

TEACHERS AS SEXUAL HARASSMENT VICTIMS: THE
INEQUITABLE PROTECTIONS OF TITLE VII IN PUBLIC
SCHOOLS

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I. INTRODUCTION

In 1992, a fifth-grade girl complained to her public school teacher that the boy sitting next to her repeatedly¹ rubbed his body against her and

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1. The harassment continued regularly for a four-month period. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

made sexually explicit comments to her.² After school authorities ignored her repeated complaints, the student filed suit against the school board.³ The United States Supreme Court held that a private cause of action under Title IX existed against the school board for student-on-student harassment.⁴

In 1993, a ninth-grade female student had sex with her public school social studies teacher over a period of six months.⁵ Once police discovered the relationship, the teacher was fired, his teaching certificate was revoked, and the student and her mother filed suit against the school district.⁶ Had a school supervisor known of the harassment and been deliberately indifferent to it, the school district would have been liable for the teacher-on-student harassment.⁷

In 2000, a female public school teacher resigned from her job after a male student sexually harassed her for two months.⁸ The teacher reported the harassment to school administrators, but when they failed to stop the harassment, the teacher sued the Department of Education.⁹ The court allowed a cause of action under Title VII¹⁰ for student-on-teacher harassment.¹¹

Although sexual harassment occurs in all workplaces, courts have been slower to recognize its impact in schools.¹² Beginning in the early 1990s, federal courts progressively recognized the need for protection of students

2. *Id.* at 633–34.

3. *Id.* at 635.

4. *Id.* at 633, 654.

5. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277–78 (1998) (noting that had a supervisory employee been put on notice of this conduct and had the employee deliberately failed to act to end the harassment, the school district would have been liable for the teacher-on-student harassment under Title IX).

6. *Id.* at 278.

7. *Id.* at 290.

8. *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 175 (D.P.R. 2005). Although there was no Supreme Court or federal appellate decision on point, the district court recognized that courts have held schools liable for teacher-on-student harassment, supervisor-on-teacher harassment, and harassment by non-employees, such as customers or clients. *Id.* at 180–81. Likewise, the court reasoned that this student-on-teacher harassment is highly analogous to these types of harassment. *Id.* at 182. Moreover, the court found support in recent opinions from New York and Illinois and in Title VII's goal to eliminate all forms of sex discrimination in the workplace. *Id.* at 181–82. Accordingly, holding schools liable for sexual harassment by students supports this goal and is consistent with recent legal precedent. *Id.* at 182. The court denied the school's motion for summary judgment and held that a jury should decide whether two months was long enough for appropriate corrective action. *Id.* at 182, 184.

9. *Id.* at 175.

10. *See infra* Part II.A.

11. *Id.* at 182, 184; *see also infra* notes 136–45 and accompanying text.

12. Natalie J. Malovich & Jayne E. Stake, *Sexual Harassment on Campus: Individual Differences in Attitudes and Beliefs*, 14 *PSYCHOL. WOMEN Q.* 63, 63 (1990).

and school employees from sexual harassment. Courts have acted extensively against student-on-student harassment and teacher-on-student harassment.¹³ However, victims of student-on-teacher harassment have not been so fortunate. Judges have been reluctant to extend to teachers legal protections, which were originally designed to protect students. Such hesitation shows that courts have not caught on to how the power dynamics in the classroom have changed. Once, students were always the victims of harassment. Today, teachers are as often the prey of students who can belittle and degrade them without legal consequence.

This Note argues that teachers who are victims of sexual harassment by their students should be afforded the same federal protections under Title VII as students who are the victims of sexual harassment. Part II discusses the protections of federal laws that have been extended to victims of student-on-student and teacher-on-student sexual harassment. Part II also explains how Title IX fails to adequately provide relief to teachers as victims of student-on-teacher harassment. Part III discusses the application of Title VII to teachers as victims of sexual harassment in a hostile work environment and details the limited success of teachers who have sought remedy under Title VII. Part III also discusses the potential for a relaxed standard for special-education students as perpetrators of sexual harassment. Finally, Part IV concludes that holding public schools accountable for hostile environment sexual harassment under Title VII will give teachers the protection they need and deserve as victims of sexual discrimination.

II. A HISTORY OF SEXUAL HARASSMENT

There are numerous definitions of sexual harassment in academia.¹⁴ These definitions usually include one or more of the following characteristics: the offender has power over the victim, the behavior is unwanted (as perceived by the victim), and there is some negative outcome such as distress or interference with activities (as perceived by the victim).¹⁵ Perhaps in more practical terms, “sexual harassment is any

13. See *infra* Part II.A–B. The standards for claims of sexual harassment by teachers and students in our nation’s public schools have been clearly established and widely publicized.

14. See generally Phyllis L. Crocker, *An Analysis of University Definitions of Sexual Harassment*, 8 SIGNS: J. WOMEN CULTURE & SOC’Y 696 (1983) (evaluating definitions of sexual harassment used by undergraduate institutions in their policy statements and grievance procedures).

15. Nick Maroules & Kathleen McKinney, *Sexual Harassment*, in SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES AND PREVENTION 29, 29 (Elizabeth Grauerholz & Mary A. Koralewski eds., 1991). The authors set forth a summary of studies that found most incidents of sexual harassment in academia are not reported. *Id.* at 37.

unwelcome behavior of a sexual nature that interferes with [an individual's] life."¹⁶

A. *The Protections of Title VII: Sexual Harassment in Employment Law*

"Title VII of the Civil Rights Act of 1964 permits victims of employment discrimination based upon race, color, national origin, religion, or sex to collect compensatory damages for sexual harassment . . ."¹⁷ "Congress enacted Title VII to recognize the inequity that exists among different groups of workers and designed it to level the playing field in the workplace."¹⁸ Verbal or physical conduct such as unwelcome sexual advances or requests for sexual favors constitutes sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.¹⁹ Remedies for victims of sexual harassment include injunctive relief, compensatory damages, and punitive damages.²⁰

The Equal Employment Opportunity Commission (EEOC) has distinguished two forms of sexual harassment: quid pro quo harassment and hostile work environment harassment.²¹ Quid pro quo harassment occurs when sexually charged advances or sexual favors are traded for

16. ROBERT J. SHOOP & JACK W. HAYHOW, JR., *SEXUAL HARASSMENT IN OUR SCHOOLS: WHAT PARENTS AND TEACHERS NEED TO KNOW TO SPOT IT AND STOP IT!* 12 (1994). Unwelcome behavior indicates the action or behavior was not solicited and not asked for, nor did the person respond with similar behavior. Behavior of a sexual nature is "virtually any conduct that refers to sex," including the use of profane language, making comments about body parts, and any kind of unwanted touching or request for sexual favors.

