A BACK DOOR TO INDIVIDUAL TITLE IX LIABILITY?

THE IMPLICATIONS OF *FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE* ON THE LIABILITY OF TEACHERS AND ADMINISTRATORS FOR PEER-TO-PEER HARASSMENT

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INTRODUCTION

Peer-to-peer harassment in primary and secondary schools has received significant attention among scholars, the media, parents, and educators. In January 2010, the suicide of teenager Phoebe Prince resulted in widespread national coverage and attention to peer-to-peer harassment.[1] In the summer and early fall of 2010, several young people committed suicide after suffering peer-to-peer harassment based on the victims' sexual orientation.[2] These tragedies have increased the media's attention to the problem of harassment in schools.

Labeling the harassment as bullying, the media has focused on state laws and school policies to prevent bullying among students. For example, the media attention surrounding Prince's death included hours of coverage on the problem of bullying in schools from national media sources like CNN, MSNBC, and Fox News.[3] While the media largely focused on Prince's suicide as a result of bullying, some commentators have suggested that the taunts and harassment were based on sex, and, as such, litigation against the school district under the federal anti-sexual discrimination statute Title IX may be appropriate.[4]

The question is whom can Prince's parents sue for violations of Title IX? A 2009 Supreme Court case, *Fitzgerald v. Barnstable School Committee* (*Fitzgerald*), has potentially opened the door to sue individual teachers and administrators, in addition to the school district, under Title IX for peer-to-peer

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1. *See* Kathy McCabe, *Teen's Suicide Prompts a Look at Bullying*, Boston.com (Jan. 24, 2010), *available at* http://www.boston.com/news/education/k_12/articles/2010/01/24/teens_suicide_prompts_a_look_at_bullying/.

2. David Crary, *Suicide Surge: Schools Confront Anti-gay Bullying*, MSNBC.com (Oct. 9, 2010), *available at* http://www.msnbc.msn.com/id/39593311/ns/us_news-life/.

3. *Anderson Cooper 360 Degrees* (CNN television broadcast Apr. 9, 2010) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/1004/09/acd.02.html); *Anderson Cooper 360 Degrees* (CNN television broadcast Mar. 30, 2010) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/1003/30/acd.02.html); Stephanie Reitz, *Documents: Bullied Teen Sought School's Help*, MSNBC.com (Apr. 9, 2010), *available at* http://www.msnbc.msn.com/id/36263424; *Nine Charged in Bullying of Massachusetts Teen Who Killed Herself*, FoxNews.com (Mar. 29, 2010), *available at* http://www.foxnews.com/us/2010/03/29/charged-bullying-massachusetts-teen-killed/.

4. Wendy J. Murphy, *Suing School Would Shine Light on 'Suicide by Bullying'*, PatriotLedger.com (Feb. 13, 2010), http://www.patriotledger.com/opinions/x814065334/WENDY-J-MURPHY-Suing-school-would-shine-light-on-suicide-by-bullying, (last accessed Apr. 24, 2010) ("It was obviously bullying, but it was also severe, pervasive and gender-specific verbal torture, which is sexual harassment, thus a violation of Title IX – the federal civil rights law that has forbidden gender discrimination in schools since its enactment in the early 1970s."); Nicole Marschean, *Phoebe Prince: Title IX's Application to School Harassment Cases*, National Women's Law Center (Apr. 1, 2010), http://www.opposingviews.com/i/phoebe-prince-title-ix%E2%80%99s-application-to-school-harassment-cases, last accessed on Apr. 24, 2010 ("But the media has largely missed that Title IX, the federal law that bans sex discrimination in education by recipients of federal funds, already applies to harassment in schools. Even without state anti-bullying protections, schools have an obligation to address and prevent sexual harassment. These horrible events serve as an unfortunate reminder to school administrators across the country.").

harassment.[5] In *Fitzgerald*, the Court found that plaintiffs may raise Section 1983 Equal Protection claims at the same time as Title IX claims, presumably ending the circuit court split over whether or not constitutional Section 1983 claims were precluded by the remedial structure of Title IX.[6] What the Court suggested, however, may have an even more dramatic effect on Title IX. While the issue was not before the Court, since the parents did not appeal the dismissal of their Section 1983 Title IX claims, the *Fitzgerald* decision suggests that the Court may have opened the door for parents and students to raise Title IX claims against teachers and administrators in their individual capacities via Section 1983.[7] This would allow plaintiffs to sue individuals for violations of Title IX when the statute itself only allows liability of federal funding recipients, for example, the school district or school board.[8]

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by federal funding recipients in education programs.[9] While the statute is more often known for requiring gender equity in university and college sports, the statute also provides remedies for sexual harassment, including peer-to-peer harassment.[10] Students, often via their parents, may raise individual rights of action against a school board or district for failing to adequately respond to and address sexual harassment.[11] The potential for liability of a school district is well established and indisputable, but individuals cannot be sued under Title IX.[12] Some courts, however, have allowed plaintiffs to bring suits against teachers and administrators in their personal capacities for violations of Title IX through Section 1983 of the Civil Rights Act of 1964.[13]

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5. *See infra* note 282 and accompanying text; Melissa Hewey, *Advisory #608: United States Supreme Court Broadens Potential Liability for Peer-to-Peer Harassment*, SchoolLaw.com (Spring 2009) http://www.schoollaw.com/html/pdf/608.pdf ("[O]n January 21, 2009, the Supreme Court issued a decision in Fitzgerald v. Barnstable School Dist.2, in which it significantly broadened the potential for liability, making it clear that not only may school districts be found liable for peer-to-peer harassment even where they acted reasonably, but also that individuals may be sued and could be liable for failure to adequately address harassment.").

6. Fitzgerald v. Barnstable, 129 S.Ct. 788, 797 (2009); *see also infra* Part VI.A.

7. *Fitzgerald*, 129 S.Ct. at 796 (2009) ("[P]arallel and concurrent [Section] 1983 claims will neither circumvent required procedures, nor allow access to new remedies.").

8. *See infra* note 42 – 45 and accompanying text.

9. 20 U.S.C. § 1681(a) (2006).

10. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

11. *Id.*

12. *Id.* at 640-41 ("The government's enforcement power may only be exercised against the funding recipient, see [20 U.S.C.S.] § 1682, and we have not extended damages liability under Title IX to parties outside the scope of this power."); *see also* Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1018-19 (7th Cir. 1997); Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262 (2000) (finding that school board members are not subject to individual liability under Title IX in peer-to-peer harassment case).

13. *See infra* Part VI. A.

While allowing students to use the procedural mechanism of Section 1983 to sue individual teachers and administrators for violations of Title IX would provide them with the potential for additional remedy, such suits contradict the statute and Congressional intent. This article will argue that Section 1983 claims based on Title IX violations ("Section 1983 Title IX claims") are precluded by Title IX in peer-to-peer harassment cases.[14] Courts should not allow Section 1983 claims for Title IX violations against individuals because it is contrary to the intention of the statute as well as to the decades of interpretation of the statute.[15] Allowing such claims would provide a back door into litigation that was not intended by Congress and is not allowed by the statute itself.

Part I briefly discusses the problem of sexual harassment in schools, a problem that recent research indicates is pervasive and widespread. Title IX and peer-to-peer harassment claims under Title IX are discussed in Part II, which analyzes some of the historically significant cases and the requirements to prevail on Title IX claims. Part III then discusses the contours of Section 1983 and the issue of the preclusion of Section 1983 claims. Part IV describes the constitutional claims that are often raised concurrently with Title IX through Section 1983. Part V describes the circuit court split regarding preclusion of Section 1983 claims, both statutory and constitutional, and analyzes the *Fitzgerald* decision. Finally, Part VI argues that there should be no individual liability for Title IX violations by allowing Section 1983 Title IX suits against teachers and administrators as individuals.[16] The conclusion discusses the impact of finding such potential liability.

The Court's holding in *Fitzgerald* that constitutional Section 1983 claims are not precluded by Title IX is consistent with Title IX's statute. The decision should not be used to suggest that Title IX does not preclude statutory Section 1983 claims based on Title IX against teachers and administrators as individuals. If faced with this issue in the future, the Supreme Court should hold that Title IX precludes Section 1983 Title IX claims in peer-to-peer harassment suits.

The problem of sexual harassment in schools is significant, but providing a back door method of liability against individual teachers and administrators directly conflicts with Title IX and is contrary to Congressional intention. While allowing such litigation could bring victims additional remedy, victims

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14. Note that some courts have found that while Title IX precludes Section 1983 Title IX claims generally, Section 1983 Title IX claims against individual teachers and administrators are not precluded when that individual is the perpetrator of the harassment. This paper addresses only peer-to-peer harassment cases in which a third party is the perpetrator of the harassment.

15. *See infra* Part VI.

16. The issue of preclusion goes beyond Title IX, and while beyond the scope of this article, it is important to note that similar circuit court splits exist regarding Title VI and Title VII. Title VII is particularly analogous to Title IX because it has been interpreted to allow only liability against employers, not individuals. Courts have frequently found that Section 1983 claims based on Title VII against individuals are precluded by the statute.

of peer-to-peer sexual harassment have recourse and remedies available to them through Title IX itself, in addition to the Constitution and state laws. Only Congress can amend Title IX to explicitly allow liability against individuals in peer-to-peer harassment cases; the courts should not legislate such a remedy on their own.

I. THE PROBLEM OF SEXUAL HARASSMENT IN SCHOOLS

The problem of sexual harassment in schools is pervasive, and peer-to-peer harassment litigation is growing. While it is difficult to determine the exact number of peer-to-peer harassment cases in any particular time period, a search for cases involving peer harassment and Title IX claims in all federal courts between January 1, 2000 and December 31, 2009 resulted in 143 case opinions, while the same search between January 1, 1990 and December 31, 1999 resulted in 54 case opinions.[17] Obviously, this kind of tally does not include claims that did not have published opinions or decisions and claims that settled before even reaching court. Even though peer-to-peer harassment cases may not be the most prevalent type of litigation schools face, the past decade has seen a substantial increase in these kinds of cases.[18]

A 2001 survey conducted by the American Association of University Women found sexual harassment is "widespread" in schools.[19] According to the study, 83 percent of female student respondents and 79 percent of male student respondents within grades eight through eleven reported having "been sexually harassed at school in ways that interfered with their lives."[20] The same

17. The following search was run in LexisNexis in the all federal courts database on May 3, 2010: Title IX and peer w/s harass! and date (geq (1/1/2000) and leq (12/31/2009) . The same search terms were run in the same database with the date restriction 1/1/1990 to 12/31/1999. Admittedly this is a limited search as some cases may refer to peer-to-peer harassment in different terms, and some cases may mention peer-to-peer harassment when the case involves a different type of harassment. Nonetheless, the majority of the cases in the results were indeed peer-to-peer harassment cases, and the searches provide support the notion that peer-to-peer harassment cases have increased. Note that this does not suggest that peer harassment has necessarily increased, merely that litigation of those cases has, which is not surprising given that the Supreme Court only held in 1990 in Davis v. Monroe County Board of Education that peer-to-peer harassment claims are cognizable against school districts under Title IX.

18. A recent American School Board Journal article described a survey about the top ten legal issues in K-12 schools. Del Stover & Glenn Cook, *The Legal List Top 10 Issues*, 196 AM. SCH. BD. J. 16, 17 (2009). While not in the top ten legal issues, sexual harassment claims were noted as receiving votes in the survey. *Id*. The article also discussed how schools are facing increased pressure in finances and litigation puts additional pressure on the limited resources. *Id*. at 20-21.

19. AMERICAN ASS. OF UNIV. WOMEN, HOSTILE HALLWAYS: BULLYING, TEASING AND SEXUAL HARASSMENT IN SCHOOL, (2001), *available at* http://www.aauw.org/learn/research/upload/hostilehallways.pdf.

20. NATIONAL WOMEN'S LAW CENTER, HOW TO PROTECT STUDENTS FROM SEXUAL HARASSMENT: A PRIMER FOR SCHOOLS 1, (Oct. 2007), *available at*

survey found that 44 percent of female students and 20 percent of male students "fear being sexually harassed during the school day."[21]

The physical and emotional toll of sexual harassment on students is severe. Research has found that students who are victims of sexual harassment are likely to participate less in class; resist attending school; have problems with concentration; and suffer from "anxiety, distress, confusion, loss of self-esteem, and depression."[22] A 2008 report found that sexual harassment had significant and long-lasting negative effects in adolescents on health outcomes, including self-esteem, mental health, physical health, and substance abuse.[23]

Peer-to-peer harassment has garnered a lot of attention in recent years, particularly in regards to bullying, as evidenced by the media response to the Phoebe Prince bullying case. Prince was a high school student in Massachusetts who committed suicide after several bullying incidents.[24] The media responded vigorously and focused heavily on the problem of peer-to-peer harassment in schools, largely labeling the issue as bullying.[25] The state of Massachusetts responded by passing anti-bullying legislation in May 2010. [26] As of January 2011, 45 states have anti-bullying laws, many of which require local districts to develop policies and training to address the issue in their schools.[27]

Many articles discuss sexual harassment as a type of bullying; however, bullying and sexual harassment are not synonymous.[28] Bullying often is used as

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http://www.nwlc.org/sites/default/files/pdfs/Final%20SH%20Fact%20Sheet-Schools.pdf. *See also* AMERICAN ASS. OF UNIV. WOMEN, *supra* note 18**.**

21. National Women's Law Center, *supra* note 20 at 1. *See also* American Association of University Women, *supra* note 19.

22. National Women's Law Center, *supra* note 20 at 1; Greetje Timmerman, *Adolescents' Psychological Health and Experiences with Unwanted Sexual Behavior at School***,** 39 ADOLESCENCE 817, 817, 823 (2004).

