against a district "strapped for funds" is not desirable, neither is stripping an abused student of any relief from the district.

It can be argued, nonetheless, that it is unfair to place liability upon a school for the sexual misconduct of a teacher because the school may have truly attempted to eradicate the problem—especially in situations where the school has increased expenditures so as to establish preventive and monitoring programs. Although this concern is valid, it is outweighed by the policies set forth above. An additional assertion may be offered to allay this anxiety: The school will face no liability unless a court finds that sexual harassment did indeed occur. If sexual harassment is found, the fairness, or lack thereof, of holding the school liable depends on the view taken. First, if the goal of Title IX is to prevent all harassment in the classroom, while the school may argue it did all it could, somehow it fell short of its respon-

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235 Cf. ASME, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) (rejecting argument that nonprofit organization should not be held to bear loss for antitrust violations by agents since it is not in business of seeking profit; in defending its use of agency principles, Court stated that "it is beyond debate that nonprofit organizations can be held liable under the antitrust laws," and in case at bar, organization is in "best position to take precautions that will prevent future antitrust violations").
237 See id. at 75; see also Wright, supra note 231, at 1386 (concluding that "[a]lthough court awards of monetary damages will be costly to institutions, such remedies represent the most effective means of compensating individual victims of sex discrimination and of deterring such discriminatory conduct by institutions").
238 Cf. ASME, 456 U.S. at 574-76 (holding that fact that treble damages for antitrust violations are punitive does not weaken argument for using agency theory of apparent authority against nonprofit organization).

Judge Furgeson, in Leija, suggested limiting the damages as a method of softening the blow of strict liability. See Leija, 887 F. Supp. at 956 (noting that "[l]imited damages under Title IX protect the school[] and simultaneously provide relief to [the] sexually abused student[]"). The cap on damages advocated by Judge Furgeson is appealing. However, particulars on the actual computation of limited damages under Title IX is beyond the scope of this Note.

239 See Schneider, supra note 23, at 568 (making argument in university context).
sibility. Second, if it is believed that it is impractical to expect a school to control a teacher's behavior toward his students, the proposed rule may have a ramification not yet evaluated: A judge, faced with what he believes to be potential injustice, may find that the plaintiff failed to meet her burden of establishing an actionable claim of sexual harassment in the first instance. Unless the suggested standard—which protects students to a far greater extent than the existing "standard"—is applied and enforced, however, whether this potential side effect will actually come to fruition is pure speculation.

While the discussion above will no doubt provide little solace to a critic of the proposed rule, a requirement that damages be limited for those suits in which a school acted promptly and appropriately upon discovery of the harassment may be more palatable. This solution would also counter the contention that a rule approximating strict liability will result in schools taking even fewer preventive measures than those taken under the current rule because their actions will not spare them from the threat of liability.

The standard adopted by this Note, based on agency principles, best adheres to the goals of Title IX, as well as the Supreme Court's desire that Title IX be interpreted broadly. By placing the risk on the party best able to bear it and providing much needed relief to the sexually harassed student, this standard will allow for greater protection of all students. While strict liability is a hard pill to swallow and would involve a total redefining of institutional liability under Title IX, agency law provides an intellectually sound and coherent standard that is consistent with Title IX jurisprudence and makes sense in the school-teacher-student relationship. Any rule that imputes liability regardless of fault (or knowledge) makes certain policy judgments. In this case, any unfairness of imputing knowledge to the school district and imposing liability thereafter must be weighed against the policies underlying Title IX. In this context, the policies weigh in the student's favor.

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240 See Baker, supra note 23, at 307 ("Title IX was intended to require institutions to provide an educational environment free of ... sex-based harassment. When they fail to live up to this duty, the cost of this failure should fall on them, not on the victim of [the abuse].").

241 See id. at 312 ("Limiting damages [in situations where school took prompt and appropriate action] should insulate schools from burdensome liability."); see also supra note 238. Inquiry into prompt and appropriate behavior upon receipt of notice of harassing conduct would not provide undue burden on the trier of fact since under the current knew-or-should-have-known standard the fact finder must confront this issue in order to decide whether the institution should bear liability. This Note suggests shifting the inquiry from the liability stage to the damages stage.

242 See supra notes 224-32 and accompanying text.
CONCLUSION

Sexual harassment is a real and prevalent problem in the elementary school through high school context. Whether a teacher interferes with a student’s education by demanding the student sleep with him to get an “A,” or by touching her improperly, or by continually making lewd comments, the effects on the student’s development and growth can be devastating. Congress designed Title IX to protect students from such discriminatory behavior and to provide relief for teacher misconduct that the school failed to prevent. In order to achieve these goals, however, Title IX must have the strength of a meaningful standard of institutional liability. Otherwise, it is simply incapable of fulfilling its promises.

As this Note has illustrated, the current state of institutional liability law is inadequate and inconsistent. Since the Supreme Court has yet to issue a definitive ruling regarding institutional liability under Title IX for the sexually harassing conduct of teachers, lower courts have turned for guidance to Title VII and Title VI, and more recently to principles of strict liability. Although Title VII and Title VI appear to be natural choices for defining substantive law under Title IX, they fail to provide a standard that suits the unique characteristics of (sexual harassment in) an educational setting. It is the potential sexually harassed student who suffers from the lack of protection that Title VII and Title VI are able to offer.

Title IX deserves a superior standard for holding elementary, junior high, and high schools liable for the sexual abuse a student is subjected to at the hands of her teacher—a standard that is tailored to the specific needs of that situation and context. This Note has argued for a standard based on existing common law agency principles. Title VII has long used agency law to impute liability to an employer for quid pro quo harassment by a supervisor. While the agency standard applied under quid pro quo transfers easily to the concerns of Title IX, the knew-or-should-have-known standard applied to hostile environment claims does not. This Note has suggested the importation of the agency standard applicable to quid pro quo claims under Title VII and an extension of the same rule to hostile environment claims. The creation of an independent standard that has its roots in agency law relieves the dependence by lower courts on Title VII and Title VI. More importantly, the proposed standard promotes the goals of Title IX.

Since this standard imputes liability to the school for quid pro quo and hostile environment harassment regardless of whether the school knew or should have known of such teacher misconduct, it is in
effect tantamount to a rule of strict liability. Given the policies on both sides, however, this rule is superior to the current "standard," which not only fails to provide incentives for the school to prevent sexual harassment from occurring but also offers almost no relief to a student once sexual harassment has occurred.