17. MARY ANN MANOS, *KNOWING WHERE TO DRAW THE LINE: ETHICAL AND LEGAL STANDARDS FOR BEST CLASSROOM PRACTICE* 42 (2006). Title VII applies to employers that have fifteen or more employees, including state and local governments, employment agencies, labor organizations, and the federal government.

18. Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims Under Title VII After Harris*, 46 FLA. L. REV. 291, 309 (1994).

19. *Id.*

20. MANOS, *supra* note 17, at 42; *see also* DEP'T OF PUBLIC INSTRUCTION, PUBLIC SCH. OF N.C., *A GUIDE TO SEXUAL HARASSMENT IN EDUCATION AND EMPLOYMENT* 5, <http://www.ncpublicschools.org/docs/federalprograms/titleIX/training/sexualharassmentguide.pdf> (last visited Dec. 26, 2008) [hereinafter *GUIDE TO SEXUAL HARASSMENT*] ("Remedies under Title VII for Sexual Harassment [include]: (A) Injunctive relief to stop the harassment and prevent any further harassment[;] (B) Reinstatement and back pay, if a job or promotion was lost due to the harassment[;] (C) Compensatory and punitive damages ranging from \$50,000 for employers with 15-100 employees to \$300,000 for employers with more than 500 employees[; and] (D) Attorney's fees.").

21. *See* 29 C.F.R. § 1604.11 (2008) [hereinafter *EEOC Guidelines*].

employee evaluations, promotions, or other job benefits.²² Hostile work environment harassment occurs when unwelcome sexual conduct creates difficult working conditions.²³

In the 1986 landmark case, *Meritor Savings Bank, FSB v. Vinson*,²⁴ the United States Supreme Court first recognized sexual harassment as a form of employment discrimination under Title VII.²⁵ In *Meritor*, the plaintiff alleged she had a forced sexual relationship with her supervisor, “which was consensual only in that she had agreed to some of the sex out of fear of losing her job.”²⁶ Her employer argued that “even if the sexual relationship had existed, it was unknown to them, so they should not be held responsible for the acts of the supervisor.”²⁷ The Court concluded that conduct severe or pervasive enough “to alter the conditions of [the victim’s] employment and create an abusive working environment” is actionable as employment discrimination.²⁸

In 1993, the Supreme Court further defined the standards to be applied in evaluating allegations of sexual harassment.²⁹ Holding that “hostile work environment harassment is not limited to cases in which the employee suffers actual psychological damage,”³⁰ the Court insisted the plaintiff show that the conduct was subjectively offensive to her. In addition to a victim’s subjective belief, a reasonable, objective person must also perceive the conduct as hostile or abusive.³¹

B. *The Protections of Title IX: Sexual Harassment in Education Law*

At the time of its passage, “Title VII specifically excluded educational institutions from its coverage.”³² Moreover, sex discrimination against students was not specifically prohibited by any federal statute.³³ “An awareness of this exclusion and a commitment to equity resulted in the

22. LESLIE PICKERING FRANCIS, *SEXUAL HARASSMENT AS AN ETHICAL ISSUE IN ACADEMIC LIFE* 49 (2001).

23. *Id.*

24. 477 U.S. 57 (1986).

25. *Id.* at 73.

26. FRANCIS, *supra* note 22, at 49.

27. *Id.*

28. *Meritor*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (alteration in original)).

29. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

30. FRANCIS, *supra* note 22, at 50.

31. *Id.*; *see also Harris*, 510 U.S. at 21 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”).

32. Robert J. Shoop, *The Legal Context of Sexual Harassment on Campus*, in *SEXUAL HARASSMENT: ISSUES AND ANSWERS* 146, 147 (Linda LeMoncheck & James P. Sterba eds., 2001).

33. *Id.*

passage of Title IX of the Education Amendments of 1972.”³⁴ The drafters of Title IX, as shown through legislative history, “make[] it clear that Congress intended to apply Title VII claims standards to Title IX,”³⁵ in effect creating a private cause of action under Title IX.³⁶ Specifically, Congress passed Title IX to combat widespread discrimination against girls and women in education.³⁷ Sexual harassment is a form of sex discrimination under Title IX,³⁸ which protects students from sexual harassment in essentially the same manner that Title VII protects employees.³⁹

As a natural extension of the provisions of the Civil Rights Act, Title IX proscribes sex discrimination in education programs or activities receiving federal funds,⁴⁰ and essentially applies the principles and guidelines of Title VII to education.⁴¹ Unlike Title VII, which is enforced by the EEOC, Title IX is enforced by the Office for Civil Rights of the U.S. Department of Education.⁴² Title IX specifically 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”⁴³ An institution found in violation of Title IX faces withdrawal of federal funds.⁴⁴ Title IX protections extend to students at all levels of education.⁴⁵

In a 1992 benchmark ruling, the Supreme Court held that student victims of sexual harassment could recover monetary damages from their

34. *Id.*; see also 20 U.S.C. § 1681(a) (2006) (prohibiting discrimination based on sex in any federally funded educational programs or activities).

35. Shoop, *supra* note 32, at 147.

36. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).

37. STEPHEN J. MOREWITZ, SEXUAL HARASSMENT & SOCIAL CHANGE IN AMERICAN SOCIETY 304 (1996).

38. Shoop, *supra* note 32, at 148. “Under Title IX, sexual harassment is defined as ‘verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, or provides different, or conditions the provision of aid, benefits, services, or treatment protected under Title IX.’” *Id.*

39. SHOOP & HAYHOW, JR., *supra* note 16, at 14.

40. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982).

41. Dan H. Wishnietsky & Dennis Felder, *The Effect of Franklin v. Gwinnett County on Sexual Harassment Policy in Secondary Education*, INITIATIVES, vol. 56, No. 1, 1994, at 37, 38.

42. Sandra Shullman & Barbara Watts, *Legal Issues*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 251, 252, 255–56 (Michele A. Paludi ed., 1990).

43. 20 U.S.C. § 1681(a) (2006).