23. James E. Gruber & Susan Fineran, *Comparing the Impact of Bullying and Sexual Harassment Victimization on the Mental and Physical Health of Adolescents*, 59 SEX ROLES 1, 9, Table 3 (2008).

24. McCabe, *supra* note 1.

25. *Anderson Cooper 360 Degrees* (CNN television broadcast Apr. 9, 2010) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/1004/09/acd.02.html); *Anderson Cooper 360 Degrees* (CNN television broadcast Mar. 30, 2010) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/1003/30/acd.02.html); Stephanie Reitz, *Documents: Bullied Teen Sought School's Help*, MSNBC.com (Apr. 9, 2010), *available at* http://www.msnbc.msn.com/id/36263424; *Nine Charged in Bullying of Massachusetts Teen Who Killed Herself*, FoxNews.com (Mar. 29, 2010), *available at* http://www.foxnews.com/us/2010/03/29/charged-bullying-massachusetts-teen-killed/.

26. MASS. GEN. LAWS ch. 71, § 37O(a) (2010).

27. *Bully Police USA*, bullypolice.org, http://www.bullypolice.org (last visited Jan. 27, 2011); U.S. Dep't of Health and Human Servs., HRSA, Stop Bullying Now, http://www.stopbullyingnow.hrsa.gov/adults/state-laws.aspx (last visited Apr. 22, 2010). *See, e.g.* ME. REV. STAT. ANN. tit. 20-A, § 1001 (15)(H) (2005) **(**requiring school boards to "[e]stablish policies and procedures to address bullying, harassment and sexual harassment").

28. *See, e.g.*, Jill Grim, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 156 n. 5 (2008) ("The terms 'peer

a catch-all term.[29] While cyber-bullying and bullying may be used to describe incidents of sexual harassment, it is important to distinguish that when the harassment is on the basis of sex, the victim has additional recourse through federal law. Claims for bullying are not actionable under Title IX unless the bullying is based on sex and is so severe and pervasive that it deprives the victim of his or her education.[30]

The Office for Civil Rights (OCR) released a policy guidance to schools in October 2010 highlighting the importance of identifying when incidents of bullying actually include or overlap with incidents of sexual harassment.[31] The guidance reminded schools that their responsibilities to address and respond to sexual harassment still apply regardless of the potential application of any anti-bullying policy and "regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination."[32]

The risk of lumping sexual harassment into the bullying category goes further than simply a difference in legal remedies. A recent study showed that sexual harassment has more pervasive and severe effects than bullying,[33] thus sexual harassment should be addressed in its own right and not merely as one kind of bullying. This paper focuses on the problem of sexual harassment in schools.

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harassment' and 'bullying' are used interchangeably throughout this article."); *Id*. at 157 ("Sexual harassment is another type of peer harassment now reported in schools."); Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "A Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1, 3 (2005) ("[T]he Supreme Court of the United States has yet to endorse the idea of a same-sex harassment cause of action for more common forms of bullying under Title IX.").

29. For example, bullying is defined by the Massachusetts Anti-Bullying Law passed in 2010 as

> the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture . . . directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of school.

MASS. GEN. LAWS ch. 71, § 37O(a) (2010).

30. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 676 (1999).

31. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, OCT. 26, 2010, *available at* http://www.2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

32. *Id*. at 3.

33. Gruber & Fineran, *supra* note 23, at 7-9.

II. TITLE IX AND PEER-TO-PEER HARASSMENT CLAIMS

Title IX prohibits educational institutions from discriminating against individuals on the basis of sex.[34] While the statute itself does not provide for an explicit private right of action, the Supreme Court has interpreted the statute's prohibitions on federal funding recipients to include an implied private right of action.[35] Additionally, the Court has found that funding recipients can be held liable for third party harassment under certain circumstances.[36]

A. Title IX

Title IX was passed as part of the Education Amendments of 1972 and was legislated by Congress's authority under the Spending Clause.[37] Congress initially attempted to pass legislation prohibiting sex discrimination as part of Title VI of the Civil Rights Act of 1964.[38] The attempt to add a prohibition against sex discrimination as part of Title VI failed, and Congress later created Title IX, modeling it after the then enacted Title VI.[39]

Title IX states in part that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[40] Title IX is enforced and implemented by federal agencies that provide federal funds to education programs or activities.[41] Congress laid out an administrative scheme by which federal agencies can take action against education institutions that do not comply with the provisions of the statute.[42] The Department of Education (DOE) promulgates the regulations for public schools.[43] Under the federal regulations, a federal funding recipient is defined as:

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which

34. 20 U.S.C. § 1681(a) (2006).
35. Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979).
36. Davis v. Monroe County Board of Educ., 526 U.S. 629, 640-41 (1999).
37. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 64 (1992).
38. 20 U.S.C. § 1681(a).
39. *Cannon*, 441 U.S. at 684-85.
40. 20 U.S.C. § 1681(a).
41. 20 U.S.C. § 1682 (2006).
42. *Id*.
43. 34 C.F.R. pt. 106 (2009).

> receives such assistance, including any subunit, successor, assignee, or transferee thereof.[44]

The Court has interpreted the regulations to preclude suit against individuals, given the definition of recipients and the focus of the statute on educational institutions.[45] Courts have consistently found that plaintiffs cannot sue individuals under Title IX.[46]

The federal regulations promulgated by the DOE note that the procedures adopted for Title VI by the OCR are similarly adopted for Title IX enforcement.[47] The OCR, a branch of the DOE, has the authority to investigate educational institutions on their own or at the initiative of a complaint by an individual.[48] Upon finding an institution in violation of Title IX, the OCR provides notice to the institution and allows the institution the chance to correct the violation.[49] After follow-up, if the institution has not satisfactorily rectified the violation, the OCR can eliminate federal funding for the institution until the OCR deems the institution to be in compliance with Title IX.[50]

In addition to facing elimination of federal funding when found to be noncompliant, educational institutions may face liability in civil suit when in violation of Title IX. While Title IX does not have an express private right of action, in 1979 the Supreme Court held in *Cannon v. University of Chicago* that the statute includes an implied private right of action for individuals to seek redress.[51] The Court found that Title IX conferred a benefit on those who had been discriminated against on the basis of their gender.[52] Additionally, the Court held that the legislative history of Title IX provided evidence that Congress intended a private right of action to be created by the statute.[53] Pointing to the similarities between Title VI of the Civil Rights Act of 1964 and Title IX, the Court maintained that Congress intended Title IX to be interpreted

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44. 34 C.F.R. § 106.2(i) (2009).

45. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999) ("The government's enforcement power may only be exercised against the funding recipient, 20 U.S.C.S. § 1682, and damages liability under Title IX does not extend to parties outside the scope of this power.").

46. *Id*. at 640-41 (1999). *See*, e.g., Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1018-19 (7th Cir. 1997); Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262 (2000) (finding that school board members are not subject to individual liability under Title IX in peer-to-peer harassment case).

47. The relevant regulations are 34 C.F.R. §§ 100.6-100.11 (2009).

48. 34 C.F.R. §§ 100.7. *See also* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2nd Cir. 1998).

49. 34 C.F.R. §§ 100.9. *See also Bruneau*, 163 F.3d at 756.

50. 34 C.F.R. §§ 100.6-100.11; *see also Bruneau*, 163 F.3d at 756.

51. Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979).

52. *Id*.

53. *Id*.

similarly, and thus as including an implied private cause of action for those who had been discriminated against on the basis of their sex.[54]

The Court also found that the objectives of Title IX were twofold: to prevent federal funding of discriminatory institutions and to provide protection for individuals against discriminatory practices in the institutions.[55] The Court concluded that an implied private cause of action in Title IX would further the objective of providing protection to individuals against discrimination on the basis of sex.[56] Ultimately, the Court held that "[n]ot only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."[57]

In addition to finding that Title IX includes an implied private cause of action, the Supreme Court held in *Franklin v. Gwinnett County Public Schools* that damages are available under Title IX.[58] Arguing that Congress did not attempt to restrict any remedies available to litigants after the Court held that Title IX had an implied private right of action, the Court maintained that "federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[59] Thus, victims of sexual harassment in educational institutions may seek damages in addition to the explicit and limited remedy of the withdrawal of federal funding from the institution.

B. Peer-to-Peer Harassment Claims Under Title IX

While Title IX did not provide for an explicit private cause of action and did not directly indicate that funding recipients may be held liable for harassment perpetrated by third parties, the law has been interpreted to allow such suits.[60] Schools may be held liable under Title IX for third party harassment after the Supreme Court's holding in *Davis v. Monroe County Board of Education*.[61] In *Davis*, a female fifth grade student reported to several teachers in the school numerous incidents of sexually harassing behavior by one male peer.[62] The student's parent followed up on the reports and was informed that the principal had knowledge of the incidents but no disciplinary measures were taken by the school.[63] The incidents did not stop until the male peer was charged with and pled guilty to sexual battery.[64]

54. *Id*. at 696-97.
55. *Id*. at 704.
56. *Cannon*, 441 U.S. at 705-06.
57. *Id*. at 709.
58. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).
59. *Id*. at 70-71.
60. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).
61. *Id*.
62. *Id*. at 634.
63. *Id*.
64. *Id*.

The Supreme Court reversed the lower court's dismissal of the student's claim, remanding and holding that Title IX allowed for liability of school districts in cases involving peer-to-peer harassment.[65] In order to be found liable, the funding recipient must be found to be "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive victims of access to the educational opportunities or benefits provided by the school."[66]

The Court in *Davis* was careful to note that in order to be found deliberately indifferent, a school district's actions must be "clearly unreasonable in light of the circumstances" and the actions of the school must "subject" the student to harassment or, at a minimum, make the victim vulnerable to harassment.[67] This requirement has been argued to include an element of causation on the part of the school district, perhaps enlightening the reasons behind the Court's willingness to ascribe liability to an institution for actions taken by a third party.[68]

The deliberate indifference standard has been further defined in additional cases. School districts will not be found to be deliberately indifferent merely from allegations that they could have or should have done more in response to sexual harassment allegations.[69] Yet a school district may be held liable for peer-to-peer harassment when a school official has actual knowledge that the policy or methods the school continues to implement have proven to be ineffective in addressing sexual harassment.[70] Additionally, a school district or funding recipient will be found to have knowledge of the harassment only when

65. *Id*. at 654.

66. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

67. *Id*. at 640-41.

68. Deborah L. Brake, *School Liability for Peer Sexual Harassment After Davis: Shifting From Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S L. J. 5, 6 (2001).

69. Porto v. Town of Tewksbury, 488 F.3d 67 (1st Cir. 2007) (affirming dismissal of claims on behalf of a special education student who alleged inappropriate sexual touching between he and another special education student in elementary school. The school separated the students upon learning the two were engaging in oral sex on the bus. In middle school the boys were found engaging in sexual intercourse in the bathroom. The plaintiff alleged the school did not do enough, but the court found such an allegation insufficient to establish deliberate indifference).

70. Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 261 (6th Cir. 2000) ("Where a school district has actual knowledge that its effort to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances."); Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009) (finding a genuine issue of fact existed over whether or not the school officials had actual knowledge the methods for handling sexual harassment were ineffective and continued to use the same methods).

the school district has actual knowledge, and not when the school district only has constructive notice, of the harassment.[71]

Schools may be liable under Title IX for peer-to-peer harassment even when the conduct takes place outside of school grounds. In *Rost v. Steamboat Springs Re-2 School District*, the Tenth Circuit discussed potential liability for a school district when a special education student alleged she was coerced into performing sexual acts during middle school and high school.[72] While in this case the court found that the school district was not liable under Title IX because the school was reasonable to allow the police to investigate incidents that occurred off campus and was kept informed of the investigation, the court suggested liability could result if there is a sufficient nexus between the out of school conduct and the school's action.[73]

C. Other Harassment Claims Under Title IX

School districts may be held liable for a teacher's sexual harassment of a student under Title IX. For example, in *Smith v. Metropolitan School District Perry Township*, the Seventh Circuit held that a hostile environment sexual harassment claim based on a teacher's sexual harassment of a student constituted discrimination on the basis of sex for the purposes of Title IX.[74] The plaintiff proposed two agency theories to find the school board liable under Title IX for the teacher's actions: one based on Title VII hostile environment claims in the employment setting and one on pure agency theory of strict liability.[75] The court rejected the theories, arguing that Title VII prohibits employers and their agents from discrimination whereas Title IX prohibits federal funding recipients only.[76] Additionally, the court noted that Title IX does not allow for strict liability, thus negating the pure agency law theory.[77] The court did find, however, that school districts are liable under Title IX for a teacher's sexual harassment of a student when a school official with actual knowledge of the harassment, with the authority and duty to supervise the employee, and with the power to take action that would end the abuse fails to take such action.[78]

School districts may not be held liable under Title IX for sexual harassment based on the victim's sexual orientation unless the harassment also

71. *See* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 759 (2nd Cir. 1998) (finding actual notice and not constructive notice is the appropriate standard of notice) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 27 (1998)).

72. Rost v. Steamboat Springs Re-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008).

73. *Id*. at 1022.

74. Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1021-22 (7th Cir. 1997).

75. *Id*. at 1022.

76. *Id*. at 1024-26.

77. *Id*. at 1027-28.

