



1-1-1997

The Fourteenth Amendment and Title IX: A Solution to Peer Sexual Harassment Comment.

Connie C. Flores

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Connie C. Flores, *The Fourteenth Amendment and Title IX: A Solution to Peer Sexual Harassment Comment.*, 29 ST. MARY'S L.J. (1997).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol29/iss1/4>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

**THE FOURTEENTH AMENDMENT AND TITLE IX:
A SOLUTION TO PEER SEXUAL HARASSMENT**

CONNIE C. FLORES

I. Introduction.....	154
II. Defining Peer Sexual Harassment	163
A. What Peer Sexual Harassment Is Not	164
B. What Peer Sexual Harassment Is	165
C. How Common Is Peer Sexual Harassment?	166
III. The Effects of Peer Sexual Harassment on Female Students	167
IV. Possible Remedies and Probable Failures.....	173
A. Equal Protection	174
1. Brief Overview.....	174
2. Classification and Standard of Review.....	176
3. Intent	178
B. Education and Fundamental Rights	180
C. Title IX	183
1. History of Title IX	184
2. Interpretation of Title IX	187
V. Proposal	190
A. Expand the Intent Requirement Under Equal Protection	191
1. Why Should the Intent Requirement Be Expanded?	191
2. What Would Constitute Intent?	193
B. Declare Education a Fundamental Right	194
C. Amend Title IX to Address Peer Sexual Harassment..	196
VI. Rebutting Arguments That Limit School Liability in Peer Sexual Harassment Claims	202
A. Schools Are Responsible for Preventing Peer Sexual Harassment	202
B. Peer Sexual Harassment Can Be Prevented by School Officials.....	204
C. An Education Free from Harassment Is Not a Special Privilege	205
VII. Conclusion	206

I. INTRODUCTION

Tawnya Brawdy, an eighth grader, was tormented by a group of fifteen to thirty boys on a daily basis.¹ These boys waited for her nearly every morning at school; and when she arrived, they made vulgar remarks about her body.² This behavior occurred not only throughout the school day, but also at home, in the form of harassing telephone calls.³ Tawnya and her mother complained to teachers, the school principal, and the superintendent of the school district; however, these school officials took no action to stop the harassment.⁴

In a separate case, two female high school students endured groping of their breasts and genital areas by male classmates in a school bathroom during school hours.⁵ Not only were these girls sodomized, but they were forced to perform fellatio on their tormentors.⁶ Although one of the girls complained to a school director, no action was taken to prevent further abuse.⁷

In another case, two eighth-grade sisters in a Texas middle school were verbally and physically abused by a male classmate.⁸ The male student fondled the genitals of both Jane and Janet Doe, and grabbed Jane's breasts.⁹ He also swatted the girls' bottoms and propositioned them for sex.¹⁰ The sisters and their mother repeatedly complained to school officials,¹¹ but the abuse never stopped.¹²

1. Elizabeth Levitan Spaid, *Schools Grapple with Peer Harassment*, CHRISTIAN SCI. MONITOR, Jan. 21, 1993, at 3.

2. *Id.* For example, the male students would follow Tawnya and call out comments like "moo" and "big tits." *Id.*

3. *Id.*

4. *Id.* Tawnya and her mother filed a complaint with the Office of Civil Rights. *Id.* The school ultimately settled a claim for contributing to the creation of a hostile environment and awarded the Brawdys \$20,000. *Id.*

5. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1365-66 (3d Cir. 1992) (en banc).

6. *Id.*

7. *Id.*

8. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir.) (describing how male classmates grabbed female students' breasts and genital areas, and made comments like "when are you going to let me fuck you?"), *cert. denied*, 117 S. Ct. 165 (1996).

9. *Id.*

10. *Id.*

11. *See id.* at 1008-09 (explaining that Janet complained to school officials no fewer than eight times and mother spoke to school officials on several occasions about harassment her daughters were experiencing).

12. *See id.* (noting that three-day suspension did not deter male harasser).

While this behavior seems unbelievable, many female students face similar sexual harassment from their male peers on a regular basis.¹³ In fact, three out of four teenage girls have experienced some form of sexual harassment from male students.¹⁴ Despite this high occurrence of sexual harassment in schools, many school officials, who are aware of this abuse, do nothing to prevent it.¹⁵ Many school administrators believe that sexual harassment is a part of adolescence and shrug off complaints of peer abuse with statements such as “boys will be boys,”¹⁶ or “girls should learn

13. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 554 (1996) (commenting that environment replete with sexual harassment is norm rather than exception in high school); Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1800 (1995) (stating that girls are repeatedly exposed to behavior that frightens, intimidates, and degrades them); Elizabeth Levitan Spaid, *Schools Grapple with Peer Harassment*, CHRISTIAN SCI. MONITOR, Jan. 21, 1993, at 3 (discussing that peer harassment is increasing even though it is not new phenomenon); *Dateline: All About Eve* (NBC television broadcast, Sept. 15, 1996) (reporting that three out of four girls are exposed to sexual harassment), available in 1996 WL 6704566; see also Xelena Gonzales, *Students Say School Sexual Harassment Soft-Pedaled*, SAN ANTONIO EXPRESS-NEWS, July 4, 1997, at 7B (describing how students are harassed at school). Gonzales notes that peer harassment has become so extreme because “students have been allowed to get away with ‘less offensive’ behavior such as calling names, telling sexual jokes and spreading sexual rumors.” *Id.*

14. *Dateline: All About Eve* (NBC television broadcast, Sept. 15, 1996), available in 1996 WL 6704566.

15. See Sylvia Hermann Bukoffsky, Note, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX*, 42 WAYNE L. REV. 171, 187 (1995) (claiming that teachers and administrators have offered little help in combating sexual harassment complaints); Anouchka Oppinger, Note, *Education Law-Title IX-Peer Sexual Harassment-Still Alive and Well in Our School Hallways After Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996), 38 S. TEX. L. REV. 307, 307-08 (1997) (recognizing that sexual harassment virtually is unchecked in educational institutions); see also *Rowinsky*, 80 F.3d at 1008 (indicating that female student complained no fewer than eight times to school official that she was being sexually harassed yet harassment continued); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995) (noting that Doe reported sexual harassment to school counselor and abuse continued); *D.R.*, 972 F.2d at 1366 (stating that student told assistant director of Middle Bucks Area Vocational Technical School that male student was trying to force her to engage in sexual conduct and received no assistance); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 549 (1996) (describing harassed student who went to school administration for help and received none).

16. *Petaluma City Sch. Dist.*, 54 F.3d at 1449. Doe reported that when she notified her school counselor of the harassment by her male peer, the school counselor's response was that “boys will be boys.” *Id.*

to play the game."¹⁷ These attitudes are based partly on the fact that harassment has occurred for many years; therefore, some school officials find this behavior acceptable.¹⁸ However, school officials are beginning to recognize that peer abuse is not acceptable because of its detrimental effects on students.¹⁹ As a result, many schools have implemented successful programs to prevent peer harassment.²⁰ Furthermore, when schools have not responded adequately to the problem of peer harassment, student victims have turned to the courts, suing schools for failure to ensure an environment free from discrimination.²¹

17. Malcolm Gladwell, *The Healy Experiment*, WASH. POST, June 21, 1992, at W9, available in 1992 WL 2181606; see also Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2130 (1993) (explaining that peer harassment is misconstrued as normal adolescent behavior).

18. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOW SCHOOLS SHORT-CHANGE GIRLS—THE AAUW REPORT 128 (1992) (stating that peer abuse is permitted if not always approved in schools).

19. See Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2122 (1993) (reporting that as peer harassment is recognized as valid claim, students and parents are less tolerant of this behavior); Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (explaining that victims of peer abuse are starting to challenge this behavior), available in 1996 WL 12570076; Joan Oleck, *Sinking Feelings of Self-Esteem*, NEWSDAY, Apr. 6, 1996, at B01 (indicating that Mineola Principal Kenneth Handler was unnerved by increasing harassment), available in 1996 WL 2518141.