44. See Shullman & Watts, *supra* note 42, at 256.

45. Shoop, *supra* note 32, at 148.

school districts under Title IX.⁴⁶ In *Franklin v. Gwinnett County Public Schools*,⁴⁷ a teacher coerced a student into sexual intercourse, phoned her at home, and requested social meetings.⁴⁸ School officials took no action to stop the harassing behavior.⁴⁹ The Court held that “a damages remedy is available for an action brought to enforce Title IX,”⁵⁰ reasoning that “Congress intended to let students try for monetary damages and compensation when it passed Title IX of the Education Amendments of 1972.”⁵¹

C. Student-on-Student and Teacher-on-Student Sexual Harassment

As the Supreme Court has acknowledged, sexual harassment occurs all too often in school.⁵² The U.S. Department of Justice gathers reports of sexual assault, rape, and sexually oriented verbal assault from school districts across the country.⁵³ “Amazingly, in one year (1996–1997), approximately 2,500 rapes, sexual assaults, or other student-to-student sexual batteries were reported.”⁵⁴ On the whole, student-on-student sexual harassment parallels harassment found in the employment context and has no single identifiable cause.⁵⁵ Studies show such harassment may begin as early as elementary school, when students are initially exposed to social interactions from which gender-defining roles stem.⁵⁶

Courts have continually struggled with establishing what constitutes sexual harassment or abuse.⁵⁷ “The original definition of sexual harassment came from the workplace and has been applied to education”⁵⁸ Because the components of what constitutes sexual

46. Susan Strauss, *Sexual Harassment in K-12*, in *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A HANDBOOK OF CULTURAL, SOCIAL SCIENCE, MANAGEMENT, AND LEGAL PERSPECTIVES* 105, 126 (Michele Paludi & Carmen A. Paludi, Jr. eds., 2003).

47. 503 U.S. 60 (1992).

48. *Id.* at 63.

49. *Id.* at 64.

50. *Id.* at 76.

51. Susan L. Webb, *The History of Sexual Harassment on the Job*, in *SEXUAL HARASSMENT: ISSUES AND ANSWERS* 136, 144 (Linda LeMoncheck & James P. Sterba eds., 2001).

52. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (“The number of reported cases involving sexual harassment of students in schools confirms that harassment is an all too common aspect of the educational experience.”); *see also* MANOS, *supra* note 17, at 42. “Sexual harassment by both school employers and students is a common occurrence in the modern American school.” MANOS, *supra* note 17, at 40.

53. *See* MANOS, *supra* note 17, at 42.

54. *Id.*

55. ROSEMARIE SKAINE, *POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT* 256 (1996).

56. *Id.*

57. *See* Strauss, *supra* note 46, at 122–23.

58. *Id.* at 123.

harassment ““come from adult-to-adult experience, they fall short when applied to sexual abuse and harassment of students. Whether welcome or not, sexual contact between adults and minors is a criminal act.””⁵⁹

A 2001 survey by the American Association of University Women (AAUW) revealed most student victims of unwanted sexual advances at school do not report them to adults.⁶⁰ In cases of physical harassment, only 11% of students who were sexually harassed reported the incident to a teacher, 22% reported it to a parent or family member, and 20% did not divulge the problem to anyone.⁶¹ “Frequently, the student victims are too embarrassed or intimidated to report the undesirable sexual advances. [They] feel they will be ignored, further ostracized, and humiliated if they report the incidents. They also fear retaliation from other students, teachers, administrators, and parents.”⁶² This low percentage of victimization reporting by students demonstrates the difficulty of discovering precise figures of sexual harassment. Nevertheless, when students have been successfully surveyed, “it is obvious that sexual harassment is a problem.”⁶³

A 1995 study revealed that most of the abusers in public schools were heterosexual males who most often sexually abused females.⁶⁴ “The teachers who harass/abuse are often popular, well-liked individuals thought of as stellar teachers by students, staff, and parents.”⁶⁵ Even though the bad decisions of a small group of faculty cast a shadow on the teaching profession, it is important to remember that most teachers *do not* sexually harass students.⁶⁶

The Supreme Court in the late 1990s decided two cases that support the idea of holding school districts liable for student-on-teacher harassment—although the cases do not address the issue directly. The first case, *Gebser v. Lago Vista Independent School District*, decided in 1998, established that school districts may be held liable for teacher-on-student harassment within public schools⁶⁷ if a school official with the authority to stop the abuse knew about it and demonstrated a “deliberate

59. *Id.* (quoting Charol Shakeshaft & Audrey Cohan, *Sexual Abuse of Students by School Personnel*, 76 PHI DELTA KAPPAN 512, 514 (1995)).

60. AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL* 29–30 (2001) [hereinafter *HOSTILE HALLWAYS*] (noting that the majority of students would most likely tell a friend about sexual harassment).

61. *Id.*

62. MOREWITZ, *supra* note 37, at 300.

63. Strauss, *supra* note 46, at 124.

64. *Id.*

65. *Id.*

66. Kenneth R. Wilson & Linda A. Kraus, *Sexual Harassment in the University*, 24 J. C. STUDENT PERSONNEL 219, 224 (1983).

67. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

indifference” by failing to remedy the abuse.⁶⁸ In *Gebser*, a male teacher seduced a fourteen-year-old female student, and kissed, fondled, and had a sexual relationship with her.⁶⁹ Because the student did not report the behavior to school authorities, the Court decided the school district could not be held liable for the teacher-on-student harassment.⁷⁰

In the second case, *Davis v. Monroe County Board of Education*, the Court, resolving a circuit split,⁷¹ ruled school districts may be held liable for student-on-student sexual harassment if the districts knew about the harassment and failed to stop it.⁷² In *Davis*, a female student in the fifth grade was repeatedly “touched, grabbed, and verbally harassed by a male classmate.”⁷³ After complaints of the harassment to school officials failed, the victim’s parents filed suit “against the school district for permitting a sexually hostile environment to exist.”⁷⁴

Teacher-on-student sexual harassment was first recognized as actionable in 1992 by the *Franklin* court,⁷⁵ six years after the Supreme Court’s landmark holding in *Meritor*.⁷⁶ As recently as 1999, the Court established a basis for school liability for student-on-student sexual harassment.⁷⁷ Prior to these judicial breakthroughs by the Supreme Court, however, lower courts were hesitant to walk the precedent-setting plank, unwilling to extend the protections of Title VII to students as victims of sexual harassment.

68. *Gebser*, 524 U.S. at 292–93; see also Strauss, *supra* note 46, at 127. In addition, actual notice to school authorities is required:

[T]he parents’ complaint to the principal concerning Waldrop’s comments in class was the only one Lago Vista had received about Waldrop, and that evidence was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student.