78. *Id*. at 1034.

includes gender-stereotyping and/or sexual conduct.[79] The harassment must be severe and pervasive and not merely amount to "name-calling."[80]

In 1997, the OCR maintained that Title IX does not protect against sexual orientation discrimination.[81] In an OCR publication providing guidance to school districts regarding compliance with Title IX, the OCR stated, "Title IX does not prohibit discrimination on the basis of sexual orientation."[82] The OCR further explained their standing, stating that when harassment of homosexual students does not include "actions or language" involving sexual conduct, then the harassment does not classify as prohibited sexual harassment under Title IX.[83] Yet, if the harassment involves "conduct of a sexual nature directed towards gay or lesbian students," then the harassment may classify as prohibited sexual harassment under Title IX.[84]

The OCR reiterated their position in an October 2010 policy guidance.[85] In the 2010 guidance, however, the OCR cautioned that schools must be careful to discern when harassment based on a student's sexual orientation may include gender-based harassment that is actionable under Title IX.[86]

Courts have interpreted Title IX in relation to Title VII, including with respect to same sex harassment. Under Title VII, the Supreme Court found in *Oncale v. Sundowner Offshore Services, Inc.,* that claims involving same sex harassment or harassment based on sexual orientation may be cognizable under Title VII but only if the harassment is on the "basis of sex."[87] When the plaintiff can provide evidence that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," then the courts can find the harassment to be on the basis of sex and cognizable as a claim under Title VII.[88] Some courts have

79. DEAR COLLEAGUE LETTER., *supra* note 31, at 8.

80. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 652 (1999).

xz 81. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, (Mar. 13, 1997), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html.

82. U.S. DEP'T OF EDUC., *supra* note 81. *See also* Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 845 (2003) (quoting U.S. Department of Education, Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parts*, 62 Fed Reg. 12,034, 12,039 (1997)).

83. Office for Civil Rights, *supra* note 82; Bedell, *supra* note 83, at 845.

84. Bedell, *supra* note 82, at 845.

85. DEAR COLLEAGUE LETTER, *supra* note 31, at 8.

86. Id. ("The fact that the harassment includes anti- LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender- based harassment.").

87. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79-80 (1998). *See* Bedell, *supra* note 82, at 844.

88. *Oncale*, 523 U.S. at 80-81.

interpreted *Oncale* as supporting cognizable claims of sexual harassment based on sex due to a failure to meet gender stereotypes.[89]

Courts have applied similar reasoning to Title IX claims. The gender stereotyping distinction in harassment claims is shown in the Minnesota district court case *Montgomery v. Independent School District No. 709*.[90] In *Montgomery*, the plaintiff alleged he was harassed because he was a homosexual and did not meet the masculinity stereotypes held by his peers.[91] The court found this to be an actionable claim of harassment on the basis of sex in violation of Title IX due to the harassment being based upon gender non-conformity.[92]

The difficulty of proving that harassment of homosexual students is based on sex has received much attention from scholars. Some argue that the court must expand the prohibitions of Title IX to include protection against this form of sexual harassment, regardless of the harassment involving sexual conduct or gender stereotyping.[93] Others suggest that a victim of sexual orientation harassment may find remedy in Section 1983 claims of violation of the Equal Protection Clause rather than Title IX.[94]

III. SECTION 1983

Section 1983 was passed as part of the Civil Rights Act of 1871.[95] The statute reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.[96]

89. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), vacated; City of Belleville v. Doe, 523 U.S. 1001 (1998) (remanding the matter for further consideration in light of Oncale).

90. Montgomery v. Indep. Sch. Dist., 109 F.Supp. 2d 1081 (D. Minn. 2000).

91. *Id*. at 1090.

92. *Id*. at 1092.

93. *See* Julie Sacks & Robert Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 164-65. *See also* Secunda, *supra* note 28.

94. *See* Bedell, *supra* note 82, at 847. For further discussion of Equal Protection Claims for peer-to-peer sexual harassment, including sexual orientation harassment, see *infra* Section V.

95. 42 U.S.C. § 1983 (2006).

96. 42 U.S.C. § 1983.

Section 1983 provides a procedural mechanism by which individuals have access to a cause of action for deprivations of constitutional or federal rights.[97] Punitive damages are available under Section 1983.[98]

A. Rights Protected by Section 1983

Constitutional rights that have been incorporated under the 14th Amendment are included under Section 1983.[99] Additionally, Section 1983 has been interpreted to allow claims for violations of rights created by federal statutes.[100] In *Maine v. Thiboutot*, the Supreme Court held that the language "and laws" of Section 1983 were to be interpreted as including causes of actions based upon federal rights created by statute.[101] In *Golden State Transit Corporation v. Los Angeles*, the Court laid out a method to determine when a federal statute creates a federal right enforceable under Section 1983.[102] The statute must create binding obligations, rather than merely Congressional preferences, and the interest must not be vague and the statute must be intended to benefit the party bringing suit.[103]

While determining whether or not a statute creates a federal right enforceable by Section 1983 overlaps with the process of determining when an implied private right of action exists in a statute, the Court has recently maintained that the determinations are separate inquiries.[104] The Supreme Court found Title IX created an implied private right of action and in its analysis noted that in order to create an implied private right of action, a statute cannot simply confer a benefit upon a specified group; the statute must show intent to confer a specific remedy as well.[105] In contrast, when determining if a statutory right is enforceable by Section 1983, the Court does not require proof of intent for a specific remedy.[106] The inquiry is limited to whether or not "Congress intended to confer individual rights upon a class of beneficiaries."[107] Courts look in part to statutory language, legislative history, and the context in which the statute was passed in order to determine Congressional intention. The test of determining when a statutory right is enforceable by Section 1983 has

97. *See* Hafer v. Melo, 502 U.S. 21, 22-23 (1991) (allowing for personal capacity suits to impose individual liability upon a government officer for actions taken under color of law).

98. Smith v. Wade, 461 U.S. 30, 35 (1983).

99. *See* Monroe v. Pape, 365 U.S. 167 (1961).

100. Maine v. Thiboutot, 448 U.S. 1, 4-6 (1980).

101. *Id*.

102. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).

103. *Id*. at 106. (internal citations omitted).

104. Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002).

105. *Id*. at 284 (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

106. *Id*. at 284.

107. *Id*. at 285.

evolved to focus more heavily on "right or duty creating language" of the statute.[108]

Finally, if a federal right is found but Congress has affirmatively foreclosed the Section 1983 remedy, then there is no cause of action.[109] Determining that Congress has affirmatively foreclosed the Section 1983 remedy requires finding that Congress intended the statute to preclude or subsume Section 1983 claims based on that particular statute.[110] The Court found in *Middlesex County Sewerage Authority v. National Sea Clammers Association* (*Sea Clammers*), that "when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[111] To determine the sufficiency of a remedial scheme, the Court considers the specificity of statutory remedies.[112] One indication that Congress did not intend Section 1983 to be available for enforcing statutory rights is inconsistency between statutory remedies provided by Congress and Section 1983 remedies.[113]

In 1984, the Supreme Court also found that statutes may preclude constitutional claims when Congress has shown intent for the statute to be the "exclusive" remedy.[114] In *Smith v. Robinson*, plaintiffs argued that claims under the Education Handicapped Act (EHA) were separate from and did not preclude due process and Equal Protection claims.[115] The Court found that the constitutional claims were virtually identical to the EHA claims, and that the statute created a substantive right as well as procedural safeguards, opportunities for fair hearings, and elaborate judicial and administrative remedial schemes, all of which evidenced Congress' intent to preclude virtually identical claims and make the EHA the sole remedy.[116] *Smith* established a

108. *Id*. at 284 n.3. *See also* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (discussing how "rights-creating language" was critical in Supreme Court's holding in Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)).

109. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

110. *Id*. at 20-21.

111. *Id*. at 20.

112. *Id*. at 20-21.

113. Almond Hill Sch. v. United States Dep't of Agriculture, 768 F.2d 1030, 1035-36 (9th Cir. 1985) ("Any inconsistency 'is a strong indication that Congress did not intend to leave the Section 1983 remedies available.'" (quoting Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 820 (9th Cir. 1984))).

114. Smith v. Robinson, 468 U.S. 992, 1009 (1984).

115. *Robinson*, 468 U.S. at 1007-08.

116. *Id*. at 1009 ("The EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.").

"virtually identical claims" inquiry for determining when a federal statute precludes constitutional claims.[117]

B. Acting Under Color of Law

While the language of Section 1983 establishes that "persons acting under color of law" are subject to suit under the statute, municipalities, including school districts, are considered "persons" and thus are subject to suit under Section 1983.[118] In order to find a municipality liable under Section 1983, the plaintiff must show that an official custom or policy has driven the violation.[119] Moreover, when school officials are sued in their official capacity, the suit is considered to be against the school district or school board, the municipality.[120] Thus, the plaintiff must show that the violation of the federal law was affected by the municipality's policy or custom.[121] The remedies available to a plaintiff suing a municipality under Section 1983 are limited, however, as punitive damages are not available.[122]

Individuals are subject to suit under Section 1983 if they are acting under color of law.[123] In order to determine when someone is acting under the color of law for the purpose of Section 1983 litigation, one must consider a few factors. First, action is under color of law when the deprivation is caused by the exercise of a right or privilege created by the state, a state rule of conduct imposed by the state, or an action by a person for whom the state is responsible.[124] The party charged with the deprivation must be fairly said to be a state actor.[125] For example, a private individual may be fairly said to be a state actor if he or she is a state official, if he or she is acting with authority granted to him or her from the state, or if he or she is acting with "significant aid" from state officials.[126]

When suing an individual under Section 1983, it is sufficient to show that the individual acted under color of law and caused the deprivation of a federal right.[127] Unlike when suing a municipality, there is no requirement for a plaintiff to show a connection from the action to a governmental "policy or

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117. *Id*.

118. Monell v. Dept. of Social Servs. of the City of New York, 436 U.S. 658, 694 (1978).

119. *Id*.

120. *Id*.

121. *See* Gregor v. Board of Educ., No. 93Civ.2672(JSM), 1993 U.S. Dist LEXIS 15933, at *7 (S.D.N.Y. Nov. 4, 1993) (citing Hafer v. Melo, 502 U.S. 21 (1991)).

122. City of Newport v. Fact Concerts Inc., 453 U.S. 247, 260-1 (1981).

123. *See Monell*, 436 U.S. at 694.

124. Lugar v. Edmondson Oil, 457 U.S. 922, 937 (1982).

125. *Id*.

126. *Id*. (holding that an individual was fairly called a state actor because the individual received a writ of attachment from the court as his or her authority to take action against plaintiff).

127. Hafer v. Melo, 502 U.S. 21, 26 (1991).

custom" when suing an individual in his or her personal capacity.[128] Additionally, in contrast to suits against municipalities, punitive damages are available under Section 1983 for suits against individuals in their individual capacities.[129]

C. Defenses to Section 1983 Claims and Damages Available

A school official facing suit for Section 1983 claims may assert a qualified immunity defense, arguing that he or she was acting in objective reasonable reliance on an existing law.[130] This defense is not available if the defendant reasonably should have known that his or her actions were against the law.[131] Because the inquiry is what one reasonably should have known, a defendant acting in violation of a law may be entitled to qualified immunity if the law was ambiguous at the time of his or her actions.[132]

In early cases involving Section 1983 claims for Title IX violations based on peer-to-peer harassment, cases were frequently dismissed on the basis of qualified immunity because the law was unclear as to liability of school officials for such harassment.[133] Since the Supreme Court found in *Davis* that such liability is possible, however, such defenses are unsuccessful. The rights have been established for some time, and school officials have little hope of arguing that they acted reasonably because they were unaware of the law. Even in cases involving peer-to-peer sexual orientation harassment, in which courts have not been consistent in their findings of liability, the defense of qualified immunity has failed.[134] In *Flores v. Morgan Hill*, the court rejected a qualified immunity defense despite no factually identical precedent case.[135] The court held that the inquiry of qualified immunity is whether "the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful."[136] The plaintiffs had sued school officials individually under Section 1983 for Equal Protection violations in their inconsistent response to harassment claims

128. *Id*.

129. Smith v. Wade, 461 U.S. 30, 35 (1983).

130. *Hafer*, 502 U.S. at 28-9.

131. *Id*.

132. *See* Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1449 (9th Cir. 1995).

133. *See e.g*. Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2nd Cir. 1998) (holding that superintendent and teacher had qualified immunity from Section 1983 suit because "it was not clearly established law in the fall of 1993 that a §1983 claim could be stated against individual officials for failure to prevent peer sexual harassment among students"). *See also* Morlock v. W. Cent. Educ. Dist., 46 F. Supp. 2d 892, 914-15 (D. Minn. 1999) (holding that a student's statutory right under Title IX to be free from teacher against student harassment was clear at the time of harassment, thus preventing a qualified immunity defense, but a student's statutory right to be free from peer-to-peer harassment was not clearly established under Title IX at the time of the harassment and thus claims were barred by qualified immunity).

134. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1135 (9th Cir. 2003).

135. *Id*. at 1137.

136. *Id*. (citing Hope v. Pelzer, 536 U.S. 730 (2002)).

by homosexual students.[137] While the Equal Protection Clause does not impose requirements of specific duties on school officials, it does require school officials to address and enforce policies against peer harassment equally for heterosexual students and homosexual students.[138] Thus, qualified immunity did not apply.

IV. EQUAL PROTECTION CLAUSE AND OTHER CONSTITUTIONAL CLAIMS FOR PEER-TO-PEER HARASSMENT

Plaintiffs frequently raise Equal Protection Clause claims under Section 1983 when filing suit under Title IX. Additionally, plaintiffs raise Fourth Amendment due process claims in attempts to seek redress for peer-to-peer harassment in schools.

A. Equal Protection

The Equal Protection Clause of the 14th Amendment holds that "no state shall. . . deny to any person within its jurisdiction the equal protection of the laws."[139] Section 1983 Equal Protection Clause claims may be brought against individuals and municipalities or other state entities.[140] One of the fundamental differences between Title IX and Equal Protection claims is that intent is a requirement in Equal Protection claims. The plaintiff must show purposeful discrimination on the part of the school.[141] Evidence of discriminatory effects or impact is typically not sufficient to prove discriminatory intent or purpose.[142] Instead, intent must be shown through other means or in addition to evidence of discriminatory effects.[143]

i. Suits Against School Districts

When a school district is sued for violations of the Equal Protection Clause under Section 1983, the school's liability is analyzed under a municipal liability framework.[144] Under this framework, the plaintiff "must show that the harassment was the result of municipal custom, policy, or practice."[145]

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137. *Id*. at 1137-38.