20. See Christopher M. Loder, *Conference Examines Symptoms of, Solutions to Anger in America's Youth*, STAR-LEDGER, May 17, 1996, at 036 (discussing program that educates parents, educators, and community leaders about violence amongst students, including peer harassment), available in 1996 WL 7935122; Joan Oleck, *Sinking Feelings of Self-Esteem*, NEWSDAY, Apr. 6, 1996, at B01 (describing how school addressed peer harassment by holding discussion groups about peer harassment), available in 1996 WL 2518141; see also AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 2-3 (noting that AAUW's mission includes equitable education of girls and that everyone has responsibility to create schools free of sexual harassment); *Parents and Students Discuss Harassment at Austin Conference*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 1996, at 30A (explaining philosophy behind organization Stop Harassment in Public Schools, or SHIPS, is "to prevent and eliminate harassment through the corporate responsibility of schools and the community.").

21. See Sylvia Hermann Bukoffsky, Note, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX*, 42 WAYNE L. REV. 171, 173 (1995) (announcing that students and parents are becoming less tolerant of harassment, and thus they are filing lawsuits against schools); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 711 (stating that increasing number of plaintiffs are bringing Title IX claims against schools and their officials); see also *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 651 (5th Cir. 1997) (noting that student brought Title IX action against school for failure to prevent teacher-to-student harassment); *Doe v.*

Although victims have had little success in taking peer harassment cases to court,²² constitutional and statutory provisions exist that should protect girls from peer harassment.²³ Three avenues by which female students can seek redress when a school does not protect them from peer harassment include the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clauses of the Fourteenth Amendment,²⁴ and Title IX of the Educational Act of 1972.²⁵ All three provisions arguably provide relief for females facing peer abuse.

Courts should find that when a school does not protect females from sexual harassment, the school violates the Equal Protection Clause of the Fourteenth Amendment. Equal protection, at the very least, guarantees that if a right or privilege is granted, that right or privilege must be made

Londonderry Sch. Dist., 970 F. Supp. 64, 66 (D. N.H. 1997) (indicating that plaintiff brought action against school under Title IX of Educational Act of 1972); *Oona R.S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1452 (N.D. Cal. 1995) (reporting that student brought equal protection claim, due process claim, and Title IX claim against school for failure to prevent sexual harassment).

22. See *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1412 (N.D. Iowa 1996) (holding that female student failed to prove that school intentionally discriminated against her in Title IX peer harassment claim); see also *Rowinsky*, 80 F.3d at 1008 (holding that school is not liable under Title IX for failing to prevent peer harassment); *D.R.*, 972 F.2d at 1376 (holding that plaintiff failed to demonstrate that school violated her constitutional rights when schools failed to investigate allegations of sexual misconduct).

23. See U.S. CONST. amend. XIV, § 1 (stating that “[n]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”); 20 U.S.C. § 1681(a) (1994) (holding that “[n]o person in the United States shall, on the basis of sex, . . . be denied the benefits of, . . . any education program or activity receiving Federal financial assistance”); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (indicating that while schools have broad authority to prescribe and enforce standards of conduct, authority must be exercised consistently); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (opining that “students [do not] . . . shed their constitutional rights . . . at the schoolhouse gate”); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that “[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted”).

24. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

25. 20 U.S.C. § 1681(a) (1994). The Educational Act of 1972 states in pertinent part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” *Id.*

available to all on equal terms.²⁶ Peer sexual harassment violates this notion by preventing females from having an equal opportunity to an education.²⁷ When girls are harassed, they suffer psychological effects that interfere with their intellectual pursuits.²⁸ In fact, female students indicate that harassment makes them feel scared, less confident, and inferior to males.²⁹ Furthermore, some female students believe that complaining to school officials will not stop the harassment and may possibly trigger retaliation from other students or school administrators.³⁰ Consequently,

26. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (indicating that guarantee of equal protection extends equally to all citizens), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989) (identifying that rights created under Fourteenth Amendment are guaranteed to individual); *Zobel v. Williams*, 457 U.S. 55, 60 (1982) (recognizing that when benefits are distributed unequally, distribution is subject to scrutiny under Equal Protection Clause); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (proclaiming that where states provide opportunity, it must be made available to all on equal terms).

27. See Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 423 (1997) (recognizing that peer sexual harassment is "pervasive barrier to education"); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 563-64 (1996) (explaining that sexual harassment directly affects girls' course of study); Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1801 (1995) (suggesting that harassment deprives women of education); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2134 (1993) (noting that "sexual harassment leads to diminished educational opportunity for young women").

28. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 559 (1996) (stating that sexual harassment causes damage and other psychological, physical, and academic harm); Laurie LeClair, Note, *Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Just Can't Wait to Be Working Women*, 16 VT. L. REV. 303, 326 (1991) (suggesting that peer harassment affects girls' self-esteem and teaches them not to participate in class); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2134 (1993) (indicating that emotional responses associated with peer harassment result in reduced ability to perform schoolwork).

29. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 560 (1996) (describing psychological effects of sexual harassment); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2134 (1993) (indicating that feelings of embarrassment, fear, anger, and loss of confidence are consequences of sexual harassment).

30. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 563 (1996) (stating that when students

many female students, unwilling or unable to get help from school officials, resort to negative self-help measures, such as refusing to participate in class, skipping classes, or even dropping out of school.³¹ In these cases, when schools refuse to respond to sexual harassment claims, they deny young women an equal opportunity to the education their male counterparts are receiving.³²

Schools that refuse to address peer harassment should also be found to violate the Due Process Clause of the Fourteenth Amendment. Because peer harassment denies a student the benefits of an education, it impinges upon a right many believe to be fundamental.³³ Although education is

complain, retaliation may occur); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 709 (explaining that teens do not think that reporting sexual harassment will make difference); Kathleen Megan, *Sexual Harassment: A Part of Most Students' Education*, HARTFORD COURANT, Dec. 22, 1996, at A1 (reporting that one high school junior responded that it is better to treat harassment as joke because "if you rat on somebody, everyone is going to know about it . . . and you are going to be labeled and you are basically going to be an outcast"), available in 1996 WL 12677351.

31. See MARY PIPHER, REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS 70 (1994) (reporting that girls who suffer from harassment have difficult time returning to school); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 562-63 (1996) (observing that girls avoid courses in which they are likely to be harassed, and in extreme cases, they withdraw from school); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2134 (1993) (noting that girls may avoid getting involved in school activities due to peer harassment).

32. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 564 (1996) (stating that sexual harassment places constraints on educational pursuits of girls and young women); Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1801 (1995) (noting that students of entire generation are deprived of benefits of education because of their gender); Charlie James Harris, Jr., Comment, *Message to the Judiciary: The Proper Application of Title IX May Save Our Children*, 63 UMKC L. REV. 429, 450 (1995) (explaining that sexually abusive environment prevents harassed students from developing their full intellectual potential and receiving most from their academic program); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2153 (1993) (arguing that peer harassment impairs academic progress and inhibits goals, so that young women's education is limited).

33. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (observing that "education has a fundamental role in maintaining the fabric of our society"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) (stating that fundamental importance of education is amply supported by prior Supreme Court decisions); *Brown*, 347 U.S. at 493 (recognizing that education is principal instrument in awakening child and preparing him for later life); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (indicating that American people regard education as matter of supreme importance).

not one of the explicit fundamental rights recognized by the United States Constitution,³⁴ such as the freedom of speech,³⁵ it should be identified among a more elusive set of fundamental rights that are implicit in the Constitution,³⁶ such as the right to vote.³⁷ While the Supreme Court has yet to declare education a fundamental right,³⁸ education could easily fit into the set of implied fundamental rights derived from the Due Process Clause because of the integral role it plays in society.³⁹

In addition to finding constitutional violations, the courts should find that schools violate Title IX of the Educational Act of 1972⁴⁰ when they fail to implement measures preventing male-to-female harassment. Title IX prohibits sexual discrimination in the educational setting.⁴¹ Thus, a school's failure to prevent sexual harassment, which the United States Congress has determined to be a form of sex discrimination,⁴² should violate Title IX as well.⁴³

34. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (recognizing that education is not fundamental right); *Papasan v. Allaine*, 478 U.S. 265, 285 (1986) (reiterating that education is not fundamental right under United States Constitution); *Rodriguez*, 411 U.S. at 35 (indicating that education is not among explicit rights protected under Constitution).