Gebser, 524 U.S. at 279.

69. *Id.* at 277–78.

70. *Id.*; see also ROBERTA WETZEL & NINA W. BROWN, STUDENT-GENERATED SEXUAL HARASSMENT IN SECONDARY SCHOOLS 26 (2000).

71. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999); see also Nan Stein, *Sexual Harassment Meets Zero Tolerance: Life in K-12 Schools*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 143, 144 (William Ayers et al. eds., 2001). For a discussion of *Davis*’ application to school cyber harassment, see Mary-Rose Papandrea, *Student Speech in the Digital Age*, 60 FLA. L. REV. 1027, 1094–96 (2008).

72. See Stein, *supra* note 71, at 144.

73. See *id.* at 143.

74. *Id.*

75. See *supra* notes 45–51 and accompanying text.

76. See *supra* note 24 and accompanying text.

77. See *supra* note 71 and accompanying text.

D. *Teaching in a Hostile Educational Environment: Why Title IX Doesn't Cut It*

Although “Title IX is one of the most sweeping sex discrimination laws ever passed,” case law shows its protections are only effective for students, not teachers.⁷⁸ Students who, by default, are not employees of the school that they attend, and who are sexually harassed by a teacher, have no recourse under Title VII. Students must proceed under Title IX for relief because Title VII only applies to employer-employee relations.⁷⁹ Conversely, for teachers who fall victim to sexual harassment by students, Title IX is an ineffective method for providing adequate relief. As *Davis* established, Title IX provides a private cause of action against the school authority for damages in cases of student-on-student harassment.⁸⁰ A victimized teacher’s better option is Title VII, which should, and to a limited extent does, permit causes of action against public school districts.⁸¹

In the 1998 *Gebser* decision “analyzing the vicarious liability of education institutions . . . the Court regarded Title VII and Title IX as having very different goals and refused to apply agency principles at all to Title IX.”⁸² Because courts continue to regard agency principles as the basis of liability under Title VII, the refusal to apply agency principles to Title IX supports the conclusion that Title IX alone does not provide adequate relief for teachers as victims of sexual harassment by their students. Even though private causes of action in tort or other common-law theories are available to victims, a teacher’s Title VII suit against their school district should be a viable option capable of producing a successful recovery.

III. THE APPLICATION OF TITLE VII TO TEACHERS AS VICTIMS OF STUDENT-ON-TEACHER SEXUAL HARASSMENT

“Few if any studies have investigated the question of sexual harassment toward school faculty.”⁸³ A study conducted by the AAUW revealed that “36 percent of high school students reported that students do indeed sexually harass teachers and other school personnel.”⁸⁴ Although less

78. SHOOP & HAYHOW, JR., *supra* note 16, at 80.

79. Elizabeth A. Keller, *Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy*, in *SEXUAL HARASSMENT: CONFRONTATIONS AND DECISIONS* 21, 25 (Edmund Wall ed., 2000).

80. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632–33 (1999).

81. *See infra* Part III.B.

82. FRANCIS, *supra* note 22, at 52.

83. MANOS, *supra* note 17, at 40.

84. *Id.* at 40–41; *see also* *HOSTILE HALLWAYS*, *supra* note 60, at 14.

researched than student-on-student and teacher-on-student sexual harassment, harassment of teachers by students is becoming more commonplace.⁸⁵ The AAUW study concluded that while both male and female faculty members may be victims, “sexual harassment is directed more at women than men.”⁸⁶ “From 1995 to 1999, more than 73,000 incidents of violence (which includes sexual battery and rape) *against teachers* were reported,”⁸⁷ even though “many incidents go unreported.”⁸⁸

Teachers who are victims of sexual harassment within their classrooms are handicapped when attempting to recover damages. Claims for student-on-teacher harassment brought under Title VII have not enjoyed much success.⁸⁹ This Part argues that actions brought pursuant to Title VII should be universally recognized by courts as a means of recovery for teachers who are victims of sexual harassment. This Part establishes a framework using agency theory, under which claims of student-on-teacher sexual harassment brought under Title VII should be successful.

A. *Hostile Educational Environment Claims Under Title VII*

Courts have established that “sexual behaviors or comments that create a hostile or offensive educational environment can violate Title IX.”⁹⁰ For a successful hostile educational environment claim, a pattern of harassing behavior is required.⁹¹ Courts have developed the “reasonable person” standard, which asks “whether a reasonable [person] would find the behaviors sufficiently severe *or* pervasive to affect work conditions and establish a hostile work environment.”⁹² The issue of whether a sexual advance was welcomed is “relevant in cases involving sexual harassment among employees,” but ordinarily should not arise in school settings.⁹³

Unlike Title IX claims brought by students, “[c]laims brought [by teachers] pursuant to Title VII are analyzed under a burden-shifting

85. See Strauss, *supra* note 46, at 128.

86. MANOS, *supra* note 17, at 41.

87. *Id.* at 42; see also PHILLIP KAUFMAN ET AL., U.S. DEP’T OF EDUC., U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2001 73 (2001) (indicating a total of 68,700 serious violent crimes against teachers, including rape, sexual assault, aggravated assault, and robbery against school teachers in the time period between 1995 and 1999) (emphasis added).

88. MANOS, *supra* note 17, at 42.

89. See *infra* Part III.C.

90. MOREWITZ, *supra* note 37, at 305–06; see also ROBERT J. SHOOP & DEBRA L. EDWARDS, HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS: A HANDBOOK AND CURRICULUM GUIDE FOR ADMINISTRATORS AND TEACHERS 20–21 (1994).

91. See MOREWITZ, *supra* note 37, at 306.

92. *Id.* (emphasis added). See also *Weston v. Pennsylvania*, 251 F.3d 420, 426 (3d Cir. 2001). “In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim’s employment and creates an abusive environment.” *Id.*

93. *Id.*

framework.”⁹⁴ If a plaintiff in a Title VII action makes a prima facie showing of sex discrimination, the burden shifts to the defendants “to establish a legitimate, nondiscriminatory reason for their actions.”⁹⁵ If defendants successfully carry this burden, “the presumption of discrimination drops from the case, and plaintiff must ‘cast sufficient doubt’ upon defendants’ proffered reasons to permit a reasonable factfinder to conclude that the [defendants’] reasons are fabricated.”⁹⁶ “It is well established that a plaintiff can demonstrate a violation of Title VII by proving that sexual harassment created a hostile or abusive work environment.”⁹⁷ In order to establish a prima facie Title VII claim premised on a hostile work environment, a plaintiff must demonstrate that he or she: “(1) suffered intentional discrimination because of [his or her] sex; (2) the discrimination was [severe or pervasive]; (3) the discrimination detrimentally affected . . . [the] plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.”⁹⁸ A prima facie showing, therefore, contains both a subjective standard—that a plaintiff was in fact affected—and an objective

94. *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 478 (D. Del. 2007).