138. *Id*.

139. U.S. CONST. amend. XIV § 1.

140. Fitzgerald v. Barnstable, 129 S.Ct. 788, 796 (2009).

141. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[A law] is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."). *See also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

142. *Vill. of Arlington Heights*, 429 U.S. at 266.

143. *Id*.

144. *See* Rost v. Steamboat Springs Re-2 Sch. Dist., 511 F.3d 1114, 1124 (10th Cir. 2008).

145. Fitzgerald v. Barnstable, 129 S.Ct. 788, 797 (2009) (citing Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658, 694 (1978)).

Alternatively, the plaintiff may show that a decision or policy made by a school official with final policymaking authority resulted in harassment.[146]

Some courts have found intent may be met when a plaintiff shows that the district customarily acquiesced to student sexual harassment.[147] In *Rost v. Steamboat Springs RE-2 School District*, the plaintiff raised claims against the school district for violations of Title IX, the Equal Protection Clause, and the Due Process Clause.[148] The Tenth Circuit affirmed the dismissal of the claims and stated that to prevail on the Equal Protection claim, "a plaintiff must prove (1) a continuing, widespread, and persistent pattern of misconduct by the state; (2) deliberate indifference to or tacit authorization of the conduct by policy-making officials after notice of the conduct; and (3) a resulting injury to the plaintiff."[149] The court found that the Equal Protection claim failed because the plaintiff's evidence did not show a widespread pattern of misconduct but rather showed that the district had attempted to respond to and remedy "several discrete problems" of harassment.[150]

The Ninth Circuit found that plaintiffs are required to show that the defendants "discriminated against them as members of an identifiable class and that the discrimination was intentional."[151] In *Flores v. Morgan Hill Unified School District* (*Flores*), the court discussed how to determine if the defendants' actions meet the intent element of an equal protection claim and held that plaintiffs could "show either that the defendants intentionally discriminated or acted with deliberate indifference."[152] The deliberate indifference standard is analyzed under the Title IX standard established in *Davis*: when a school official responds in a manner that is "clearly unreasonable" the deliberate indifference standard has been met.[153]

ii. Suits Against School Officials as Individuals

In order to be held individually liable under a Section 1983 claim for violation of the Equal Protection Clause, a school official must be shown to have acted under color of law.[154] Even when the conduct that is the primary basis of harassment was by a third party, a school official can be found to have

146. *Rost*, 511 F.3d at 1124-25.

147. *Id*. at 1125.

148. *Id*. at 1117.

149. *Id*. at 1125 (citing Gates v. Unified Sch. Dist. No. 449 of Leavenworth Cnty. Kan. 966 F.2d 1035, 1041 (10th Cir. 1993); P.H. v. Sch. Dist. of Kan. City, Mo., 265 F.3d 653, 658-59 (8th Cir. 2001)).

150. Rost v. Steamboat Springs Re-2 Sch. Dist., 511 F.3d 1114, 1125 (10th Cir. 2008).

151. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1134 (9th Cir. 2003).

152. *Id*. at 1135 (quoting Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996); Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999)).

153. *Id*. at 1135 ("'Deliberate indifference' is found if the school administrator 'responds to known peer harassment in a manner that is . . . clearly unreasonable.'") (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999)).

154. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1251 (10th Cir. 1999).

taken state action and thus be susceptible to liability when "a supervisor or employer participates in or consciously acquiesces in sexual harassment by an outside third party."[155] Thus, courts have held that in order to show "deliberate" discriminatory conduct under an equal protection claim, a plaintiff must show that the defendant knew of the harassment and acquiesced to it.[156] In gender-based classification, the intentional discrimination requirement does not mean a plaintiff must show intent to harm, but rather the plaintiff must show that the defendant treated the group "less favorably than others."[157] One way by which plaintiffs can establish that a school official took deliberate discriminatory action is by showing the official acted with deliberate indifference by failing to reasonably respond to knowledge of harassment.[158] Teachers as well as administrators can be found individually liable under this theory.[159] Other courts have held, however, that acquiescence by a school official to harassment by an outside third party does not necessarily amount to a constitutional violation.[160] The Third Circuit has held that school officials cannot be held liable under Section 1983 when "private actors committed the underlying violative acts."[161]

Proving deliberate indifference is not the only method by which plaintiffs can prevail on Equal Protection gender discrimination claims. In *Fitzgerald*, the school district argued that the plaintiffs (the Fitzgeralds) could not prevail on an Equal Protection claim regardless of the Court's finding of preclusion of such a claim because the lower court had already determined on the merits that the school district and school officials were not deliberately indifferent in their response to the alleged harassment.[162] The Court determined that the Fitzgeralds could raise the Equal Protection claim under the theory that the school's response to the harassment was deliberate discriminatory conduct.[163] Thus, while the deliberate indifference standard provides one theory of liability for claims under Equal Protection, a showing that the response itself was deliberately discriminatory provides another avenue by which plaintiffs can show defendants are liable under a Section 1983 Equal Protection claim.

iii. Same Sex Harassment

The Equal Protection Clause has provided for causes of action for peer-to-peer sexual orientation harassment. The Seventh Circuit was the first circuit to

155. *Id*. at 1250 (quoting Noland v. McAdoo, 39 F.3d 269, 271 (1994)).

156. *Id*. (citing Jojola v. Chavez, 55 F.3d 488, 490 (10th Cir. 1995)).

157. Communities for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 694-95 (6th Cir. 2006), *cert. denied* 549 U.S. 1322 (2007).

158. *Murrell*, 186 F.3d at 1250.

159. *Id*. at 1250-51.

160. *See* D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993).

161. *Id*. at 1376.

162. Fitzgerald v. Barnstable, 129 S.Ct. 788, 796 (2009).

163. *Id*.

uphold an Equal Protection Claim for same sex harassment as surviving summary judgment.[164] In *Nabozny v. Podelsny* (*Nabozny*), students provided evidence that the school district responded more aggressively to harassment claims involving male-female sexual harassment versus same sex harassment claims.[165] The court found this evidence provided a prima facie case for violation of the Equal Protection Clause.[166]

Similarly, the Ninth Circuit found that students who had provided enough evidence that the school district did not enforce district policies prohibiting discrimination and harassment against allegations of peer-to-peer sexual orientation harassment survived summary judgment.[167] In *Flores*, the Ninth Circuit determined that students alleging discrimination over an eight year period on the basis of sexual orientation were an identifiable class for purposes of an Equal Protection claim.[168] The plaintiffs had alleged that the school officials did not enforce the anti-harassment and anti-discrimination policies in place at the school when the officials learned of the harassment against the plaintiffs.[169] The court found that the plaintiffs had provided enough evidence that would allow a jury to find the school officials treated the plaintiffs differently in violation of the Equal Protection Clause.[170]

B. Due Process Clause

Some plaintiffs pursue claims against defendant school districts, administrators, or teachers for deprivation of the plaintiff's bodily integrity in violation of the due process clause of the Fourteenth Amendment.[171] State actors are not required, however, to protect individuals from harm.[172] The exceptions to this general rule include when a special relationship exists between the state entity and the individual; the harm results from a policy, practice, or custom; or the danger was created by the state.[173] Proving due process violations are difficult for plaintiffs in peer-to-peer harassment cases.

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164. Sandhya Gopal & Laurie L. Mesibov, *Liability for Peer Harassment of Gay Students*, 34 SCH. L. BULLETIN, no. 4, 2003 at 16, 20.

165. *See* Nabozny v. Podelsny, 92 F.3d 446, 454-55 (7th Cir. 1996). *See also* Gopal & Mesibov, *supra* note 164, at 18-20.

166. *Nabozny*, 92 F.3d at 456.

167. *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1134 (9th Cir. 2003) and the text accompanying *supra* note 152. *See also* Gopal & Mesibov, *supra* note 164, at 20.

168. *Flores*, 324 F.3d at 1134-35 (citing High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 570-71 (9th Cir. 1990)).

169. *Id*. at 1135.

170. *Id*.

171. *See, e.g*., Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997).

172. DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 197 (1989).

173. *Id*. at 199-200; Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989); D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373 (3d Cir. 1992).

Despite compulsory attendance laws, most courts have found that there is no special relationship between school officials and students that would impose constitutional duties to protect students on the school officials.[174] In cases of peer-to-peer harassment it is difficult to show that the school's policy, practice, or custom was the cause of the harassment because the conduct was by a third party.[175]

The state created danger exception is also difficult to prove, but some courts have suggested this may be a possible avenue for liability for school officials. The Seventh Circuit maintained that a due process claim may be possible if the student can show that the school official's actions in response to the harassment created a danger to the student.[176] In *Nabozny*, the Seventh Circuit rejected a due process claim based on any special relationship or duty to protect the student but did not reject completely the theory that the school official's response to the harassment, or lack thereof, created a danger to the student.[177] The court ultimately found the plaintiff had not provided enough evidence for the claim to survive, but noted that a school official may be liable for a due process violation if the plaintiff can show that he or she "created a risk of harm or exacerbated an existing one."[178]

C. Constitutional Claims and Failure to Train Liability

School districts may be held liable for constitutional violations under Section 1983 on the theory that the school failed to adequately train teachers and administrators in the prevention of and response to harassment.[179] Under

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174. *See DeShaney*, 489 U.S. at 200 ("[i]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf- through incarceration, institutionalization, or other similar restraint of personal liberty- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means."); Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992) ("[W]e agree with the Third and Seventh Circuits and conclude that compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."); *Middle Bucks*, 972 F.2d at 1371-72 (finding no special relationship exists and noting that "even when enrolled in public school parents retain the discretion to remove the child from classes as they see fit").

175. *See, e.g.*, *Collier*, 956 F. Supp. at 1215 ("[W]hen acts are performed by school students, rather than teachers or supervisors, " § 1983 liability may not be predicated on a theory of establishing and maintaining a custom, practice or policy which causes harm to a student because private actors committed the underlying violative acts.") (quoting *Middle Bucks*, 972 F.2d at 1376) (internal quotes and brackets omitted); *see also* Bedell, *supra* note 82 at 853 (discussing how same-sex harassment cases are difficult to prove against a school board itself given the difficulty in pointing to "a specific policy or custom on the part of the school board").

176. Nabozny v. Podelsny, 92 F.3d 446, 460 (7th Cir. 1996).

177. *Id*.

178. *Id*.; *see also* Gopal and Mesibov, *supra* note 164, at 22.

179. *See* Plamp v. Mitchell Sch. Dist. No. 17-2, 565 F.3d 450, 461 (8th Cir. 2009) ("To establish its failure to train theory, the plaintiff must show that the Board's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of

this liability theory, the plaintiff does not need to prove that a particular school official acted in reckless disregard or with deliberate indifference, but rather that the school's training is obviously inadequate such that it would subject individuals to violation of their rights.[180] Even when a school's policy as written is itself constitutional, the school district may still be liable for failure to train if the policy is not properly enforced or implemented.[181] The proper standard for failure to train liability is objective deliberate indifference.[182]

V. CIRCUIT SPLIT AND FITZGERALD V. BARNSTABLE SCHOOL COMMITTEE

The circuit courts were split regarding whether or not Title IX precluded Section 1983 suits, both constitutional Section 1983 claims and statutory Section 1983 claims. In *Fitzgerald*, the Supreme Court only addressed the issue of whether or not Title IX precluded Section 1983 claims based on the Equal Protection Clause of the 14th Amendment.[183] The Court specifically held that Section 1983 Equal Protection claims are not precluded by Title IX[184] and suggested that all constitutional Section 1983 claims are not precluded.[185] Yet the issue of whether or not Section 1983 Title IX claims are precluded was not addressed. The Fitzgeralds did not appeal the dismissal of their Section 1983 Title IX claim against individual teachers and administrators, and the question presented specifically noted that the Court was addressing whether or not Section 1983 Equal Protection claims are precluded by Title IX.[186] While the *Fitzgerald* decision has broad language that suggests the Court would be open to the liability of individual teachers and administrators for peer-to-peer harassment through Section 1983 Title IX suits, courts should not allow such claims. Title IX does not allow for individual liability and Section 1983 should not be used as a back door entry into liability the statute does not allow.

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the students.") (quoting Thelma D. v. Bd. of Educ., 934 F.2d 929, 933 (8th Cir. 2002)) (internal punctuation omitted). *See also* City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989) (establishing liability for constitutional violations when employer fails to adequately train staff such that they evidence deliberate indifference to individuals' rights).

180. *See Plamp*, 565 F.3d at 461.

181. *See City of Canton*, 489 U.S. at 387 ("[I]f a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train.").

182. *See Id*. at 389 (establishing liability due to "deliberate indifference" where both the need for training and the injury resulting from inadequate training are obvious).

183. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788, 792 (2009).

184. *Id*. ("Accordingly, we hold that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.").

185. *Id*. ("[W]e conclude that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights.").

186. *Id*. at 793.