35. U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

36. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (arguing that while Constitution does not explicitly grant right of privacy, Court has recognized that right under Constitution); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (suggesting that specific guarantees emanate from Bill of Rights). *But see Rodriguez*, 411 U.S. at 35 (holding that education is not implicitly protected by Constitution).

37. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (recognizing that right to vote is implied under First Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (recognizing voting as fundamental political right because it is "preservative of all rights").

38. Compare *Plyler*, 457 U.S. at 221 (stating that while education is not fundamental right, it is not merely some governmental benefit), with *Rodriguez*, 411 U.S. at 35 (holding that education is not fundamental right).

39. See *Meyer*, 262 U.S. at 399, 400 (recognizing liberty right of individual to control education and its acquisition under Due Process Clause).

40. 20 U.S.C. § 1681(a) (1994).

41. *Id.* In proposing Title IX, Senator Bayh noted that the purpose of Title IX is: [T]o provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.
118 CONG. REC. 5808 (1972).

42. 29 C.F.R. § 1604.11(a) (1991).

43. See *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1377 (N.D. Cal. 1997) (accepting that Title IX applies to both teacher-to-student and student-to-student

In theory, the Equal Protection and Due Process Clauses of the Fourteenth Amendment and Title IX should provide relief to female students facing peer harassment. Nevertheless, in practice these provisions have failed to protect girls from peer abuse. Specifically, the Equal Protection Clause has not provided relief from peer harassment because female plaintiffs asserting this claim must prove that the school *intentionally* discriminated against them based on their gender.⁴⁴ The intent requirement makes it difficult, if not impossible, for female victims of peer harassment to recover under an equal protection claim.⁴⁵ Additionally, a female plaintiff pursuing a due process claim on the grounds that she was denied her right to an education because of peer harassment would fail as the Supreme Court has specifically held that education is not a fundamental right.⁴⁶ Thus, courts would defer to schools and their ability to regulate school policy in peer harassment claims.⁴⁷

Moreover, even if a female student pursued a statutory claim under Title IX, she would find little, if any, relief. Title IX has done little to solve peer harassment problems because the language of Title IX does not specifically address peer harassment; therefore, courts have had a difficult time determining whether peer abuse violates this Act.⁴⁸ Conse-

sexual harassment); *Oona R.S.*, 890 F. Supp. at 1469 (stating that Title IX may be violated when female students are subjected to harassment and school encourages or fails to appropriately respond to peer harassment).

44. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that decisionmaker must have selected particular course of action "because of" its effects upon unidentifiable group); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (requiring proof of discriminatory intent to sustain equal protection claim); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (explaining requirement of discriminatory purpose under Equal Protection Clause).

45. See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 *IND. L.J.* 1123, 1144 (1994) (indicating that intent requirement under equal protection claim is significant hurdle for plaintiffs); see also *Wright*, 940 F. Supp. at 1420 (opining that school did not violate Title IX because there was no proof of intentional discrimination in peer harassment claim).

46. See *Rodriguez*, 411 U.S. at 35 (holding that education is neither explicit nor implicit fundamental right under United States Constitution).

47. Cf. *id.* at 35, 40 (holding that since education is not fundamental right, rational basis scrutiny, which defers to State, is appropriate standard of review).

48. See *Londonderry Sch. Dist.*, 970 F. Supp. at 72 (observing that there is little guidance from Supreme Court on scope of Title IX); *Petaluma City Sch. Dist.*, 949 F. Supp. at 1419 (recognizing that courts' approaches as to whether peer harassment violates Title IX have varied); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 *S. CAL. REV. L. & WOMEN'S STUD.* 549, 565 (1996) (indicating that it is unclear what remedies are available under Title IX); Laurie LeClair, Note, *Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Can't Wait to Be Working*

quently, many schools that deny female students their educational rights have been shielded from liability under Title IX.⁴⁹

Since the Equal Protection and Due Process Clauses of the Fourteenth Amendment and Title IX provide scant relief from peer harassment, female students are left relatively unprotected from peer abuse.⁵⁰ Schools know that unless they blatantly discriminate against female students, schools will not be held liable for failing to prevent peer harassment.⁵¹ As a result, schools can allow peer harassment to occur without fear of liability. Furthermore, because no legal consequences exist, schools are not motivated to prevent peer abuse.⁵² Therefore, in order to prevent schools from shirking their responsibility to provide an environment free from discrimination, courts should either: (1) lessen the standard of intent under the Equal Protection Clause or (2) declare education a fundamental right. In addition, Congress should amend Title IX to prohibit peer harassment. Of the three, the most practical solution is for Congress

Women, 16 VT. L. REV. 304, 319 (1991) (noting that Title IX has undeveloped standards); Anouchka Oppinger, Note, *Education Law-Title IX-Peer Sexual Harassment-Still Alive and Well in Our School Hallways After Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996), 38 S. TEX. L. REV. 307, 308 (1997) (discussing that courts have had difficult time interpreting scope of Title IX); Margo L. Ely, *5th-Grader's Lewd Conduct Subjects School to Liability*, CHI. DAILY L. BULL., Mar. 11, 1996, at 6 (discussing that it is not clear whether right to be free from sex discrimination under Title IX includes peer harassment); see also *Rowinsky*, 80 F.3d at 1012-13 (stating that court interpreted ambiguous language in Title IX to impose liability for acts of grant recipients, not third parties).

49. See *Rowinsky*, 80 F.3d at 1008 (stating that Title IX does not impose liability unless school directly discriminates based on sex); *Wright*, 940 F. Supp. at 1420 (opining that school is not liable for Title IX violation in peer harassment case, because plaintiff did not prove intentional discrimination).

50. See *D.R.*, 972 F.2d at 1376 (holding that school's failure to prevent student harassment did not rise to level of constitutional violation); *Wright*, 940 F. Supp. at 1420 (holding that school's failure to control peer harassment did not violate Title IX because plaintiff did not prove that school intentionally discriminated against her).

51. See *Rowinsky*, 80 F.3d at 1016 (holding that unless plaintiff proves that school responded differently to claims of harassment based on sex, school has not violated Title IX); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1160 (1994) (explaining that equal-protection claim may not be successful because plaintiffs will have to prove that school employees intended to discriminate based on sex).

52. See Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1816 (1995) (stating that under traditional intent standard, schools lack incentive to adopt measures to prevent peer abuse); Anouchka Oppinger, Note, *Education Law-Title IX-Peer Sexual Harassment-Still Alive and Well in Our School Hallways After Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996), 38 S. TEX. L. REV. 307, 324 (1997) (discussing that when Title IX requires discriminatory act on part of school, there are no legal consequences, and it allows schools to "turn a blind eye" to harassment).

to amend Title IX. This approach will not only explicitly address the problem of peer harassment through directed means, but it will also have an immediate and far-reaching effect.

This Comment argues that peer sexual harassment interferes with a female's opportunity to obtain an education and that schools violate the Fourteenth Amendment and Title IX when they fail to prevent student harassment. Part II clarifies what behavior constitutes peer sexual harassment. Part III assesses the psychological consequences of peer harassment on female students and demonstrates that harassment denies young women access to the benefits of an education. Part IV of this Comment examines possible remedies, including the Fourteenth Amendment and Title IX. Part V proposes that the intent requirement under an equal protection claim should be expanded. Additionally, Part V argues that education should be a fundamental right under the Due Process Clause and that Title IX should be amended to forbid peer harassment. Finally, Part VI rebuts arguments against holding schools liable for peer harassment.