95. *Id.*

96. *Id.* at 479 (quoting *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc)).

97. *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir. 1999). “[T]o determine whether an environment is sufficiently hostile or abusive, courts must look to the totality of the circumstances, including the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’” *Mongelli*, 491 F. Supp. 2d at 479 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

98. *Id.* at 479 (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 (3d Cir. 1990) (alterations in original) (footnotes omitted)). When the plaintiff attempts to hold an employer, such as the school board, liable for the actions of non-employees, such as students, courts take into account the control of the employer over non-employees. *Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109(APR), 2001 WL 1328921, at *5–6 (E.D.N.Y. Aug. 6, 2001). The court observed:

There are, of course, distinctions between student-on-student harassment and student-on-teacher harassment, the most important of which is that a victim student has no disciplinary authority over the harassing student, while a victim teacher wields at least nominal disciplinary authority. It is therefore conceivable that school officials would owe a greater duty of protection to powerless students than to teachers. Nevertheless, as a general rule, school administrators and school board officials have disciplinary authority that exceeds that of a classroom teacher, such as the power to suspend students and take other actions not commonly carried out by individual classroom instructors.

Id. at *6.

standard—that a reasonable, similarly situated plaintiff would have been affected.⁹⁹

B. *Setting the Standard for Student-on-Teacher Sexual Harassment*

“Despite the authority of teachers in the teacher-student relationship, teachers are subjected to objectionable sexual behaviors by students.”¹⁰⁰ Over the past twenty years, investigators have discovered a variety of instances in which male students have sexually harassed female teachers.¹⁰¹ Studies show that in most cases of student-on-teacher sexual harassment, the victim is a female teacher.¹⁰² Although some sexually suggestive behaviors of students may be written off as “boys . . . ‘just being boys,’” many of these behaviors directed towards teachers have included the grabbing of teachers and “unwanted sexual comments and obscene remarks.”¹⁰³ Until recently, “analysts have questioned whether this behavior constitutes true sexual harassment because of the inherent power differences between teachers and students.”¹⁰⁴ The behaviors in question have also been termed “sexual hassling” by these analysts, instead of sexual harassment, indicating behaviors that might otherwise be offensive but may not rise to the level of harassment.¹⁰⁵

The apparent disparity between the protective treatment *received* by students and the cold-shoulder treatment *expected* by teachers as victims of sexual harassment might have been justified by Congress and federal benches of generations past. However, as protections for students have grown, so must the protections safeguarding *their* educators. Such treatment of teachers is unjust: teachers cannot justifiably be left to fend for themselves.

Perhaps most unsettling, some school officials have blamed the teachers for being harassed by students.¹⁰⁶ “Researchers have discovered that until recently, the sexual harassment of . . . female teachers was frequently a hidden but accepted part of the curriculum.”¹⁰⁷ Before

99. *Andrews*, 895 F.2d at 1483. Title VII also contains an anti-retaliation provision. See Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933–37 (2007); Lindsay Roshkind, Comment, *Employment Law: And Adverse Action Against Employers: The Supreme Court's Expansion of Title VII's Anti-Retaliation Provision*, 59 FLA. L. REV. 707 (2007).

100. MOREWITZ, *supra* note 37, at 301.

101. *See id.* at 302.

102. *See id.* at 301.

103. *Id.* (quoting CARRIE M.H. HERBERT, TALKING OF SILENCE: THE SEXUAL HARASSMENT OF SCHOOLGIRLS 4 (1989)).

104. *Id.* at 302.

105. *Id.*

106. *See id.*

107. *Id.* at 303.

legislation existed for teachers, a “[l]ack of knowledge and taboos toward sexual harassment” enabled “objectionable sexual behaviors to occur without sanctioning from school officials.”¹⁰⁸

In 2005, in *Plaza-Torres v. Rey*, a federal district court in Puerto Rico recognized that although a teacher could bring an action for sex discrimination under Title IX, by no means was such a claim her *only* method of recourse.¹⁰⁹ Noting that “the issue of whether a school may be held liable for student-on-teacher harassment has not been expressly resolved,”¹¹⁰ the court concluded a teacher “may seek redress under Title VII” against the school district “for the sexual harassment suffered on account of one of her students.”¹¹¹ In this landmark decision, the court explained that “Title VII seeks to eliminate *all* forms of sex discrimination in *all* work environments” and “absent clear directive from the U.S. Supreme Court . . . we will not limit the reach of Title VII liability by closing the door on student-on-teacher harassment.”¹¹²

The court then addressed the issue of the school’s liability for the teacher’s Title VII sexual harassment claim.¹¹³ The school district argued that the teacher’s claims under Title VII should be dismissed because a school district cannot be held liable for the actions of a student and because the teacher did not establish that the district failed to take corrective action.¹¹⁴ “[A]n employer’s liability for hostile environment sexual harassment depends on the relationship between the employer and the person responsible for the sexual harassment.”¹¹⁵ The court dismissed the school district’s argument because it found “[t]he basis for liability in this case is clear.”¹¹⁶ The court explained “[a]n employer/school is liable ‘[i]f an official representing that institution knew, or in the exercise of reasonable care, should have known of the harassment’s occurrence, unless that official can show that he or she took appropriate steps to halt it.’”¹¹⁷

108. *Id.*

109. *See Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 179 (D.P.R. 2005).

110. *Id.* at 181.

111. *Id.* at 182.

112. *Id.* (emphasis added).

113. *Id.*

114. *Id.*

115. *Id.* at 183; *see also* *Molina Quintero v. Caribe G.E. Power Breakers, Inc.*, 234 F. Supp. 2d 108, 112 (D.P.R. 2002) (distinguishing the applicable standards for employer liability as a result of sexual harassment perpetrated by a supervisor or by a coworker).

116. *Plaza-Torres*, 376 F. Supp. 2d at 183.

117. *Id.* (quoting *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988) (alteration in original)).