A. Circuit Split Regarding Title IX and Preclusion of Section 1983 Suits

The Supreme Court has been reluctant to find that statutes passed under Congress's authority from the Spending Clause of the Constitution create enforceable private rights of action under Section 1983 unless the statute includes express provisions authorizing such suits.[187] Title IX was enacted under Congress's Spending Clause and explicitly notes that federal funding may be terminated if educational institutions are noncompliant with Title IX's prohibition on discrimination on the basis of sex.[188] Despite the fact that Title IX does not allow for individual liability, some federal courts have held that plaintiffs may sue individual administrators and teachers through Section 1983 for Title IX violations and constitutional violations.[189]

In 1996, the Sixth Circuit held that Title IX did not preclude concurrent, independent constitutional claims brought under Section 1983.[190] The plaintiff brought, among other claims, Title IX and substantive due process claims, under Section 1983, against a teacher, the principal, the superintendent, and the board of education.[191] The defendants argued that under the *Sea Clammers* doctrine, the separate constitutional due process claims should be precluded by the Title IX claims.[192] In its analysis, the Sixth Circuit noted that the *Sea Clammers* doctrine was not the appropriate analysis by which to determine preclusion of constitutional claims but provided an analysis for determining when a statute precluded Section 1983 claims based on the statute itself.[193] Noting that "the plaintiffs' section 1983 action does not attempt either to circumvent Title IX procedures, or to gain remedies not available under Title IX," the court examined the preclusion of constitutional claims by relying on the Supreme Court's holding in *Smith*.[194] The Sixth Circuit found that Title IX did not support preemption of separate constitutional claims because the claims were not "virtually identical" and because nothing in the statute or its legislative history suggested that Congress intended Title IX to be a sole

187. Gonzaga Univ. v. Doe, 536 U.S. 273, 281, 283 (2002) ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes. . . . We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.").

188. 20 U.S.C. § 1681(a) (2006); 34 C.F.R. §§ 100.6-100.11; *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979).

189. *See e.g.*, Crawford v. Davis, 109 F.3d 1281, 1282-1284 (8th Cir. 1997) (finding that the plaintiff could pursue Section 1983 claims for both Title IX violations and constitutional violations); *see also* Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 718 (6th Cir. 1996) (finding that Title IX does not preclude constitutional Section 1983 claims).

190. *Lillard*, 76 F.3d at 723.

191. *Id*. at 718.

192. *Id*.

193. *See Id*. at 723 ("[T]he plaintiffs' section 1983 action does not attempt either to circumvent Title IX procedures, or to gain remedies not available under Title IX.").

194. *Id*.

alternative remedy to such claims.[195] Similarly, the Tenth Circuit has held that Title IX does not preclude a plaintiff from pursuing claims under Title IX and Section 1983 for constitutional violations.[196]

The Eighth Circuit went further than the Sixth and Tenth Circuits by finding both constitutional Section 1983 claims and Section 1983 Title IX claims are not precluded by Title IX. In *Crawford v. Davis*, the plaintiff raised several claims against a university and university employees, both in their official and individual capacities, under Section 1983 and Title IX.[197] The Eighth Circuit held that Title IX does not provide a "sufficiently comprehensive" remedy for victims of discrimination on the basis of sex as the statute only allows for the restriction of federal funding as a remedy for violation of the statute.[198] The court suggested that by finding an implied private right of action, the Supreme Court had shown that Congress did not foreclose additional sources of remedy and thus could not foreclose Section 1983 Title IX claims or constitutional claims.[199]

Other circuits, however, have rejected Section 1983 claims against individuals for Title IX violations and constitutional violations, finding that such claims are subsumed by Title IX's administrative remedy scheme and implied private right of action. In *Fitzgerald v. Barnstable School Committee*, the First Circuit found that Title IX has a comprehensive remedial scheme "indicat[ing] that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions" and as precluding statutory Section 1983 claims based on Title IX.[200] The court noted that Section 1983 claims have always been

195. *Id*. The court did not elaborate on what in the legislative history or statute itself suggested Congress did not intend preclusion, merely stating there was nothing to provide evidence of that intention. *Id.*

196. Seamons v. Snow, 84 F.3d 1226, 1234 (10th Cir. 1996), *aff'd in part*, *rev'd in part*, 206 F.3d 1021, 1031 (10th Cir. 2000).

197. Crawford v. Davis, 109 F.3d 1281, 1282 (8th Cir. 1997).

198. *Id*. at 1284 ("To the extent that Ms. Crawford's § 1983 claims are based on alleged violations of Title IX, we find unpersuasive the defendants' argument that Title IX contains a "sufficiently comprehensive" remedial scheme…there is no evidence that Congress intended to foreclose the use of § 1983 to redress violations of Title IX.").

199. *Id*. *See also* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999). In a 2007 decision, the 8th Circuit suggests that individual liability under Section 1983 Title IX claims is not available, stating that "[b]ecause Title IX only prohibits discrimination by federal grant recipients, a supervisory school official may not be sued in his individual capacity, either directly under Title IX or under § 1983 based upon a violation of Title IX." Cox v. Sugg, 484 F.3d 1062, 1066 (8th Cir. 2007). Despite noting that not all circuits agreed, the Cox decision does not address Crawford, and the court noted that the Section 1983 Title IX claims against individuals were untimely raised anyway. *Id*. at 1067, n.2. The claims raised in Cox were different from that in Crawford, since the plaintiff in Cox only raised a supervisory liability theory whereas in Crawford, the plaintiff raised claims of discrimination in the official's actions taken in response to the reported harassment and liability for failure to train. *Id*. at 1064; *Crawford*, 109 F.3d at 1282.

200. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 178-79 (1st Cir. 2007).

limited to "ensure[] that plaintiffs cannot circumvent the idiosyncratic requirements of a particular remedial scheme by bringing a separate action to enforce the same right under section 1983."[201] The Third Circuit held in *Pfeiffer v. Marion Center Area School District*, that Title IX foreclosed any actions for Title IX violations under Section 1983 against individuals in both their official and individual capacities.[202] Similarly, the Eleventh Circuit found in *Williams v. Board of Regents* that Title IX precludes Section 1983 Title IX suits against individuals, stating, "to allow plaintiffs to use § 1983 in this manner would permit an end run around Title IX's explicit language limiting liability to funding recipients."[203]

In addition, the Second Circuit held that Title IX provides a "comprehensive administrative enforcement scheme" that precludes Section 1983 claims for violations of Title IX.[204] In *Bruneau v. South Kortright Central School District*, the Second Circuit pointed to the DOE's authority to initiate its own investigations and an individual's right to file complaints with the DOE in order to prompt investigation for violation of the statute as evidence of a comprehensive remedial scheme.[205] The plaintiff sued the school district, school board, and staff members alleging that they failed to remedy complaints of persistent sexual harassment imposed by male peers.[206] The plaintiff argued the harassment created a hostile environment, interfering with her education.[207] The court stated that other circuits were too narrow in their approach to determining the remedies available by Title IX in determining if Section 1983 claims are precluded.[208] The court reasoned that since the inquiry is into Congressional intention to preclude parallel claims, the court must consider both express and implied remedies.[209] Because the remedy of termination of federal funding was not the sole remedy, and the statute included an implied private cause of action, Title IX provided "a full panoply of remedies."[210] The

201. *Id*. at 176.

202. Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3rd Cir. 1990). *See also* Maier v. Canon McMillan Sch. Dist., 2008 U.S. Dist. Lexis 96368, at *10 (W. Dist. Penn. 2008).

203. Williams v. Bd. of Regents, 477 F.3d 1282, 1300 (11th Cir. 2007).

204. Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2nd Cir. 1998).

205. *Id*.

206. *Id*. at 752.

207. *Id*.

208. *Id*. at 756-57.

209. *Id*. at 757.

210. Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2nd Cir. 1998).At least two district courts in the Second Circuit found that Bruneau only found that Section Title IX suits against non-individuals are precluded and that Section 1983 Title IX suits against individuals are not precluded since Title IX does not provide for individual liability. Cinquanti v. Tompkins-Cortland Community College, 2000 U.S. Dist. LEXIS 9433, at *23 (N.D. N.Y. 2000) ("[S]ince Title IX does not provide a sufficiently comprehensive remedy for a plaintiff suing an individual defendant, Title IX does not subsume plaintiff's § 1983 claim against [an individual] defendant."); Hayut v. State Univ. of New York, 127 F. Supp. 2d 333, 339-340 (N.D.N.Y 2000) ("The reasoning in Cinquanti which holds that the

Second Circuit additionally found that Title IX precluded constitutional Section 1983 claims.[211]

The Seventh Circuit initially held that Title IX precluded all Section 1983 litigation alleging sex discrimination.[212] In a later decision, however, the Seventh Circuit determined that Title IX could not preempt Section 1983 claims against school officials when those claims were not available under Title IX itself.[213] In *Delgado v. Stegall*, the court held that Title IX precluded Section 1983 claims against school officials; but Title IX did not preclude Section 1983 claims against a teacher who had sexually harassed the student.[214] The court reasoned that Title IX provided all the remedy necessary for discriminatory practices and policies of schools, but that Title IX did not provide remedy for a teacher's harassment of a student when that harassment did not implicate policy of the school.[215] Thus, the Seventh Circuit held that Congress could not have intended to eliminate remedies for sex discrimination by teachers.[216]

B. Fitzgerald v. Barnstable School Committee

Under the backdrop of the circuit court split over whether or not Title IX precludes Section 1983 claims, the Supreme Court granted certiorari for *Fitzgerald*. The case was brought by parents of a female kindergarten student who sued the Barnstable School Committee in Barnstable, Massachusetts, and the Superintendent for violations of Title IX and, under Section 1983, for violation of Title IX and the Equal Protection Clause of the 14th Amendment.[217] The kindergartener had reported to her parents (the Fitzgeralds) that a third grade male student had sexually harassed her on the bus, coercing the girl to lift up her skirt, pull down her underwear, and spread her legs on the days she wore a dress to school.[218] Allegedly this took place two to three times per week.[219] The kindergartener did not allege any touching.[220]

The Fitzgeralds reported the incidents to the school principal, prompting a school and police investigation.[221] Neither investigation resulted in evidence

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remedial scheme of Title IX is not "sufficiently comprehensive" as to the individual defendants so as to preclude liability under Section 1983 is adopted. Such defendants are not amenable to suit under Title IX, so it cannot be said that Title IX provides plaintiff's comprehensive remedy as against the individual defendants.").

211. *Bruneau*, 163 F.3d at 756.

212. Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999).

213. Doe v. Smith, 470 F.3d 331 (7th Cir. 2006).

214. Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004).

215. *Id*.

216. *Id*. at 674-75 ("The legislators who enacted Title IX would be startled to discover that by doing so they had killed all federal remedies for sex discrimination by teachers of which the school lacked actual knowledge.").

217. Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788 (2009).

218. Hunter v. Barnstable Sch. Comm., 456 F.Supp. 2d 255, 259 (Mass. 2006).

219. *Id*.

220. *Id*.

221. *Id*. at 260.

that substantiated the charges.[222] The investigations included questioning the accused student, other students on the bus, and the bus driver.[223] The police closed the case about one month after the initial complaint, finding that the grounds were insufficient to pursue criminal charges against the alleged harasser.[224]

A couple of weeks after learning of the allegations and investigating them, school officials informed the Fitzgeralds that they could provide a different bus for the girl to take to school every day, or they could ensure that there would be empty rows between older and younger students on the bus.[225] The Fitzgeralds refused these options and requested that the alleged harasser be assigned to another bus or that the school hire a bus monitor to ride the bus every day.[226] The school refused these proposals.[227]

The Fitzgeralds began driving the girl to school every day upon informing the school of the allegations.[228] The Fitzgeralds alleged that the school responded inadequately and as a result their child suffered from continued harassment.[229] The allegations of continued harassment included incidents in the school halls the following school year and in gym class, causing the kindergartener to miss several days of gym class and school.[230]

At the district court, the court granted summary judgment in favor of the school committee on the Title IX claim, finding that no incidents of sexual harassment were alleged after the school received actual notice of the harassment and thus the school's response was not unreasonable.[231] The district court dismissed the Section 1983 claims, both the statutory Title IX claim and the constitutional claim under the Equal Protection Clause.[232]

In appeal to the First Circuit, the court affirmed the summary judgment decision, holding that the school's response was not "so deficient as to be clearly unreasonable" and stating, "Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by the parent."[233] The First Circuit further ruled that the district court properly dismissed the Section 1983 statutory and constitutional claims as precluded by Title IX.[234] Regarding the statutory Section 1983 claim, the court maintained that an existing private right

222. *Id*.
223. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 173 (1st Cir. 2007).
224. Hunter v. Barnstable Sch. Comm., 456 F.Supp. 2d 255, 260 (Mass. 2006).
225. *Id*.
226. *Id*.
227. *Id*.
228. *Id*.
229. *Id*. at 260-61.
230. Hunter v. Barnstable Sch. Comm., 456 F.Supp. 2d 255, 260-61 (Mass. 2006).
231. *Id*. at 266.
232. *Id*. at 261.
233. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007).
234. *Id*. at 180.

of action in the statute, either express or implied, provides evidence that Congress intended to preclude parallel Section 1983 actions.[235] The court further stated that Title IX is a contract between federal funding recipients and the government, and as such the repercussions of violating the contract are directed at the recipients rather than individual employees.[236] To allow Section 1983 Title IX claims, in the First Circuit's opinion, "would permit an end run around this manifest congressional intent."[237] Thus, the First Circuit held that Title IX precluded section 1983 actions under the statute, including actions against individuals.[238]

In considering the Equal Protection Clause Section 1983 claim, the First Circuit noted that a comprehensive statutory remedial scheme can preclude constitutional Section 1983 claims when those claims are "virtually identical" to the claims brought under the statute.[239] The court noted that the Fitzgeralds' Equal Protection claim was virtually identical to the Title IX claim and that the parents did not suggest a different theory of liability under Equal Protection.[240] The First Circuit held that the constitutional Section 1983 Equal Protection claims were also precluded by Title IX.[241] The court did note, however, that their holding did not foreclose the possibility that a plaintiff could bring a constitutional Section 1983 claim concurrently with a Title IX claim and suggested if the individual defendant was alleged to be responsible for the harm individually, such a claim would be possible.[242]

The Supreme Court granted certiorari to address whether or not Title IX precludes constitutional Section 1983 claims.[243] The petitioners argued that the First Circuit incorrectly found Title IX precluded constitutional Section 1983 claims.[244] Arguing that Congress provided no indication that it intended Title IX to limit remedies already in existence, the petitioners maintained that the purpose of Title IX was to "expand. . . the protections available for victims of gender discrimination."[245]

In contrast, the respondents, the Barnstable School Committee and Superintendent, argued that Title IX has a comprehensive administrative

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235. *Id*. at 178 ("Thus, the existence of a private judicial remedy often has proved to be, in practical effect 'the dividing line between those cases in which the Court has held that an action would lie under § 1983 and those in which it has held that it would not.'") (internal brackets omitted) (citing City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005)).