II. DEFINING PEER SEXUAL HARASSMENT

"Sexual harassment occurs in the mundane, daily matters of school life: in the chemistry lab as well as in the carpentry shop, in the driver's ed car, and on the practice fields of extracurricular sports."⁵³

The term "peer sexual harassment" is a relatively new way to describe conduct that has been occurring for years.⁵⁴ Nevertheless, unlike workplace or adult sexual harassment, peer harassment has not received the legal recognition it deserves⁵⁵ because most people do not understand

53. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORT-CHANGE GIRLS—THE AAUW REPORT* 129 (1992).

54. See JoAnn Strauss, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions*, 10 *LAW & INEQ. J.* 163, 165 (1992) (stating that "[s]exual harassment is not a modern phenomenon"); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 *U. ILL. L. REV.* 699, 706 (stating that peer harassment is not new occurrence); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 *U. PA. L. REV.* 2119, 2122 (1993) (mentioning that while student-to-student harassment occurs frequently, material regarding this abuse has only recently been published); Debra Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, *SAN DIEGO UNION & TRIB.*, Oct. 12, 1996, at E5 (stating that sexual harassment is not new), available in 1996 WL 12570076.

55. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 2* (1993) (recognizing that while much is known about workplace harassment, little is known about harassment in schools); Xelena Gonzalez, *Students Say School Sexual Harassment Soft-Pedaled*, *SAN ANTONIO EXPRESS-NEWS*, July 4, 1997, at 7B (indicating that schools breed type of

what peer harassment means or are mistaken about the behavior it encompasses.⁵⁶ In fact, some individuals believe that sexual harassment cannot occur between children or that children cannot be held accountable for harassing other children.⁵⁷ These outdated views, as well as ignorance of what peer harassment comprises, are part of the problem. Thus, in order to understand the severity of this problem, one must have a working definition of what behavior does and does not constitute peer harassment.

A. *What Peer Sexual Harassment Is Not*

It is fairly well established that isolated incidents of name-calling or touching do not constitute peer harassment.⁵⁸ This Comment does not address stolen kisses between classmates or trivial incidents such as hair pulling. Instead, this Comment examines serious, unwelcome violations of a person's physical and emotional self. Recently, the media spotlighted separate cases in which two young boys, Johnathan Prevette and De'Andre Dearing, were suspended from their elementary schools for kissing female classmates.⁵⁹ Segments of the public were outraged and

sexual harassment prohibited in adult workplace); Kathleen Megan, *Sexual Harassment a Part of Most Students' Education*, HARTFORD COURANT, Dec. 22, 1996, at A1 (explaining that recognition of peer harassment lags behind acknowledgment of workplace harassment), available in 1996 WL 12677351.

56. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 2* (1993) (recognizing that little is known about peer abuse in schools); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708 (explaining that critics think activists have "overbroad interpretations of harassing behavior"); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2130 (1993) (noting adults' uncertainty about what constitutes peer sexual harassment).

57. See Holly Coryell, *Trial to Begin for Girl Alleging Sex Harassment*, AUSTIN AM.-STATESMAN, Nov. 3, 1996, at A8 (reporting that South Kortright school officials, in response to sexual harassment charge brought against them, claim that law does not apply to peer harassment among children); Kathleen Megan, *Sexual Harassment: A Part of Most Students' Education*, HARTFORD COURANT, Dec. 22, 1996, at A1 (indicating that reaction to peer harassment has been slow because some question whether children understand sexual harassment and whether children are capable of this behavior), available in 1996 WL 12677351.

58. See Ellen Goodman, *Media Hype Obscured Full Story of Kiss*, SAN ANTONIO EXPRESS-NEWS, Oct. 16, 1996, at 9B (explaining that child's kiss does not make him sex offender).

59. See Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (describing incident where six-year old was suspended for kissing female classmate), available in 1996 WL 12570076; Bill Maxwell, *Pity the Schools in These Litigious Times*, ST. PETERSBURG TIMES, Oct. 6, 1996, at 1D (reporting incidents where two young boys were suspended for kissing female classmates),

claimed that the schools had overreacted to an innocent childhood expression of affection.⁶⁰ These critics claimed that the punishment for these harmless incidents of adolescent behavior illustrated the excesses of political correctness and feminism.⁶¹ While many individuals believe these cases represent the actionable peer harassment complained of by female plaintiffs and many scholars, this belief is erroneous.⁶²

B. *What Peer Sexual Harassment Is*

Determining what constitutes peer harassment is difficult because peer sexual harassment takes a variety of forms, including glances, inappropriate gestures, sexual jokes, physical assaults, or emotional torment.⁶³ The

available in 1996 WL 11944656; *Schools Walk a Tightrope over Sex Harassment Law*, PORTLAND PRESS HERALD, Oct. 6, 1996, at 4A (explaining recent suspension of two little boys for kissing girls in their schools), available in 1996 WL 13304858.

60. See Ellen Goodman, *Media Hype Obscured Full Story of Kiss*, SAN ANTONIO EXPRESS-NEWS, Oct. 16, 1996, at 9B (describing outrage over boys' punishment for kissing female classmates); Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (recognizing suspension of child was widely perceived as overreaction), available in 1996 WL 12570076; Frank J. Murray, *High Court Limits Harassment Cases: Man-to-Man, Child-to-Child Claims Rejected*, WASH. TIMES, Oct. 8, 1996, at A3 (discussing how North Carolina school was ridiculed for punishing six-year old boy for kissing female classmate), available in 1996 WL 2967489.

61. See Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 423 (1997) (commenting that some columnists saw young boys as "casualties in the 'war against boys' waged by feminist organizations"); Ellen Goodman, *Media Hype Obscured Full Story of Kiss*, SAN ANTONIO EXPRESS-NEWS, Oct. 16, 1996, at 9B (declaring that six-year-old became poster child for excesses of "school system, legal system, political correctness and feminism"); Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (reporting that people perceived schools as trying to be politically correct), available in 1996 WL 12570076.

62. See Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 224 (1994) (reporting that harassment is often mischaracterized as "harmless adolescent exploration" or is dismissed as "flirting"); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708 (explaining how critics think peer harassment consists of overbroad interpretations of "normal childhood development"); Holly Coryell, *Trial to Begin for Girl Alleging Sex Harassment*, AUSTIN AM.-STATESMAN, Nov. 3, 1996, at A8 (quoting attorney with National Women's Law Center who stated that case where two little boys were suspended for kissing girls clearly does not fit within definition of sexual harassment).

63. See Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 275 (1994) (stating that sexual harassment includes wide array of behavior, including comments, looks or gestures, touching, and solicitation); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 556 (1996) (discussing how harassment

American Association of University Women Educational Foundation (AAUW) has attempted to define peer sexual harassment as "unwanted and unwelcome sexual behavior which interferes with your life. Sexual harassment is not behaviors that you like or want (for example: wanted kissing, touching, or flirting)."⁶⁴ Another method of helping young people determine what behavior constitutes peer harassment is asking students if the behavior in question is something they would want their mother or sister to experience.⁶⁵

These definitions provide a basis for individuals to determine what peer harassment is. Nonetheless, the excessive publicity in cases like those of Johnathan Prevette and De'Andre Dearinge undermines the seriousness of peer harassment.⁶⁶ Columnist Ellen Goodman poignantly noted that while the Dearinge story made the first page of many newspapers, no one heard about the incident where a nine-year old boy grabbed a girl's head and pushed it to his crotch.⁶⁷ Clearly, this type of behavior constitutes peer harassment. While many may shrug off this example as an isolated event, this sort of injurious peer harassment is quite common.⁶⁸

C. *How Common Is Peer Sexual Harassment?*

In 1993, the AAUW conducted a survey and questioned 1,632 public school students between the eighth and eleventh grades about whether

takes many forms, including "sexual comments, jokes, gestures, or looks"); Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1800 (1995) (asserting that peer harassment takes many forms); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708 (stating that harassment may include ogling, jokes, name calling, and physical assault).

64. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 6 (1993).

65. Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708.

66. See Ellen Goodman, *Media Hype Obscured Full Story of Kiss*, SAN ANTONIO EXPRESS-NEWS, Oct. 16, 1996, at 9B (stating that while six-year old's kiss made front page news, serious cases of peer harassment received no attention); Kathleen Megan, *Sexual Harassment a Part of Most Students' Education*, HARTFORD COURANT, Dec. 22, 1996, at A1 (indicating that publicity of six-year old kissing classmate creates misimpression that peer harassment is overblown), available in 1996 WL 12677351.

67. Ellen Goodman, *Media Hype Obscured Full Story of Kiss*, SAN ANTONIO EXPRESS-NEWS, Oct. 16, 1996, at 9B.

68. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 7 (1993) (reporting that harassment has become so common that nearly 85% of female students have experienced this behavior).

they had experienced sexual harassment during school hours.⁶⁹ The AAUW found that eighty-five percent of the girls surveyed had been sexually harassed and that this harassment generally occurred for the first time between the sixth and ninth grades.⁷⁰ One of the most startling revelations of the study is that harassment is more likely to come from peers than from teachers.⁷¹ In fact, of the number of girls who reported being harassed, eighty-six percent were harassed by current or former students at school.⁷² Of the harassed girls, one of four reported that she was targeted “often.”⁷³ Based on these statistics, it is apparent that peer sexual harassment is pervasive in junior high and high schools.

III. THE EFFECTS OF PEER SEXUAL HARASSMENT ON FEMALE STUDENTS

“A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.”⁷⁴

While peer harassment clearly affects a majority of school-aged girls, many individuals know very little about student harassment or how it denies a female student an education.⁷⁵ As a result, many believe that schools should not be held responsible for peer abuse and that addressing these claims provides female students with special privileges.⁷⁶ Yet, this contention illustrates basic misunderstandings about the severity and effects of peer harassment on female students.

69. *Id.* at 5.

70. *Id.* at 7.

71. *Id.* at 10–11.

72. *Id.* at 11.

73. AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS* 7 (1993).

74. Kimberly L. Limbrick, Comment, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 624 (1995).

75. See AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS* 2 (1993) (noting that very little data exists regarding sexual harassment occurring in schools); Amy M. Rubin, *Peer Sexual Harassment: Existing Harassment Doctrine and Its Application to School Children*, 8 HASTINGS WOMEN’S L.J. 141, 164 (1997) (recognizing that fundamental problem in solving peer harassment is ignorance about sexual harassment).

76. See *Teen’s Sex Harassment Suit Could Set National Precedent*, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 1996, at 9B (quoting resident who believes that sexual harassment claim is not valid because children cannot commit sexual harassment). Some residents who live in a school district that is being sued by a former student, Eve Bruneau, are circulating a petition to dismiss her case because they feel her claim lacks merit. *Id.* One petitioner stated “[w]e taxpayers believe that it is WE who are really getting harassed.” *Id.*

In *Taking Women Students Seriously*, feminist critic Adrienne Rich describes how sexual harassment interferes with a female's ability to receive her education. Rich notes,

[W]omen and men do not receive an equal education because . . . women are perceived not as sovereign beings but as prey. . . . The undermining of self, of a woman's sense of her right to occupy space and walk freely in the world, is deeply relevant to education. The capacity to think independently, to take intellectual risks, to assert ourselves mentally, is inseparable from our physical way of being in the world, our feeling of personal integrity.⁷⁷

Rich's statement illustrates how sexual harassment denies young women an education by creating psychological problems that directly affect a woman's perception of herself and her ability to contribute to society.⁷⁸ Therefore, when a school allows harassment to continue, the harassment directly interferes with a female student's educational benefits.⁷⁹

While both male and female students suffer from peer harassment, studies indicate that girls are affected more severely by peer harassment than their male counterparts.⁸⁰ Two explanations for this outcome are that girls suffer far more harassment than their male counterparts⁸¹ and

77. Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 563 (1996) (quoting Adrienne Rich, *Taking Women Students Seriously*, in ON LIES, SECRETS, AND SILENCE 237, 241-42 (1979)).

78. See Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 802 (1994) (explaining that girls suffer psychological and emotional problems when harassing behavior continues); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2132 (1993) (discussing how sexual harassment affects females' self-esteem and productivity).

79. See Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 225-26 (1994) (noting that harassment prevents girls from reaching their "full academic potential"); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2132 (1993) (discussing how sexual harassment results in diminished educational opportunity).

80. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 15 (1993) (reporting that studies indicate that while both girls and boys are targets of peer harassment, girls report greater problems resulting from sexual harassment than boys); Laure LeClair, Note, *Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Can't Wait to Be Working Women*, 16 VT. L. REV. 303, 320 (1991) (discussing that females are most frequent victims of peer harassment).

81. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 559-60 (1996) (reporting that girls are

that young girls have not developed effective coping skills to deal with peer harassment.⁸² These explanations are partly attributable to how boys and girls are socialized.⁸³ Girls are socialized to be passive, while boys are socialized to be aggressive.⁸⁴ Thus, each gender reacts differently to certain situations.⁸⁵ For example, when a female student receives a low grade, she typically perceives that her academic failure is due to a lack of ability; however, boys generally “attribute their failures to a lack of trying. . . .”⁸⁶

Although it is difficult to determine why girls suffer more intensely from harassment than boys, the reality is that girls’ psychological development is greatly affected by peer abuse.⁸⁷ Some of the psychological effects girls suffer from include a sense of powerlessness, depression, loss of self-esteem or self-confidence, fear, substance abuse, insomnia, and

victims of sexual harassment in significantly greater proportions than boys); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1125–26 (1994) (reporting that peer harassment has disproportionate effect on female students).

82. See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1158 (1994) (explaining that one reason girls have harder time with peer harassment is that studies show that girls have not developed self-defense skills that boys have developed); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708 (indicating that peer harassment is especially damaging to preteen girls because they do not have firm self-concept).

83. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 153–54 (1979) (explaining that social roles and behavior are allocated according to gender); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1159 (1994) (noting there are differences in way boys and girls are socialized).

84. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 155–56 (1979) (describing that female sex roles encourage notion that women are weak and emotional, while men are encouraged to be strong, aggressive, and dominant).

85. See *id.* at 154 (stating that individual’s feelings are strongly associated with masculine and feminine roles ascribed to them); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1159 (1994) (reporting that girls and boys react differently to situations because of how they are socialized).

86. AMERICAN ASS’N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORT-CHANGE GIRLS—THE AAUW REPORT* 123 (1992).

87. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN’S STUD. 549, 559 (1996) (stating that peer harassment causes psychological damage); Helena K. Dolan, Note, *The Fourth R—Respect: Combating Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 223 (1994) (describing that girls suffer emotional distress from peer harassment).

feelings of isolation.⁸⁸ While this list is not exhaustive, it illustrates that student harassment negatively affects a young woman's sense of herself and her individual worth. Tawnya Brawdy felt so tormented by the abuse she encountered on a daily basis that she wrote a will and then attempted to commit suicide.⁸⁹ Tawnya's example may be extreme or atypical of most peer abuse situations, but it does show that the psychological effects of peer abuse can be quite serious.

In spite of the trauma female students suffer at the hands of their male aggressors, numerous girls do not report their harassment.⁹⁰ Many feel that reporting the incidents will not stop the harassment or will result in retaliation, further exacerbating the abuse.⁹¹ In addition, many girls are

88. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 560-61 (1996) (stating that sexual harassment creates "a host of other emotional problems," including sense of powerlessness, fear, anxiety, substance abuse, and loss of confidence); Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 223 (1994) (reporting that harassment leads to emotional distress).