In this case, the teacher resigned two months after she informed her school's officials about the harassment.¹¹⁸ After establishing its theory of recovery for teachers under Title VII, the court in *Plaza-Torres* denied the school district's motion for summary judgment. Under Title VII, the court held the issue of "[w]hether two months is enough time to take an appropriate corrective action against sexual harassment in the work place is an issue of fact which is reserved for the jury."¹¹⁹

In *Plaza-Torres*, the court relied on several recent decisions to determine whether a school can be held "liable for the misconduct or sexual harassment perpetrated by one of its students upon a teacher/employee of the school."¹²⁰ Rejecting the school district's invitation to dismiss the harassed teacher's claims since a cause of action for student-on-teacher sexual harassment has not been established by either the U.S. Supreme Court or the First Circuit, the court reasoned such a cause of action "may be inferred from recent Title VII, Equal Protection and Title IX case law."¹²¹ Existing precedent clearly establishes that a school may be held liable both for teacher-on-student harassment and for student-on-student harassment, while an employer may be held liable for harassment of an employee by a supervisor, of an employee by a coworker, and even of an employee by a non-employee such as a customer.¹²² In the same manner that an employer may be held liable for customer-on-employee harassment, the *Plaza-Torres* court ultimately held that a teacher may bring a cause of action for student-on-teacher harassment.¹²³ The court relied on a "handful of cases which suggest that student-on-teacher harassment is cognizable under Title VII."¹²⁴

C. A "Special" Exception?

"[S]pecial education students who are prone to disruptive behavior by virtue of their disabilities"¹²⁵ used to be placed in separate special education classes apart from other students. Now, however, federal law places these students, regardless of the severity of their disabilities, "in the most normal or regular school setting possible where [they] can be

118. *Id.* at 184.

119. *Id.*

120. *Plaza-Torres*, 376 F. Supp. 2d at 180.

121. *Id.*

122. *Id.* at 181.

123. *Id.* at 182 ("[A]bsent clear directive from the U.S. Supreme Court or the First Circuit Court, we will not limit the reach of Title VII liability by closing the door on student-on-teacher harassment. After all, Title VII seeks to eliminate all forms of sex discrimination in all work environments.").

124. *Id.* at 181.

125. *Mongelli*, 491 F. Supp. 2d at 478.

successful.”¹²⁶ Do the unique circumstances surrounding special education students require a “special” exception for sexual harassment?

In *Mongelli v. Red Clay Consolidated School District Board of Education*, a male ninth-grade special education student sexually harassed a special-education teacher eight times over twelve days.¹²⁷ The student directed vulgar comments and sexually suggestive gestures towards the teacher, and physically grabbed her several times.¹²⁸ Following school protocol, the teacher made numerous written referrals to the principal’s office, and the student was suspended several times for up to five days.¹²⁹ The harassment occurred in front of the teacher’s other students.¹³⁰

The court admitted that, under the circumstances, the student’s conduct could be described as humiliating, and not merely an offensive utterance.¹³¹ In addition, the court recognized the harassment “could have interfered with [the teacher’s] work performance by disrupting the classroom and undermining her authority as a teacher.”¹³² Despite the student’s disturbing conduct, for which he had since been charged criminally, the court concluded, mainly because the student’s actions had occurred over a short period of time, that the teacher failed to establish a prima facie case of a hostile work environment against the school district and that “the severity of the conduct and the context in which it took place [were] not sufficient to satisfy Title VII’s ‘severe or pervasive’ requirement.”¹³³ The court reasoned that even if the student’s conduct was found to satisfy the severe or pervasive requirement, the teacher nonetheless “failed to establish that a reasonable person in her situation would have been detrimentally affected by the objectionable conduct.”¹³⁴

Although the court conceded “a school *may* be held liable for student-on-teacher harassment, even if the harasser is a special education student,”¹³⁵ it was unwilling to allow the teacher’s claim to succeed. In attempting to shield the defendant school district from liability, the court cited the Supreme Court’s opinion in *Oncale v. Sundowner Offshore Services, Inc.*, emphasizing that “the objective severity of harassment

126. STUART E. SCHWARTZ & CRAIG A. CONLEY, HUMAN DIVERSITY: A GUIDE FOR UNDERSTANDING 613 (4th ed. 2000). Many educators prefer to place children with disabilities in the regular education classroom and “to provide whatever services are needed in that setting so that the children are successful in that environment.” *Id.*

127. *Mongelli*, 491 F. Supp. 2d at 471–73.

128. *Id.*

129. *Id.* at 472, 474.

130. *Id.* at 480.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 480 n.20 (emphasis added).

should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances, including careful consideration of the social context in which particular behavior occurs and is experienced by its target."¹³⁶ Relying on *Oncale*, the school district argued that within the context of special education in which the harasser was a special-needs student, the behavior could not be severely abusive or hostile as a matter of law.¹³⁷

Admittedly, "it is not uncommon for special education students to act out in an inappropriate manner . . ." ¹³⁸ However compelling the argument may be for forbidding a special-education student's actions from being considered sexual harassment, the court was not persuaded to make a bright line rule that "no special education student's behavior could ever constitute harassment actionable under Title VII."¹³⁹ The court appeared willing to find a teacher a victim of sexual harassment under Title VII, under circumstances much more severe or pervasive than those faced by this teacher. This decision, however, leaves a reasonable person perplexed as to how severe or pervasive the harassing behavior must actually be for a successful claim. *Mongelli* reveals that the court interpreted the colorful language of *Oncale* through a stripped-down, all-or-nothing lens, effectively leaving the teacher with no relief in sight.

A blanket prohibition immunizing schools from liability for harassment of a teacher by a special education student would be "a disservice to teachers, who deserve a working environment free from abuse, and would provide schools with no incentive to remedy incidents of harassment in their special education classrooms."¹⁴⁰ Nevertheless, "the requisite threshold of abuse will necessarily be higher than with students lacking developmental disabilities," yet "harassment of teachers by special education students can constitute a hostile work environment for Title VII purposes."¹⁴¹ To date, there is no authority that "imposes a different standard of sexual harassment because developmentally disabled individuals are involved."¹⁴²

The message the *Mongelli* court sends to teachers, especially those of special-education students, is frightening. The court recognized that "while plaintiff has made it clear that she was subjectively offended by [the student's] behavior, nothing in the record purports to show where the

136. *Id.* at 480 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

137. *See id.* at 480–81.

138. *Id.* at 481.

139. *Id.* (emphasis added).

140. *Id.* at 478.

141. *Id.* (emphasis added).