236. *Id*. at 178.

237. *Id*.

238. *Id*. at 178-79.

239. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 179 (1st Cir. 2007).

240. *Id*.

241. *Id*.

242. *Id*.

243. Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788 (2009).

244. Brief for the Appellant-Petitioner at 2, Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788 (2009) (No. 07-1125).

245. *Id*. at 2.

scheme and includes a private right of action such that it precludes parallel, identical claims under Section 1983, including constitutional claims.[246] The respondents highlighted that the Section 1983 equal protection claim raised by the Fitzgeralds rested upon the same factual allegations and theory of liability as the Title IX claim, further supporting preclusion.[247]

The Supreme Court overturned the First Circuit, finding that Title IX did not preclude constitutional Section 1983 claims.[248] The Court held that Title IX is not the exclusive method of relief for gender discrimination in schools and does not replace Section 1983 to enforce constitutional rights.[249] The Court noted that the only express remedy provided for by Section 1983 is the potential withdrawal of federal funding when, through administrative procedure, an institution has been found to be out of compliance with the statute.[250] In addition, a plaintiff may be eligible for injunctive relief and damages through an implied private right of action previously recognized by the Supreme Court.[251]

The Court held that the remedies of withdrawal of federal funding and an implied right of action did not constitute "unusually elaborate" or "carefully tailored" enforcement schemes that indicated Congress intended to preclude Section 1983 claims.[252] In so finding, the Court noted that "parallel and concurrent [Section] 1983 claims will neither circumvent required procedures, nor allow access to new remedies."[253]

Additionally, the Court pointed to the differences in substantive rights and protections under Title IX and under the Equal Protection Clause as supporting the notion that Congress did not intend to preclude Section 1983 suits when enacting Title IX. First, the Court pointed to the fact that individuals cannot be sued under Title IX but can be sued under Section 1983 as evidence of how the claims diverge.[254] Second, the Court noted that under Title IX certain institutions may be exempted from restriction that would not be exempted from constitutional protections.[255] For example, military and single-sex public colleges are exempt from Title IX's provisions.[256] Yet military and single-sex public colleges may be subject to Equal Protection claims for the same activities that are exempt from Title IX.[257]

246. Brief for the Appellee-Respondent at 13, Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788 (2009) (No. 07-1125).

247. *Id*. at 13.

248. *Fitzgerald*, 129 S. Ct. at 797.

249. *Id*. at 797.

250. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788, 795 (2009).

251. *Id*. at 795 (citing Cannon v. University of Chicago, 441 U.S. 677, 717 (1979)).

252. *Id*. at 795-96.

253. *Id*. at 796.

254. *Id*.

255. *Id*.

256. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788, 796 (2009).

257. *Id*.

Third, the Court maintained that the standards of liability may be distinct for similar claims under Title IX and Section 1983. Under a Title IX claim, a defendant school district may be held liable for the deliberate indifference of one school administrator,[258] whereas under a Section 1983 claim for violation of the Equal Protection Clause, the same defendant would only be liable if it is shown that a municipal custom, policy, or practice led to the harassment.[259]

Fourth, the Court stated that Congress modeled Title IX after Title VI of the Civil Rights Act of 1964.[260] Title VI, in 1972, the time Title IX was enacted, had been held to allow claims under the statute as well as under Section 1983.[261] Because Congress provided no indication that Title IX should be interpreted differently, the Court found that this fact provided further evidence that Title IX was not intended to preclude Section 1983 claims.[262]

The Fitzgeralds did not appeal the First Circuit's dismissal of their statutory Section 1983 claims under Title IX against the Superintendent as an individual.[263] Therefore, the Supreme Court did not explicitly rule upon whether or not plaintiffs may sue individuals for violations of Title IX under Section 1983. The Court discussed statutory Section 1983 claims in their analysis of the remedial scheme of Section 1983, and used broad language when stating that "parallel and concurrent [Section] 1983 claims will neither circumvent required procedures, nor allow access to new remedies."[264] Yet throughout the opinion, the Court repeatedly specified "constitutional" Section 1983 claims, including when the Court stated, "we hold that [Section] 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging gender discrimination in schools."[265] While the opinion suggests that plaintiffs may bring claims under Title IX and under Section 1983 against individuals for violating Title IX concurrently, the narrow question presented and the fact that the concurrent Section 1983 Title IX claims were not an issue presented to the Supreme Court prevent a firm conclusion on this issue.

VI. CLOSING THE DOOR TO INDIVIDUAL LIABILITY UNDER TITLE IX

The Supreme Court's holding in *Fitzgerald* that Equal Protection claims under Section 1983 are not precluded by Title IX only resolves part of the circuit split regarding Title IX preclusion. Some circuits have found individuals may be liable under Title IX via Section 1983.[266] While the Supreme Court did

258. *Id*. at 797 (citing Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 290 (1998)).

259. *Id*. at 797 (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 695 (1978)).

260. *Id*. at 797.

261. *Id*.

262. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788, 797 (2009).

263. Brief for the Appellee-Respondent, *supra* note 246, at 7.

264. *Fitzgerald*, 129 S.Ct. at 796.

265. *Id*. at 797.

266. *See supra* Part VI. A.

not explicitly hold that Title IX does not preclude statutory Section 1983 claims,[267] and the broad language in the *Fitzgerald* decision, suggesting that all parallel and concurrent Section 1983 claims are not precluded by Title IX,[268] may encourage more courts to allow individual liability under Title IX. The Supreme Court should hold in the future that Title IX precludes Section 1983 claims based upon the statute. Teachers and administrators are not subject to liability under Title IX itself.[269] To allow a back door method of suing teachers and administrators in their individual capacity under Title IX via Section 1983 would impose liability that Congress did not intend for under the statute.

A. Individual Liability for Teachers and Administrators under Title IX Contradicts the Statute Itself and Legislative Intent

The earliest versions of what became the Education Amendments of 1972 included a section prohibiting discrimination on the basis of sex in educational institutions.[270] In the House Report for the bill, special attention was paid to evidence of discrimination against women in higher education institutions programs and practices.[271] In its final form, the Education Amendments included Title IX, a prohibition against discrimination on the basis of sex in education programs and institutions.[272] The language specified that recipients of federal funding were subject to the prohibition and the focus of the legislation was to remedy discriminatory practices that had pervaded higher education institutions and other education institutions.[273] Neither Title IX nor the committee reports explaining the amendments and changes to previous iterations of the bill suggest individuals may be held liable under the statute.[274]

The purposes of the statute were reiterated in *Canon v. University of Chicago*:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.[275]

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267. *See supra* note 263 and accompanying text.

268. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788, 796 (2009).

269. *See supra* notes 45-46 and accompanying text.

270. H.R. REP. No. 92-554, at 51-2 (1971).

271. *Id*. at 51.

272. 20 U.S.C. § 1681(a) (2006).

273. 20 U.S.C. § 1681(a) (2006); *see also supra* Part III. A.

274. 20 U.S.C. § 1681(a) (2006); H.R. REP. No. 92-554 (1971); SEN. REP. No. 92-604 (1972); SEN. REP. No. 92-798 (1972); SEN. REP. No. 92-346 (1972).

275. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

Considering the two objectives, some may argue that effective protection requires remedy against individuals. Yet, the protection Title IX provides is against education institutions operating programs or policies that discriminate on the basis of sex. The statute has been consistently interpreted as only providing for liability against funding recipients, not individuals.[276] As there is no agency law liability under Title IX[277] and no individual liability under the statute itself,[278] the purposes and intent of the statute would be compromised by allowing a back door into suing individual teachers and administrators through Section 1983 Title IX claims.

In contrast, allowing for constitutional claims under Section 1983 while also raising Title IX claims is not inconsistent with the statute. The inquiry into preclusion of constitutional Section 1983 claims involves determining if the claims are "virtually identical" to those of the statute.[279] The most analogous constitutional claim to a Title IX claim is the Equal Protection Clause claim. In *Fitzgerald*, the Court addressed the issue of whether these specific constitutional claims are precluded by Title IX claims.[280] Proponents of the theory that Title IX precludes Equal Protection claims based on the same underlying actions argue that the two claims are nearly identical and thus Congress intended to foreclose concurrent and parallel Equal Protection claims.[281] Opponents argue that the claims are not identical and Congress did not intend to shut down plaintiffs' constitutional rights through providing an implied cause of action under Title IX.[282] In *Fitzgerald*, the Court concluded that Title IX does not preclude Equal Protection claims, stating that Section "1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."[283] The Court noted that when the rights and protections of the Constitution differ "in significant ways" from those of the statute at issue, like Title IX, it is reasonable to infer a lack of Congressional intent to preclude claims under the Constitution.[284]

276. *See supra* note 44 and accompanying text.

277. *See supra* note 78 and accompanying text.

278. *See supra* note 34 and accompanying text.

279. *See* Smith v. Robinson, 468 U.S. 992, 1007-08 (1984). *See supra* note 119-22 and accompanying text.

280. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788 (2009).

281. Brief for the Appellee-Respondent, *supra* note 246 at 13-14 ("[T]he Fitzgeralds' Title IX and § 1983 claims are virtually identical, based on the same factual allegations and based on the same theory of liability…making preclusion a common-sense result."). *See also* Lindsay Neihaus, *The Title IX Problem: Is It Sufficiently Comprehensive to Preclude §1983 Actions?*, 27 QUINNIPIAC L. REV. 499, 523 (2009) ("Allowing individuals to bring § 1983 and Title IX claims concurrently permits individuals to bring the same gender discrimination claim against educational institutions by way of two set procedural mechanisms that protect the same right.").

282. Brief for the Appellant-Petitioner, *supra* note 246, at 35 ("Title IX and the Equal Protection Clause are not co-extensive in scope."). *See also Fitzgerald*, 129 S.Ct. at 797 ("In light of the divergent coverage of Title IX and the Equal Protection Clause...").

283. *Fitzgerald*, 129 S.Ct. at 797.

284. *Id*. at 794.

Theories of liability may differ under the Equal Protection Clause claims and Title IX claims.[285]

In addition, some suggest that because individuals can be sued under the Equal Protection Claim via Section 1983, this is further evidence of a substantial difference between Title IX, under which individuals cannot be sued, and Equal Protection claims.[286] While this logic seems circular, it is evident that Title IX claims and Equal Protection claims are not identical or "virtually identical" such that Title IX should preclude such constitutional claims.[287] The *Fitzgerald* decision is accurate in holding that constitutional Section 1983 claims are not precluded by Title IX.

The analysis for preclusion is different, however, for statutory Section 1983 claims. The inquiry for statutory Section 1983 claims, as described in *Sea Clammers*, focuses on congressional intent and preventing the circumvention of a federal statute's remedial scheme.[288] Under *Sea Clammers*, the Supreme Court determined if a federal statute precluded Section 1983 claims by determining if the statute created an enforceable right and if the statute provided a "sufficiently comprehensive remedial scheme" suggesting Congress has foreclosed private enforcement.[289] The Supreme Court noted that Section 1983 suits should not provide an end run around a statute.[290]

In *Fitzgerald*, the Court cited to *Sea Clammers* in its reasoning. While the Court's grant of certiorari in *Fitzgerald* was limited to the question of whether or not Title IX precluded constitutional Section 1983 gender discrimination claims, the reasoning of the Court echoed *Sea Clammers* analysis of federal statutes.[291] The Court found that Title IX did not provide a restrictive private remedy or comprehensive remedial scheme and did not explicitly limit this reasoning to constitutional claims, suggesting that statutory claims under Title IX may not be restricted.[292]

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285. *See supra* notes 146-48 and accompanying text.

286. Beth B. Burke, *To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 WASH. U. L. Q. 1487, 1513 (2000).

287. *See* Smith v. Robinson, 468 U.S. 992, 1009 (1984) (coining the "virtually identical" analysis). *See also supra* note 198 and accompanying text.

288. Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1468 (1998).

289. *See supra* notes 115-18 and accompanying text.

290. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 15 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."). *See also id*. at 120 ("[A] state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under [Section] 1983.") (J. Stewart, dissenting) (quoting Chapman v. Houston Welfare Rights Org., 441 US 600, 673 n.2 (1979)).

291. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788, 796 (2009).

292. *Id*. at 796. ("As a result, parallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies.").

In determining the remedial scheme of a statute, some courts and scholars suggest that the *Sea Clammers* inquiry should only address the explicit remedies provided for by the statute, thus eliminating consideration of the judicially created implied private cause of action and the judicial finding that damages are available under Title IX.[293] Yet the Supreme Court, in *Fitzgerald*, contradicted this argument and supported analyzing the comprehensiveness of the remedial structure of Title IX by including the implied private cause of action in its discussion. The Court argued that the remedies provided under Title IX, withdrawal of federal funds and an implied cause of action, "stand in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*."[294]

The remedial schemes of the statutes at issue in *Sea Clammers* and *City of Rancho Palos Verdes v. Abrams*[295] are certainly more elaborate than that in Title IX, but the holdings in both cases do not conflict with finding that Title IX has a remedial scheme that precludes Section 1983 claims for Title IX violations.[296] In *Sea Clammers*, the Court noted the two statutes at issue detailed express remedial provisions, including granting governmental agencies the authority to issue compliance orders and initiate civil suits, the opportunity for judicial review, and the authorization of citizen-suits for injunctive relief.[297] The statute at issue in *Rancho Palos Verdes*, the Telecommunications Act (TCA), included an express cause of action and expedited judicial review.[298] The Court noted that:

> in all of the cases in which we have held that § 1983 is available for violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea Clammers* and *Smith*, did not provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated.[299]

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293. Zwibelman, *supra* note 288, at 1477 ("If, instead of limiting their analysis to Title IX's express remedial scheme, courts considered these judicially created remedies when applying the *Sea Clammers* comprehensiveness test, then the foreclosure question in the Title IX context would be much more difficult.").