89. See Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2120 & n.10 (1993) (describing how harassment caused Brawdy to write will and then attempt suicide).

90. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW REPORT ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 14 (1993) (reporting that girls rarely report harassment to school officials); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 709 (noting that teens are unwilling to report harassment). Girls are often scared to report harassment for the following reasons:

First, female students still believe that they are somehow responsible for encouraging the sexual harassment. Second, female students fear that administrators will not find their claims credible. Third, female students often believe that the administration will fail to take any action in response to their complaints. Fourth, female students fear reprisals. Finally, female students are reluctant to pursue litigation due to the expense and the delays in their education. Another reason for the paucity of student initiated sexual harassment cases is judicial deference to the internal decision-making process of academic institutions.

Laurie LeClair, *Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Can't Wait to Be Working Women*, 16 VT. L. REV. 303, 317-318 (1991).

91. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 563 (1996) (discussing how victims may not report harassment to avoid retaliation); Theodore F. Claypoole, Comment, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1167 (1987) (recognizing that retaliation is often result of rejecting sexual harassment); Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 223 (1994) (describing how harassment is often accompanied by retaliation); Kimberly L. Limbrick, Comment, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 603 (1995) (indicating that majority of harassed women

simply afraid to challenge the status quo.⁹² Thus, they suffer in silence.⁹³ Those girls who do report incidents of peer harassment suffer as well, facing the wrath of students and school administrators.⁹⁴ In the case of eighteen-year-old Kathi Vonderharr, reporting the harassment resulted in tragedy.⁹⁵ When Vonderharr was fifteen, she notified school officials that she had been molested by male peers while attending a youth hockey tournament.⁹⁶ After Kathi reported the incident, classmates tormented her by calling her “slut” and “whore” and wrote, “Kill the bitch, she took our friends to court” on her locker.⁹⁷ Kathi became an outcast, while her male harassers became heroes.⁹⁸ School officials did nothing to assist the young woman, and she ultimately killed herself because of the severe har-

would rather take abuse than suffer from retaliation for reporting harassment); Melissa DeVaughn, *Teen-Age Girls Fight Harassment in Classroom*, ROANOKE TIMES & WORLD NEWS, Feb. 4, 1995, at NR1 (quoting girl who says that “when nothing’s done about it [peer harassment], nothing changes”), available in 1995 WL 2623282.

92. See MARY BECKER ET AL., FEMINIST JURISPRUDENCE 716 (1994). Frank Till notes that many females suffering from harassment try to deal with the problem on their own. *Id.* This is mainly attributable to the following six factors:

1. fear that they are somehow responsible for the incident;
2. fear that they will not be believed;
3. shame at being involved in anything sexual;
4. fear that by protesting they will call attention to their sex rather than their work;
5. a belief no action will be taken; and
6. fear of reprisals by the initiator and his colleagues.

Id.

93. See Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 225 (1994) (explaining that when girls realize that speaking up does not help, they endure harassment privately).

94. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN’S STUD. 549, 563 (1996) (stating that retaliation and isolation are possible consequences of reporting harassment); Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 225 (1994) (explaining that alienation of female students is often result of reporting harassment).

95. See JoAnn Strauss, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions*, 10 LAW & INEQ. J. 163, 163 (1992) (reporting how peer harassment led to suicide of Kathi Vonderharr).

96. *Id.* While Kathi attended a hockey tournament in Minnesota, two boys she knew fondled her breasts and vagina. *Id.* Kathi did not report the incident for a week. *Id.* at 164. However upon learning that the boys had spread rumors about sleeping with her, she filed charges against them. *Id.*

97. *Id.* at 164.

98. *Id.* The boys who assaulted Kathi pleaded guilty to fourth-degree sexual assault. *Id.* They were placed on probation and ordered to perform 570 hours of community service. *Id.* Upon their return to school, the boys became hockey heroes; however, Kathi became an outcast. *Id.*

assment.⁹⁹ Kathi Vonderharr's tragic death should not have occurred. That her death was not prevented reinforces the notion that girls are second-class citizens.¹⁰⁰ Society would rather its female students accept harassment silently than ruin boys' reputations by accusing them of sexual misconduct.¹⁰¹

In order to prevent the retaliation that may occur if harassment is reported, many girls simply try to avoid the harassment.¹⁰² In fact, countless female students do not participate in classes or school activities in order to escape their tormentors.¹⁰³ Other girls skip classes or drop out of school entirely.¹⁰⁴ By avoiding peer harassment, girls may accomplish their temporary goal of diverting attention from themselves; however, these students cannot entirely avoid harassment because they are required by law to attend school.¹⁰⁵ Consequently, harassed girls are

99. *Id.* When Kathi reported the graffiti on her locker, the vice-principal told her "I've got 200 kids who were late for school. I've got to arrange their detention. Clean the locker yourself." *Id.*

100. See Amy M. Rubin, *Peer Sexual Harassment: Existing Harassment Doctrine and Its Application to School Children*, 8 HASTINGS WOMEN'S L.J. 141, 164 (1997) (stating that "tolerance of sexual harassment sends a message that society believes girls are less worthy than boys and may be treated accordingly"); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2132 (1993) (commenting that sexual harassment from males teaches young women that they are second-class citizens).

101. See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1154 (1994) (stating that males receive favorable treatment because educators want to shelter them from accusations of sexual harassment).

102. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 15 (1993) (reporting that 23% of sexually harassed girls do not want to attend school as result of harassment); MARY PIPHER, *REVIVING OPHELIA—SAVING THE SELVES OF ADOLESCENT GIRLS* 69–70 (1994) (describing how difficult it is for girls who are harassed to return to school and face more harassment).

103. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 562 (1996) (explaining that girls avoid classes where they may be harassed); Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 225–26 (1994) (explaining that female students do not participate in class or they miss school to avoid harassment).

104. Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 562 (1996); Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 225–26 (1994).

105. See *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1420 (N.D. Cal. 1996) (recognizing that it is virtually impossible for children to leave their assigned school).

forced to endure situations in which they are degraded and humiliated.¹⁰⁶ The result is that girls are robbed of a safe and effective learning environment.

IV. POSSIBLE REMEDIES AND PROBABLE FAILURES

The denial of an education, along with the crippling effects peer abuse has on young women, has not gone unnoticed by society.¹⁰⁷ In fact, society is growing increasingly intolerant of schools' failure to control peer harassment.¹⁰⁸ Thus, within the last few years, student harassment has become the basis for a wide variety of lawsuits.¹⁰⁹ Title IX, which addresses sex discrimination in schools, has been the most direct route to combatting peer harassment.¹¹⁰ Yet, because a school's failure to prevent peer harassment affects women, a quasi-suspect class, and possibly a fundamental right, the school's inaction goes beyond a statutory violation to a denial of the rights guaranteed under the Equal Protection and the Due

106. See Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1800 (1995) (stating that in classrooms, girls are repeatedly exposed to degrading and intimidating behavior).

107. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORT-CHANGE GIRLS—THE AAUW REPORT 129* (1992) (recognizing that harassment prevents girls from participating in activities and ultimately robs them of effective learning environment).

108. See Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2122 (1993) (explaining that as harassment becomes viable legal claim, students and parents are less willing to accept this behavior); Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (noting that victims of peer harassment are increasingly challenging school's failure to control peer abuse), available in 1996 WL 12570076; *Parents and Students Discuss Harassment at Austin Conference*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 1996, at 30A (reporting that parents are tired and angry at schools' refusal to take peer harassment cases seriously; thus, parents are forming activist groups, such as Stop Harassment in Public Schools, to prevent and eliminate peer harassment).

109. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 558 (1996) (explaining that "primary and secondary students are filing more sexual harassment complaints"); Sylvia Hermann Bukoffsky, Note, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX*, 42 WAYNE L. REV. 171, 173 (1995) (claiming that parents and students are increasingly filing suits against schools for failing to prevent peer harassment); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2122 (1993) (stating that students are beginning to challenge sexual harassment).

110. See 20 U.S.C. § 1681(a) (1994) (declaring that individuals attending school receiving federal funding shall not be denied participation in education program based on gender).

Process Clauses of the United States Constitution.¹¹¹ In order to address how peer harassment denies female students their statutory and constitutional rights, this section begins with brief overviews of the Fourteenth Amendment and Title IX of the Educational Act of 1972.

A. *Equal Protection*

1. Brief Overview

An education that is free from peer harassment should be guaranteed to female students under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause ensures that if the government offers a right or privilege, it will be given to all equally.¹¹² When a school fails to prevent or punish student harassment, education is not provided equally.¹¹³

Historically, the purpose of the Equal Protection Clause was to ensure freedom and equal treatment for African-Americans.¹¹⁴ Yet, from the be-

111. See U.S. CONST. amend. XIV, § 1 (stating that “[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws”); Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 *FORDHAM L. REV.* 215, 226 (1994) (explaining that “school sexual harassment deprives female students of their ability ‘to partake in the rights, benefits, services and privileges of schooling that are part of the promise of our democracy’” (quoting Nan Stein, *Sexual Harassment: ‘It Breaks Your Soul and Brings You Down’*, N.Y. *TEACHER*, Oct. 18, 1993, at 23)); Monica L. Sherer, Comment, *No Longer Just Child’s Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 *U. PA. L. REV.* 2119, 2134 (1993) (stating that “if sexual harassment is allowed to occur it disrupts the right to equal education . . .” (quoting Susan Strauss, *Sexual Harassment in the School: Legal Implications for Principals*, NAT’L ASS’N OF SECONDARY SCH. PRINCIPALS BULL., Mar. 1988, at 93, 95)).

112. See U.S. CONST. amend. XIV, § 1 (stating that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws”); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that if state gives opportunity for education, it must be made available to all on equal terms); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 *IND. L.J.* 1123, 1143 (1994) (explaining that when state offers services, it has duty to offer equal services to all).

113. See Monica L. Sherer, Comment, *No Longer Just Child’s Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 *U. PA. L. REV.* 2119, 2134 (1993) (discussing how peer harassment interferes with right to equal education).

114. See *Karcher v. Daggett*, 462 U.S. 725, 746 (1983) (noting that Fourteenth Amendment, along with Thirteenth and Fifteenth Amendments, abolished slavery); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (stating that initial view of Fourteenth Amendment was to secure “freedom of the slave race”); *Trimble v. Gordon*, 430 U.S. 762, 780 (1977) (indicating that Fourteenth Amendment was aimed at protecting African-Americans); GERALD GUNTHER, *CONSTITUTIONAL LAW* 601 (12th ed. 1991) (recognizing that initial purpose of Equal Protection Clause of Fourteenth Amendment was to end racial discrimination against African-Americans).

ginning, courts have interpreted this provision to ensure equal application of the laws to all individuals.¹¹⁵ Despite this interpretation, the Equal Protection Clause during the early twentieth century was referred to as “the . . . last resort of constitutional arguments.”¹¹⁶ The Equal Protection Clause was used sporadically and was invoked mainly against economic legislation.¹¹⁷ Moreover, if an equal protection claim was asserted, the courts generally deferred to the challenged government legislation.¹¹⁸ Consequently, the Equal Protection Clause did not provide much relief for plaintiffs asserting this claim.¹¹⁹ Additionally, the Equal Protection Clause did not receive much attention during the early twentieth century because the courts relied heavily on the Due Process Clause of the Fourteenth Amendment to provide relief from legislation that impinged upon natural rights.¹²⁰ Natural rights are those having no legal or constitutional basis but arising from the “natural order of things.”¹²¹ Initially, these rights related to the right to contract freely and the right to own

115. See *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (asserting that equal protection requires that government treat citizens “as individuals” and not simply as components of racial or sexual class) (citing *Arizona Gov't Comm. for Tax Def. Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983)), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (noting that violation of equal protection is injury to individual right of person); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (recognizing that rights guaranteed under Fourteenth Amendment are individual rights).

116. GERALD GUNTHER, *CONSTITUTIONAL LAW* 602 (12th ed. 1991); see WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW* 679 (9th ed. 1993) (stating that Supreme Court originally tried to narrow view of equal protection).

117. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 216 (1991) (indicating that Equal Protection Clause was used sporadically in area of economic regulation).

118. See *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949) (stating that it is not court's function to pass judgment on wisdom of regulation in question); GERALD GUNTHER, *CONSTITUTIONAL LAW* 602 (12th ed. 1991) (explaining that, initially, equal protection supported minimal judicial interference).

119. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (holding that it is up to legislature, not court, to balance advantages and disadvantages of law regulating visual care); *Railway Express Agency*, 336 U.S. at 109 (asserting that it is not function of court to judge wisdom of economic regulation).

120. See Risa L. Lieberwitz, *Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace*, 29 B.C. L. REV. 21, 23 (1987) (noting that during late part of 19th century and early part of 20th century, court used Due Process Clause to strike down legislation regulating private property in virtually every case that came before it); see also GERALD GUNTHER, *CONSTITUTIONAL LAW* 602 (12th ed. 1991) (explaining that during early 20th century, due process, not equal protection provided cutting-edge judicial intervention).

121. See Risa L. Lieberwitz, *Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace*, 29 B.C. L. REV. 21, 22 (1987) (exploring historical roots of natural law theory).

property.¹²² However, in response to the industrial growth following the Civil War and the adoption of laissez-faire economic principles, courts began to limit their use of the Due Process Clause to interfere with economic legislation.¹²³ At the same time, courts began to expand their use and interpretation of the Equal Protection Clause in the area of individual rights.¹²⁴

2. Classification and Standard of Review

Today, under this expanded equal protection analysis, courts focus on two considerations: whether the plaintiff is a member of a suspect or quasi-suspect class,¹²⁵ and whether the plaintiff has established that the government actor intentionally discriminated against that class of individuals.¹²⁶ Classification will establish a court's standard of reviewing the issue in question,¹²⁷ and proof of intent will determine whether or not the government is liable for its discriminatory acts.¹²⁸

In order to trigger an equal protection claim, the government must take a discriminatory action against a particular class of individuals.¹²⁹ Under a traditional equal protection analysis, all classifications were sub-

122. See Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1176-77 (1991) (recognizing that substantive due process theory protected property rights through both Contract Clause and Due Process Clause).

123. See GERALD GUNTHER, CONSTITUTIONAL LAW 437 (12th ed. 1991) (indicating that with increase in industrialization and corporate power, legal scholars and judges began to denounce use of Due Process Clause because it undermined accepted laissez-faire theories).

124. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 219 (1991) (recognizing birth of equal protection occurred at time when era of substantive due process ended).

125. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 591 (4th ed. 1991) (noting that in order to subject law to equal-protection analysis, courts consider classification of individuals).

126. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (recognizing that under equal-protection claim government must intentionally discriminate).

127. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985) (recognizing that standard of review is determined by classification in question); *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 17 (1973) (stating that framework for analysis depends on classification made).

128. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (demanding that plaintiff prove intentional discrimination to establish violation of Equal Protection Clause); *Washington*, 426 U.S. at 246 (requiring purposeful discrimination to show equal-protection violation).