142. Mitchell H. Rubinstein, *Shocking Decision Holding that Teacher Does Not State Sexual Harassment Claim Against Student*, Adjunct Law Prof. Blog, <http://lawprofessors.typepad.com/adjunctprofs/2007/07/teacher-does-no.html> (July 9, 2007).

tolerance threshold of a reasonable special education teacher lies, let alone whether it was crossed in the case at bar.”¹⁴³ Essentially, when a teacher, in front of the other students in her class, is repeatedly “grabbed forcefully,” “hump[ed],” told her “nipples are hard,” and is “pulled . . . close to [a student’s] body” while being called a derogatory name,¹⁴⁴ there still is insufficient evidence from which a jury could possibly determine that this behavior has detrimentally affected a reasonable special education teacher in the plaintiff’s position.¹⁴⁵ Although the court admits there is no precedent for a tolerance threshold of harassment, a jury of fact-finders would be quite capable of making such a determination. Shockingly, what would typically be thought of as an issue for a jury to resolve—determining a tolerance threshold of harassment—was swiftly swept under the carpet. In granting the school district’s motion for summary judgment,¹⁴⁶ the *Mongelli* court, in effect, closed the door on any possibility of relief for a special education teacher bringing a Title VII claim, even though it expressly declined to adopt such a bright line rule.¹⁴⁷

D. *Reasoning in the Right Direction: Support for Student-on-Teacher Sexual Harassment Claims*

Although the cases described in this Part employ different legal arguments, they all have one thing in common: they uniformly suggest that a cause of action under Title VII for student-on-teacher harassment should be recognized.

In *Peries v. New York City Board of Education*, a teacher filed suit against the New York Board of Education for failing to take remedial action against a student who harassed him because of his race and national origin.¹⁴⁸ The teacher filed suit under Title VII, arguing the student’s “name-calling, mimicking, and other abuse created a hostile work environment.”¹⁴⁹ The district court held that the teacher could prevail on an action for sexual harassment against the school if he could show “first that a hostile environment existed and second that the school board either provided no reasonable avenue of complaint or knew of the harassment

143. *Mongelli*, 491 F. Supp. 2d at 481.

144. *Id.* at 472.

145. *Id.* at 481.

146. *Id.*

147. *Id.* (“[T]he court has declined defendants’ invitation to find that no special education student’s behavior could ever constitute harassment actionable under Title VII.”).

148. *Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109(APR), 2001 WL 1328921, at *1 (E.D.N.Y. Aug. 6, 2001).

149. *Id.* at *6.

and failed to take appropriate remedial action.”¹⁵⁰ The court reasoned that school board officials and school administrators are charged with a “disciplinary authority that exceeds that of a classroom teacher” and includes “the power to suspend students and take other actions not commonly carried out by individual classroom instructors.”¹⁵¹

Most important to this Note, however, was the court’s conclusion that summary judgment of the plaintiff’s Title VII claims against the school was improper since “[t]he question of whether school officials took appropriate remedial action is a question of fact, not law.”¹⁵² Reconciling the *Peries* holding, where the school board’s motion for summary judgment was denied, with *Mongelli* is a challenge to say the least. Instead of dismissing the plaintiff’s claim in *Mongelli* on summary judgment, the court could have followed the logical opinion of the *Peries* bench. Specifically, *Peries* decided that “the jury will have to make a decision ‘by looking at all the circumstances’ surrounding the harassment, . . . including the severity of the abuse, the nature of the humiliation, its interference with [the plaintiff’s] teaching, and its effect on his psychological well-being.”¹⁵³ Even if the jury is not convinced by the teacher’s allegations, the *Peries* court believed the question should not be resolved by the court on a motion for summary judgment.¹⁵⁴ The saving grace for the *Mongelli* court was that *Peries* is persuasive, rather than controlling, judicial authority.

The *Mongelli* court chose to ignore the *Peries* court’s reasoning and thus created a conflict among federal district courts as to when a question of fact in school sexual harassment cases exists. Two additional cases, *Schroeder v. Hamilton School District*¹⁵⁵ and *Lovell v. Comsewogue School District*,¹⁵⁶ provide further support for the conclusion that harassment of a teacher by a student is actionable.¹⁵⁷ In both of these cases, teachers sued their school districts for not taking any significant measures to prevent harassment from their students because of the teachers’ sexual orientation.¹⁵⁸ Both cases were filed under the Equal Protection clause,¹⁵⁹ and the courts “recognized that a cause of action for student-on-teacher harassment is actionable under the Equal Protection clause.”¹⁶⁰ In addition,

150. *Id.*

151. *Id.*

152. *Id.* at *7.

153. *Id.* at *6 (citations omitted).

154. *Id.*

155. 282 F.3d 946 (7th Cir. 2002).

156. 214 F. Supp. 2d 319 (E.D.N.Y. 2002).

157. *Plaza-Torres*, 376 F. Supp. 2d at 181.

158. *Id.*

159. U.S. CONST. amend. XIV.

160. *Id.* at 182.

the *Schroeder* court noted that if this were “a Title VII case, the defendants could be liable . . . if [the plaintiff] demonstrated that they knew he was being harassed and failed to take reasonable measures to try to prevent it.”¹⁶¹ The *Mongelli* court should have taken into account the underlying recognition from *Schroeder* and *Lovell* that school districts could be held liable under Title VII.

In *Howard v. Board of Education*, a teacher filed suit under Title IX against the school district for sexual harassment by fellow teachers and students.¹⁶² The court held the teacher’s Title IX claim was precluded by Title VII and accordingly dismissed the claim.¹⁶³ The court noted “Title VII provides a comprehensive scheme for aggrieved individuals to enforce the prohibition against discrimination in employment,” suggesting that had the teacher filed a claim under Title VII she would likely have been successful.¹⁶⁴ The *Plaza-Torres* court, in its analysis of student-on-teacher sexual harassment claims under Title VII, interpreted *Howard* as not rejecting the possibility of a Title VII student-on-teacher harassment claim against the school board.¹⁶⁵

Although several courts have recognized student-on-teacher harassment in the context of Title VII, unfortunately, these decisions are merely persuasive: none have been the work of the Supreme Court nor have any of them been codified into an applicable federal statute. As such, these well-reasoned holdings are of little help to victims such as the plaintiff in *Mongelli*.

E. Principles of Agency Theory Hard[ly] at Work

Before the Court decided *Meritor* in 1986,¹⁶⁶ courts were divided “on whether in hostile environment cases the plaintiff could rely on agency principles”¹⁶⁷ “In *Meritor*, the Court expressed general approval of the use of agency law—that is, law governing when one person should be held to have acted on behalf of another—to determine whether the employer should be vicariously liable, leaving it open to lower courts to fashion standards case by case.”¹⁶⁸ After *Gebser* was decided in 1998, it was clear that in sexual harassment law, a “plaintiff will either need to show that the

161. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002).