294. *Fitzgerald*, 129 S. Ct. at 795 (2009).

295. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

296. Note that in Smith, the Court analyzed the Education of the Handicapped Act to determine if Congress intended it to be the sole remedy in preclusion of constitutional Section 1983 claims. As it provides the analysis for constitutional Section 1983 preclusion, its remedial scheme is less relevant in determining if Title IX precludes Section 1983 Title IX claims.

297. Middlesex Cnty Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981).

298. *Rancho Palos Verdes*, 544 U.S. at 122.

299. *Id*. at 121. Note that in Smith, the Court analyzed the Education of the Handicapped Act to determine if Congress intended it to be the sole remedy in preclusion of constitutional Section 1983 claims. As it provides the analysis for constitutional Section

While Title IX does not provide an express private cause of action and arguably does not have an "unusually elaborate" remedial scheme, it has an express administrative remedy, authorizing governmental agencies to eliminate federal funding of educational institutions found to be in violation of the statute.[300] The administrative scheme is carefully articulated in the statute and requires notice to the funding recipient, due process, and an opportunity for the recipient to amend its violations prior to the elimination of federal funds.[301] Additionally, while not express in the statute, Title IX has been consistently interpreted as including an implied private cause of action that would allow plaintiffs to seek damages, injunctive relief, attorney costs, and other remedies.[302] With both an administrative remedy and an implied cause of action, Title IX contains a remedial scheme that is sufficient enough to preclude Section 1983 claims based on the statute.

In *Fitzgerald*, the Supreme Court referenced *Sea Clammers* and *Rancho Palos Verdes* as holding that to provide plaintiffs with a direct avenue to suit through Section 1983 would "circumvent" the procedures outlined by the statutes at issue and would allow plaintiffs the opportunity to receive "benefits-such as damages, attorney's fees, and costs – that were unavailable under the statute."[303] For example, in *Rancho Palos Verdes*, the Court noted that the dividing line between statutes creating a federal right enforceable by Section 1983 and statutes that preclude such suits is "the existence of a more restrictive private remedy for statutory violations."[304] Additionally, the Court found that the statute at issue "adds no remedies to those available under 1983, and limits relief in ways that 1983 does not," thus the statute precluded statutory Section 1983 claims.[305]

The Court noted that it had never found an implied private right of action to preclude Section 1983 claims and maintained that the implied right evidenced Congressional intent to allow Section 1983 claims.[306] The Court emphasized that the implied private right of action, as established by the Court in *Cannon*, allows plaintiffs to "obtain the full range of remedies" and that "parallel and concurrent [Section] 1983 claims will neither circumvent required procedures, nor allow access to new remedies."[307] In considering Section 1983

1983 preclusion, its remedial scheme is less relevant in determining if Title IX precludes Section 1983 Title IX claims.

300. 20 U.S.C. § 1682 (2006).

301. 20 U.S.C. § 1683 (2006). *See also supra* notes 39-48 and accompanying text.

302. *See supra* notes 49-60 and accompanying text.

303. Fitzgerald v. Barnstable Sch. Comm., 129 S.Ct. 788,795 (2009). *See also* Doe v. Covington Cnty. Sch. Bd. of Educ., 930 F. Supp. 554, 574 (M.D. Ala. 1996) ("[T]he court finds that a § 1983 action against the individual defendants to enforce rights under Title IX would effectively allow the plaintiffs to gain remedies unavailable under Title IX and to circumvent the congressional intent to foreclose such Title IX actions.").

304. Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005).

305. *Id*. at 122.

306. *Fitzgerald*, 129 S.Ct. at 796.

307. *Id*.

Title IX claims, this argument overlooks the fact that the implied right of action is more restrictive than the Section 1983 claims. Individuals can be sued under Section 1983, while only federal funding recipients can be sued under Title IX. Thus, allowing Section 1983 Title IX claims circumvents the statute by allowing "access to new remedies" in the potential individual liability of teachers and administrators.[308] One must consider the full context of remedies available to a plaintiff under Title IX, which includes an implied private right of action that does not allow for liability against individuals.[309] The existing remedial scheme of Title IX is more restrictive than that of Section 1983, thus supporting that Section 1983 claims based on Title IX against individuals should be precluded.[310]

Additionally, arguing that an implied right of action means Congress intended availability of Section 1983 claims based on the statute overlooks the Supreme Court's holding that "[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983."[311] The Court went further in *Rancho Palos Verdes*, when it held that private remedial provisions in a statute can indicate that Congress did not intend for "more expansive remedy under [Section] 1983."[312] The language in the opinion suggested that the Court had shifted from a rebuttable presumption of intent to allow Section 1983 claims to a presumption that the statute provides an exclusive remedial scheme precluding Section 1983 claims.[313]

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308. In Fitzgerald, the Court maintained that because of the implied private right of action and the administrative remedial scheme, Title IX provided access to the "full range of remedies," thus allowing Section 1983 claims would not provide "access to new remedies." *Id*. This overlooks, however, that allowing Section 1983 statutory claims under Title IX would provide access to new defendants and thus new remedies by opening individuals up to liability.

309. This argument has been raised in support of Title IX subsuming all Section 1983 claims, constitutional and statutory. *See* Neihaus, *supra* note 281, at 526 ("[B]ecause the express enforcement mechanism of Title IX, in combination with the implied right of private action, creates a comprehensive enforcement scheme within Title IX, individuals have access to a full spectrum of remedies, including monetary damages and equitable relief, demonstrating that Congress intended Title IX to preclude § 1983 actions for gender discrimination by educational institutions."). It has been argued, however, that the comprehensive enforcement scheme analysis is specific to statutory Section 1983 claim preclusion inquiry, and that the inquiry for constitutional Section 1983 claims differs. *See* Burke, *supra* note 286, at 1514 ("[I]n applying the contextual approach, courts find that the Civil Rights Amendment of 1991, the Rehabilitation Act Amendments of 1986, and the implied right of action are part of Title IX's mandate because they are expressed in the 'enactment itself.'").

310. *See* Debora A. Hoehne, Note, *Assessing the Compatibility of Title IX and Section 1983: A Post-Abrams Framework for Preemption*, 74 FORDHAM L. REV. 3189, 3220 (2006).

311. Blessing v. Freestone, 520 U.S. 329, 341 (1997).

312. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005).

313. *See* Candace Chun, Comment, *The Use of § 1983 as a Remedy For Violations of the Individuals With Disabilities Education Act: Why It Is Necessary and What It Really Means*, 72 ALB. L. REV. 461, 481-82 (2009) (" In phrasing the issue this way, the Court

In suggesting that Section 1983 Title IX claims against individuals are allowed, the Supreme Court has ignored the larger inquiry supported by *Sea Clammers* and *Rancho Palo Verdes*, which emphasizes Congressional intent.[314] In the case of Title IX, there is no indication that Congress ever intended individuals to be liable for Title IX violations.[315] In fact, the Court previously interpreted Congressional intent of Title IX as foreclosing suit against individuals, finding the proper defendants under the statute were only federal funding recipients.[316] The Court itself has noted that as Spending Clause legislation, Congress merely provided a condition by which federal funding recipients must abide, thus only the federal funding recipients themselves should be liable.[317]

Moreover, the Supreme Court has shown reluctance to extend Section 1983 claims for federal statutory claims.[318] In *Gonzaga University v. Doe*, the Court held that Congress must show intent in "clear and unambiguous terms" to provide individual rights that can be pursued under Section 1983.[319] As noted previously, Congress did not provide a clear and unambiguous indication that Title IX was intended to allow for Section 1983 suits based on the statute.[320]

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seemingly threw out the 'rebuttable presumption' theory… and replaced it with the theory that Congress's inclusion of a private remedy in a federal statute gives rise to a presumption that the remedy is exclusive.").

314. Brief for the Appellant-Petitioner, *supra* note 246, at 15("The decisive consideration in this case 'is what Congress intended.'") (quoting *Rancho Palos Verdes*, 544 U.S. at 120).

315. The statute explicitly provides for remedy against "federal funding recipients" but not individuals. 20 U.S.C. § 1681(a) (2006). *See also supra* notes 38-43.

316. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640-41 (1999). *See also supra* note 44 and accompanying text (defining a federal funding recipient).

317. *Davis*, 526 U.S. at 640-41. *See also* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610-11 (8th Cir. 1999) ("Title IX operates to condition an offer of federal funding on a promise by the recipient not to discriminate, "in what amounts essentially to a contract between the Government and the recipient of funds.' 'The fact that title IX was enacted pursuant to Congress's spending power is evidence that it prohibits discriminatory acts only by grant recipients.") (quoting in part Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998)) (other internal citations omitted).

318. *See* Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims*, 77 FORDHAM L. REV. 775, 780-81 (2008).

319. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). *See* Levinson, *supra* note 318, at 780-81 (Explaining that in Gonzaga University v. Doe, the Court specifically noted that the Federal Education Right to Privacy Act (FERPA) was unlike Title IX and did not provide a federal right enforceable through Section 1983 because Title IX had "individually focused language" whereas FERPA did not. Some argue that the Gonzaga decision confirms that Title IX is enforceable against individuals through Section 1983.); Sasha Samberg-Champion, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838 (2003).

320. *See supra* Part V. A. for a full discussion of the Circuit Courts split on whether or not Congress intended Title IX to preclude Section 1983 suits. The fact that the Circuits disagree shows that there is ambiguity regarding Congress' intent to allow Section 1983 suits via Title IX.

Some have interpreted the *Gonzaga* decision as suggesting that the Court is reluctant to increase liability for officials and therefore would be reluctant to recognize a Section 1983 claim based on a federal statute without "unmistakably clear" language in the statute showing the intention of Congress to create a right enforceable by Section 1983.[321]

It may seem contradictory to argue that, when raised concurrently with Title IX, constitutional Section 1983 claims against individuals should be upheld while statutory Section 1983 claims must be precluded. The distinction is not arbitrary, however, nor is it unprecedented.[322] In *Seamons v. Snow*,[323] the Tenth Circuit suggested, though it did not officially rule, that it would allow recovery on concurrent constitutionally based Section 1983 claims but would not allow recovery on concurrent Section 1983 Title IX claims.[324] Finding such a distinction is reasonable given that the inquiries into preclusion are different for constitutional Section 1983 claims and statutory Section 1983 claims. In fact scholars have argued that courts incorrectly meld the two inquiries into one, and rely on *Sea Clammers* and *Smith* when they should be relying on one or the other based upon whether or not the claim is constitutionally based or statutorily based.[325]

As the Supreme Court has allowed for separate inquiries into the two types of claims, and the Court specifically noted in the *Fitzgerald* case that constitutional claims are not precluded, making a distinction between such claims is wholly reasonable.[326] Additionally, allowing for constitutional Section 1983 claims but not statutory Section 1983 claims would ensure that plaintiffs still have recourse against individuals for violations of their constitutional rights, in addition to having recourse against the school districts or federal funding recipients for violation of the federal statute Title IX.[327]

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321. Levinson, *supra* note 318, at 780-81.

322. *See id*. at 796 ("Permitting statutorily created rights to be enforced only through statutory remedies, which Congress has carefully constructed, is understandable."). *Cf*. Niehaus, *supra* note 281, at 524 (arguing that a distinction between statutory Section 1983 claims based on Title IX and constitutional Section 1983 claims under a preclusion analysis is arbitrary).

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

324. *Seamons*, 84 F.3d at 1234, n.8 ("Of course, the 1983 action could not be predicated on a violation of Title IX itself. Such a duplicative effort would be barred.").

325. Zwibelman, *supra* note 288, at 1471.

326. *Seamons*, 84 F.3d at 1234 n.8.

327. Michael Zwibelman claims that if Title IX is found to preclude Section 1983 claims, plaintiffs will have no recourse for constitutional violations, arguing that such a consideration must be made when determining preclusion. Zwibelman, *supra* note 288, at 1484 ("Although the Sea Clammers and Smith tests do not involve such considerations explicitly, the tests do embody Section 1983's overarching objective of protecting the rights of individuals against the constitutionally impermissible conduct of individuals acting under color of state law."). Yet, this is only true if Title IX precludes constitutional Section 1983 claims, and the Fitzgerald case and the argument above maintain Title IX does not preclude such claims. *See* Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 796-97 (2009).

B. The Impact of Section 1983 Personal Liability Suits Against Teachers and Administrators under Title IX

The Supreme Court decision in the *Fitzgerald* has cracked open the door for suits against teachers and administrators as individuals by suggesting that Title IX does not preclude statutory Section 1983 claims. The question remains as to what the reality of this cracked door means for students, schools, teachers, and administrators. Likely the decision will increase confusion among school districts, school boards, and teachers and administrators regarding their potential liability under Title IX. As the circuits were split prior to the *Fitzgerald* decision, it is not unreasonable to predict that district courts will have difficulty in determining when to find statutory Section 1983 claims precluded by Title IX and when to allow individual liability against teachers and administrators based upon Title IX violations.

The fact that the *Fitzgerald* decision is recent limits the extent to which any predictions can be made; however, it seems likely that more plaintiffs will raise Section 1983 Title IX claims. Section 1983 claims against individual teachers and administrators based on Title IX benefit students. By suing teachers and administrators as individuals, students would have the ability to increase the number of defendants in a suit and thereby potentially increase the likelihood of a finding of liability or settlement. Some scholars suggest that plaintiffs are likely to seek Section 1983 Title IX claims because of Section 1983's lower burden of proof for supervisor liability.[328] Section 1983 merely requires a showing of gross negligence as opposed to Title IX, which requires actual knowledge and deliberate indifference in order to find supervisors liable.[329] Presumably, in the context of peer-to-peer harassment cases, supervisory liability would be most relevant in theories of liability resting on the response of a school employee to the harassment[330] instead of the actual harassment itself since the harasser is not an employee.

Some argue that claims against individuals are important for situations where a school district will not be found liable because it did not have "actual

328. Zwibelman, *supra* note 288 at 1466-67 ("For example, a plaintiff may find it easier to prove that the principal, superintendent, or school district were responsible for a teacher's misconduct under Section 1983, which generally requires a showing of gross negligence, than under Title IX, which requires a showing of actual knowledge plus deliberate indifference on the part of supervisory officials and institutions.").

329. Zwibelman, *supra* note 288, at 1466-67.

330. The Fitzgeralds raised this theory of liability under Equal Protection, but it is reasonable to assume a plaintiff may raise a theory of liability that a school official or employee's response to harassment was in violation of Title IX because it discriminated on the basis of sex. *See Fitzgerald*, 129 S.Ct. at 798 ("[The Fitzgeralds] intend…to advance claims of discriminatory treatment in the investigation of student behavior and in the treatment of student complaints."). *See also* Hewey, *supra* note 5 (outlining the development of liability for peer-to-peer harassment).

notice" of the harassment.[331] For example, in a teacher-student harassment case, the Supreme Court suggested that only school officials with the authority to take corrective action are appropriate persons for the purpose of establishing notice or knowledge of the harassment.[332] This suggests principals and administrators are appropriate persons, but teachers may not be. An Eleventh Circuit decision noted, however, that in the case of peer-to-peer harassment, determining who an appropriate person is for establishing actual notice is less stringent than in a teacher-student harassment case because "a much broader number of administrators and employees could conceivably exercise at least some control over student behavior."[333] The OCR has also issued policy statements maintaining that, for OCR enforcement purposes, appropriate persons include "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility."[334] Thus, it seems reasonable for courts to find that a teacher can be an appropriate person for the purposes of establishing notice in peer-to-peer harassment cases. In those cases where courts do not find a teacher or the person notified to be an appropriate person, it is reasonable to conclude that the plaintiff is left without recourse under Title IX. Yet the plaintiff likely would have additional causes of action under state law and the Constitution. If there is no action under state law, however, state legislatures may want to fill any potential gap in protecting students' rights.

Before considering the impact of Section 1983 Title IX suits against individuals on schools, it is important to note one particularly significant effect of the *Fitzgerald* holding that constitutional Section 1983 claims are not precluded by Title IX. Constitutional Section 1983 claims will increase school districts' and administrators' focus on training and policies for sexual harassment in schools.[335] This effect is positive for students and for schools since proper policies and adequate training will help schools respond better to peer-to-peer harassment. Schools may be held liable for a failure to train in sexual harassment suits.[336] Additionally, under Section 1983, failure to train liability is a possibility when plaintiffs can show a pattern or routine of behavior, or ineffective or incomplete training and that failure to train can be

331. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (requiring that the federal funding recipient have actual knowledge of the harassment to be found liable for peer-to-peer harassment under Title IX).

332. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

333. Hawkins v. Sarasota County Sch. Bd., 322 F.3d 1279, 1287 (11th Cir. 2003).

334. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 13 (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

335. *See* Hewey, *supra* note 5.

336. *See supra* Part IV. C.

causally connected to a constitutional deprivation.[337] At least one circuit has already allowed claims against supervisory school officials under a Section 1983 failure to train theory of liability.[338]

The National Women's Law Center ("Center") provides recommendations to schools in ensuring appropriate training and policies for sexual harassment. The Center recommends that schools ensure the entire school community is involved in development of the policy and that the policy itself list specific behaviors that constitute sexual harassment, making it clear that all students are protected and providing examples of potential punishments.[339] The Center also suggests that policies note that all complaints will be confidential and that retaliation for complaints is prohibited.[340] The policies should include a formal complaint procedure, and finally the policy itself must be "[w]ell-publicized and effectively implemented."[341]

The OCR requires that every school have a policy against sex discrimination, must adopt and publicize grievance procedures, and must have a Title IX coordinator.[342] The OCR also publishes a checklist for schools in ensuring they are compliant with Title IX. The checklist states that schools should continually evaluate and assess their harassment policies and ensure that they are appropriate and that "[s]chool personnel continually monitor the school climate and promptly address problems that could lead to harassment or violence or that indicate that harassment could be occurring."[343] The OCR checklist further highlights the need for effective training in order for schools to be compliant with Title IX.[344]

Even if actual liability does not increase for schools and their employees under the *Fitzgerald* holding, costs to school districts and employees are likely to increase. Due to the finding that constitutional Section 1983 claims are not precluded by Title IX, schools may need to invest more in training and policies

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337. Hewey, *supra* note 5, at 2.

338. Crawford v. Davis, 109 F.3d 1281, 1282 (8th Cir. 1997) ("Ms. Crawford then filed suit under 42 U.S.C. § 1983 and Title IX... against [school officials] in both [their] individual and official capacities. She advanced an array of liability theories based on Title IX and equal protection principles, [including] a "failure-to-train" claim, that is, that UCA and its officials are liable because they failed to ensure that UCA's sexual harassment policy was known to its employees.").

339. NATIONAL WOMEN'S LAW CENTER, HOW TO PROTECT STUDENTS FROM SEXUAL HARASSMENT: A PRIMER FOR SCHOOLS 2 (2007), *available at* http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/studentsfromsexualharassment.pdf.

340. *Id*.

341. *Id*. at 2-3.

342. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 16 (2008), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf.

343. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CHECKLIST FOR A COMPREHENSIVE APPROACH TO ADDRESSING HARASSMENT (2005), *available at* http://www2.ed.gov/about/offices/list/ocr/checklist.html.

344. *Id*. ("Staff training and professional development programs support the district's anti-harassment efforts.").

for sexual harassment, as noted previously. While this is a positive for students and would occur regardless of finding Section 1983 Title IX claims cognizable, it is important to note since the costs of such an investment will impact the schools and administrators generally.[345]

Other costs to schools are likely if courts allow Section 1983 Title IX claims. First because Section 1983 introduces different standards than traditional Title IX claims for determining liability for the same underlying incident, litigation may become more costly to schools, and teachers and administrators may be involved in suits more frequently as individuals.

Second, an increase in potential individual liability for administrators and teachers may have negative implications for educational opportunities of students by increasing the demands on and anxiety of teachers and administrators. Studies suggest that administrators spend much of their time dealing with legal issues and this detracts from their ability to attend to curricular and other educational matters, negatively impacting the educational experience in schools.[346] One survey of superintendents found that half of the respondents reported legal issues and litigation absorbed too much of their time.[347] Another study found that principals' and superintendents' time is consumed by avoiding lawsuits, and that sexual harassment is one of the most problematic areas.[348]

Additionally, studies show that teachers and administrators fear liability,[349] and that such fears may limit educational opportunities for students.[350] In a study involving focus groups in Colorado Public Schools, over 60 percent of teachers and principals who participated reported experiencing a high to moderate degree of legal fear, almost daily.[351] In a 1999 nationwide

345. As previously noted the increased focus on training and school policies addressing sexual harassment is positive. Incentive to address such a serious problem in schools is important, but in considering the effects on schools one must consider the costs such an incentive will bring.

346. Christina A. Samuels, *Managers Help Principals Balance Time*, EDUC. WK., Feb. 11, 2008 ("Investigators who shadowed principals for a week showed that a crush of managerial duties allowed them to spend only a third of their day—or less—on tasks that involved interaction with students and teachers. And often, the contact that did occur was too short and unfocused to lead to real instructional improvement.").

347. STEVEN FARKAS, ET. AL., TRYING TO STAY AHEAD OF THE GAME: SUPERINTENDENTS AND PRINCIPALS TALK ABOUT SCHOOL LEADERSHIP 9 (2001), *available at* http://www.publicagenda.org/files/pdf/ahead_of_the_game.pdf.

348. JEAN JOHNSON AND ANN DUFFETT, "I'M CALLING MY LAWYER:" HOW LITIGATION, DUE PROCESS AND OTHER REGULATORY REQUIREMENTS ARE AFFECTING PUBLIC EDUCATION 3 (2003), *available at* http://www.publicagenda.org/files/pdf/im_calling_my_lawyer.pdf.

349. Press Release, American Tort Reform Association, School Principal Survey Reveals Fear of Liability Limits Educational Opportunities for America's Children (Sept. 1, 1999), http://www.atra.org/show/91.

350. *Id*.

351. SUSAN ELIOT & JUDY GORDON, A FOCUS GROUP RESEARCH STUDY, THE NEW THREE R'S: RULES, REGULATIONS, AND MORE RULES 1-2 (2007), *available at* http://commongood.org/assets/attachments/189.pdf.

survey, the American Tort Reform Association found that increased litigation has negatively impacted students, as a large proportion of K-12 principals were eliminating programs and activities due to the costs and fears of litigation.[352] In another survey, 63 percent of teachers and 64 percent of principals responded that they "believe that the increased potential for legal challenges by students or parents has hurt their ability to do their jobs."[353]

Evidencing the pervasiveness of litigation anxiety among educators, various education organizations have noted the costs of litigation and have issued guidance on how to avoid or prepare for litigation. In an article in a newsletter published by the National School Board Association, the authors noted the extensive costs of litigation in school districts, stating "[t]he costs of lawsuits for school districts range from $45,000 to $400,000 per year" and noted that "more than $200 million is spent nationally on attorney fees."[354] The authors also warned that money is not the only consideration in costs of litigation, as there is "enormous time spent by teachers and administrators to avoid and prepare for litigation."[355]

In Massachusetts, teachers facing suit for sexual harassment are given the following advice by the Massachusetts Teachers' Association (MTA):

> It is more likely that the employer, rather than the individual employee, will be sued for sexual harassment that is committed by teachers at school, whether it is against students or other staff members. However, sexual harassment could be viewed as a civil rights violation, in which case [state law] does not indemnify the individual employee. Moreover, it is possible, although not clear, that an individual employee could be the subject of a discrimination charge at the Massachusetts Commission Against Discrimination.[356]

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352. American Tort Reform Association, *supra* note 349 ("The programs eliminated or altered include such staples of American education as physical education, driver's education, shop, recess, dances and scouting. An amazing number of principals (78) reported banning all physical contact (i.e. hugging) for fear of lawsuits.").

353. CITIZENS AGAINST LAWSUIT ABUSE, THE FOURTH 'R' OF CALIFORNIA SCHOOL DISTRICTS: RIPPED OFF BY LITIGATION 6 (2008), *available at* http://www.cala.com/docs/schoolsreport.pdf (quoting HARRIS INTERACTIVE, EVALUATING ATTITUDES TOWARD THE THREAT OF LEGAL CHALLENGES IN PUBLIC SCHOOLS 12 (2004), http://commongood.org/assets/attachments/11.pdf).

354. David Schimmel & Matthew Miltello, *The Dangers of Not Knowing: Why Your Teachers Should Be Legally Literate* 2, LEADERSHIP INSIDER (National School Boards Association, Alexandria, VA), May 2009, at 2, *available at* http://www.nsba.org/MainMenu/SchoolBoardPolicies/Newsletters/Insider-May-09.aspx.

355. *Id*.

356. Judith Neumann, Esq. (Revisions by Matthew D. Jones, Esq.), MTA Division of Legal Services, *Teacher Rights and Liability: Helping Teachers Avoid Trouble on the Job*, http://lexington.massteacher.org/Documents/Sundries/TchrInfo/TeacherRightsandLiability.htm# (last visited on Nov. 20, 2009).

With the *Fitzgerald* decision and its implications, the MTA's advice may need revising, as it seems more likely than before that individual teachers could be sued, not only for teacher harassment but also for peer-to-peer harassment in which the teacher was not a participant. As teachers and administrators learn of lawsuits against individuals for peer-to-peer harassment, concerns may rise over potential liability, which may negatively impact the work of teachers and administrators and the educational experiences of students.

The costs of litigation arguably should not be a consideration when determining an individual's right for remedy for violations of a federal statute. The points made above are intended to shed light on the potential implications of individual liability under Title IX through Section 1983 suits, both positive and negative.

CONCLUSION

The *Fitzgerald* decision appropriately held that constitutional Section 1983 claims are not precluded by Title IX. Courts, however, should not allow Section 1983 Title IX claims against individual teachers and administrators for peer-to-peer harassment. Title IX does not allow suit against individuals, and this fact cannot be overlooked in analyzing whether or not Section 1983 suits would contravene the intention of the statute. While the majority of circuit courts do not allow Section 1983 claims against individuals for Title IX violations, some courts have allowed the claims to proceed. The costs to schools and confusion for plaintiffs is significant, since the issue has not been addressed clearly. The Court's holding in *Fitzgerald* has potentially added to the confusion as the reasoning in the opinion may allow for liberal interpretation that Section 1983 Title IX suits are appropriate.

If courts allow Section 1983 Title IX claims against individual teachers and administrators, they are circumventing the intention and language of Title IX. Section 1983 Title IX claims provide a back door into litigation against individuals under Title IX. Congress, not the courts, should analyze the policy implications of holding individual teachers and administrators individually liable for Title IX violations to determine if such liability would provide necessary redress to victims of peer-to-peer harassment. Until Congress amends Title IX to explicitly allow individual liability, however, courts should remain true to the statute and dismiss Section 1983 Title IX claims against individuals for peer-to-peer harassment.