162. *Howard v. Bd. of Educ.*, 893 F. Supp. 808, 812 (N.D. Ill. 1995).

163. *Id.* at 815.

164. *Id.*

165. *Plaza-Torres*, 376 F. Supp. 2d at 182.

166. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). See Part I.A, *supra*.

167. FRANCIS, *supra* note 22, at 51 (“The basic premise of agency law is that the acts of the agent are attributed to the principal if the agent is acting ‘within the scope’ of his or her authority.”).

168. *Id.*

agent was acting within the scope of responsibilities or will need to establish some other basis for attributing the agent's conduct to the principal."¹⁶⁹ Therefore, in hostile environment cases, "the employer is liable . . . if the employer knows of the harassment and negligently fails to correct it"¹⁷⁰

In *Plaza-Torres*, the court recognized "the applicable standard [in considering student-on-teacher harassment] is the one utilized in customer-on-employee harassment"¹⁷¹ In *Plaza-Torres*, the court dismissed the school district's argument that even if the student's behavior was considered harassment, the teacher would have no recourse under Title VII because the EEOC Guidelines¹⁷² do not include students as examples of third parties or non-employees for which an employer may be held liable for sexual harassment.¹⁷³ By their very nature, EEOC Guidelines contain examples of the situations in which employer liability attaches for non-employee conduct, but the list is not exhaustive.¹⁷⁴ The court based its conclusion on the EEOC guidelines, which provide:

An employer may also be held responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace where the employer (or its *agents* or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.¹⁷⁵

Thus, it is evident "*the term 'non-employee,' as defined in EEOC Guidelines, does not exclude students*, especially if the [c]ourt finds that a school has control and legal responsibility over student misconduct."¹⁷⁶ If the behavior of students creates a hostile work environment "and the educational institution knows about it, it will be liable if it fails to take 'immediate and appropriate corrective action' [T]he type of

169. *Id.*

170. *Id.*

171. *Plaza-Torres*, 376 F. Supp. 2d at 183.

172. *See supra* note 21 and accompanying text.

173. *Id.*

174. *Id.*

175. *Id.* (quoting 29 C.F.R. § 1604.11(e) (2008) (emphasis added)).

176. *Id.* (emphasis added); *see also* *Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109(APR), 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001) (recognizing that while a victim teacher wields at least nominal disciplinary authority over a student harasser, as a general rule, school districts and school officials have disciplinary authority, such as the power to suspend students, that exceeds the authority of individual classroom teachers).

appropriate steps the school should take will differ depending on the level of control the school has over the third party harasser.”¹⁷⁷ The *Plaza-Torres* court ultimately held that “[u]nnecessary restriction in the scope of employer liability under Title VII is inappropriate absent any legal authority to that effect.”¹⁷⁸

In 1986, the Supreme Court in *Meritor* first expressed general approval of using agency principles as a guide for interpreting Title VII.¹⁷⁹ Notwithstanding the judiciary’s recent connection between agency principles and Title VII,¹⁸⁰ courts have remained hesitant to apply those principles to Title VII.

IV. CONCLUSION: WHAT WILL IT TAKE FOR A TEACHER TO SUCCESSFULLY BRING A CLAIM AGAINST A STUDENT?

Courts must give teachers the ability to bring Title VII claims and win. To make this a reality, courts should establish a bright-line rule allowing juries to consider a victim’s case after being harassed once or on several occasions instead of dismissing the case outright on summary judgment. Alternatively, courts should set a clear standard on the amount of time a teacher must endure harassment before a teacher can file a claim. Absent any such established guidelines, teachers are left to fend for themselves, swinging aimlessly in a ring of phantom Title VII protections.

As the law stands now, a teacher cannot determine how much harassment they must endure—and for how long—before they can bring a Title VII claim. From *Mongelli*, it is evident that eight incidents of sexually harassing behavior directed at a teacher over twelve days do not constitute conduct of a legally sufficient nature to reach a jury. In contrast, in *Plaza-Torres*, the court found a jury could consider whether multiple incidents of harassment lasting two months constituted illegal discrimination.¹⁸¹ In an educational system with a “zero tolerance”¹⁸² policy, a reasonable commentator is hard-pressed to determine a middle ground between the findings of *Mongelli* and *Plaza-Torres*. Essentially, courts have articulated that a reasonable person would not be affected by harassment over a twelve-day period, but *might* be affected by harassment over a two-month period. From afar, these two conclusions may be seen

177. FRANCIS, *supra* note 22, at 58 (quoting Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,040 (Mar. 13, 1997)).

178. *Plaza-Torres*, 376 F. Supp. 2d at 183–84.

179. *See Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

180. *See supra* notes 103–06 and accompanying text.

181. *See supra* notes 137–46 and accompanying text.

182. *See generally* Stein, *supra* note 71, at 143–54 (discussing the interplay between zero-tolerance policies and the recognition of sexual harassment in schools by the courts).

as viable boundaries for a cause of action against a student harasser. As a result, this line of reasoning sends a message to teachers suffering from harassment by their students that they must endure humiliating and demeaning verbal and physical assaults for at least two months if they want a chance at recovery. In order to protect our nation's educators, the judiciary needs to give some teeth to the idea that teachers can bring suit under Title VII and win.

With the number of teacher-on-student harassment claims far exceeding the number of student-on-teacher harassment claims, courts are seemingly better equipped for considering the protections available to students as opposed to victimized teachers. Nevertheless, student-on-teacher sexual harassment under Title VII needs the same clarity afforded to student-on-student and teacher-on-student sexual harassment under Title IX. Teachers should not need to endure more severe harassment for a longer period of time than employees in non-educational settings to successfully bring a Title VII claim.

While advocating for the underdog typically isn't the most popular position, it certainly is one that needs to be recognized in our democracy. Victimized teachers deserve the same tools to fight harassment that victimized students have. The *Plaza-Torres* court momentarily led teachers to believe that redress for their student harassers was in the making and must be credited for attempting to tackle what inevitably will become another form of equal protection for both students *and* teachers. As cases like *Mongelli* work themselves through the costly federal appeals process, the Supreme Court should come to recognize teachers as victims of sexual harassment by their students, ultimately effectuating their recovery under a Title VII line of attack.