129. See GERALD GUNTHER, CONSTITUTIONAL LAW 601 (12th ed. 1991) (explaining that nearly all laws classify and that these classifications are subject to varying degrees of judicial scrutiny).

ject to judicial scrutiny that deferred to the government action.¹³⁰ This standard of scrutiny required that the means (*i.e.*, the classification) used by the legislature bear a rational relationship to a legitimate governmental objective.¹³¹ Nearly every classification passed this level of scrutiny; therefore, an equal protection argument often did not have much force.¹³² However, upon addition of two more exacting standards of review, strict scrutiny and intermediate scrutiny, the use of the Equal Protection Clause surged.¹³³

While courts continue to use deferential scrutiny in the areas of economic and social legislation, the most significant changes in equal protection law have occurred in areas where the courts apply the new heightened levels of scrutiny.¹³⁴ The courts invoke strict scrutiny when a statute involves a suspect classification or impairs a fundamental right.¹³⁵ Strict scrutiny is the most stringent level of review, and nearly all statutes that face this level of review are found unconstitutional.¹³⁶ By contrast, classifications based on gender and illegitimacy are reviewed under intermediate scrutiny.¹³⁷ A policy that is subject to intermediate scrutiny must serve important objectives, and the government action must be substan-

130. *See id.* at 602 (explaining that “old equal protection” required that classification made by government reasonably relate to legislative purpose).

131. *Id.*

132. *See id.* (recognizing that because deferential scrutiny was easy to meet, Equal Protection Clause did not have much bite).

133. *See id.* at 603 (describing how additional standards of scrutiny launched equal protection revolution).

134. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 603, 605 (12th ed. 1991) (explaining that while rational basis equal protection was still used for economic and social legislation, equal protection blossomed into major interventionist tool when strict and intermediate standards of scrutiny were used).

135. *Id.*

136. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (describing strict scrutiny as “strict in theory but fatal in fact”). *But see* Adarand, 515 U.S. at 237 (wishing to dispel notion that strict scrutiny is strict in theory but fatal in fact); Korematsu v. United States, 323 U.S. 214, 216, 223 (1944) (holding that, even under strict scrutiny, discrimination against Japanese was proper because United States was at war with Japan). *Korematsu* was one of the only instances in which racial classification survived strict scrutiny. GERALD GUNTHER, CONSTITUTIONAL LAW 638 (12th ed. 1991).

137. *See* Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (applying intermediate scrutiny to hiring plan that favored male applicants); Reed v. Reed, 404 U.S. 71, 76 (1971) (invalidating law preferring male to female estate administrators); GERALD GUNTHER, CONSTITUTIONAL LAW 605 (12th ed. 1991) (describing gender discrimination as best example of classification subject to intermediate scrutiny); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 692 (2d ed. 1991) (stating that heightened scrutiny is required for some forms of gender discrimination).

tially related to achieving those objectives.¹³⁸ As a result of utilizing heightened standards of review in examining questions of equal protection, the courts have allowed the Equal Protection Clause to become one of the broadest constitutional provisions for ensuring individual rights,¹³⁹ including the right to be free from gender discrimination.¹⁴⁰ Thus, if a student asserts that a school's failure to address peer harassment claims constitutes gender discrimination, intermediate scrutiny will apply.¹⁴¹ Under this level of scrutiny, a school must provide an important justification for failing to act when students report peer harassment.¹⁴²

3. Intent

When female plaintiffs file gender discrimination suits against schools for failing to prevent peer harassment, the Equal Protection Clause requires the students to demonstrate that in addition to taking adverse action against a particular class, the school intentionally discriminated against that class.¹⁴³ The Supreme Court established the intent requirement in *Washington v. Davis*.¹⁴⁴ Subsequently, this requirement has been

138. See *City of Cleburne*, 473 U.S. at 440–41 (holding that standard for gender classifications is intermediate scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that gender classification, under immediate scrutiny, must serve important government objectives and must be substantially related to achievement of those interests to withstand a constitutional challenge); GERALD GUNTHER, CONSTITUTIONAL LAW 605 (12th ed. 1991) (stating that gender discrimination is subject to intermediate scrutiny); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 692 (2d ed. 1991) (explaining that *Craig v. Boren* established heightened scrutiny as standard for gender discrimination).

139. See DAAN BRAVEMAN & WILLIAM C. BANKS, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 442 (1987) (explaining that Fourteenth Amendment has become primary tool for protecting individual rights); GERALD GUNTHER, CONSTITUTIONAL LAW 602–04 (12th ed. 1991) (describing transformation of Equal Protection Clause from “old equal protection” to “major cutting edge”).

140. See GERALD GUNTHER, CONSTITUTIONAL LAW 604 (12th ed. 1991) (describing how Burger court added classifications of sex, alienage, and illegitimacy under heightened scrutiny).

141. See *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996) (signaling that in gender classification, state must have important governmental objective for classification); *Feeney*, 442 U.S. at 273 (subjecting gender-preferred plan to intermediate scrutiny); *Craig*, 429 U.S. at 197 (asserting that statutory classifications that distinguish based on gender are subject to intermediate scrutiny).

142. See *City of Cleburne*, 473 U.S. at 441 (upholding gender classifications as unconstitutional, unless substantially related to important governmental interest); *Craig*, 429 U.S. at 197 (recognizing that case law established that gender classifications must serve important government objectives to be constitutional).

143. See *Village of Arlington Heights*, 429 U.S. at 264–65 (demanding plaintiff show proof of intentional discrimination to succeed on equal protection claim); *Washington*, 426 U.S. at 246 (requiring purposeful discrimination in police force admissions test).

144. *Washington*, 426 U.S. at 246.

assimilated into all equal protection analyses.¹⁴⁵ While proving intent is always a difficult burden for the plaintiffs to bear, it becomes an impossible burden when the statute or practice is facially neutral but is administered in a discriminatory manner, as little or no evidence establishing intent exists.¹⁴⁶ To determine if a discriminatory intent exists, courts look to a pattern of behavior, legislative history, and other facts relating to the challenged policy.¹⁴⁷ Generally, female students who face peer harassment must contend with a statute or practice that is facially neutral, but administered in a discriminatory manner.¹⁴⁸ Therefore, these plaintiffs face the difficult burden of proving that school officials purposely discriminated against them by failing to take appropriate action in peer harassment claims on the basis of gender.¹⁴⁹

Clearly, the intent requirement of the Equal Protection Clause creates an insurmountable obstacle for female students seeking protection from peer harassment. Consequently, unless the courts modify the intent standard, schools can continue to deny sexually harassed students an equal education without fear of liability.

145. See *Feeney*, 442 U.S. at 279 (establishing in sex discrimination suit that “state legislature selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”); *Village of Arlington Heights*, 429 U.S. at 265 (stating in zoning case that discriminatory purpose need not be sole motive, just “motivating factor”).

146. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1105–06 (1989) (explaining that some commentators have opposed intent requirement because intent may be impossible to prove where discrimination exists); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1144 (1994) (explaining that intent requirement is significant hurdle to overcome in establishing equal-protection violation).

147. See *Village of Arlington Heights*, 429 U.S. at 266–67 (discussing how determining discriminatory purpose requires investigation into circumstantial and direct evidence, such as sequence of events and historical background).

148. See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1144 (1994) (explaining that because it is unlikely that school policy will directly discriminate based on sex, girls will have to show harassment by showing that school failed to address complaints).

149. See *Washington*, 426 U.S. at 239 (stating that intent to discriminate is needed to violate Equal Protection Clause); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1144 (1994) (discussing students’ burden of proving discrimination in peer harassment claims, which is difficult to satisfy because it is unlikely that statute or practice will be facially discriminatory).

B. *Education and Fundamental Rights*

In addition to pursuing an equal protection claim, female plaintiffs should encourage the Supreme Court to reevaluate its position that education is not a fundamental right because education plays a vital role in exercising other fundamental rights.¹⁵⁰ Although many of our fundamental rights are explicitly stated in the United States Constitution,¹⁵¹ there is a separate ambiguous group of substantive individual rights that have been deemed fundamental under the Equal Protection and Due Process Clauses.¹⁵² The Court's creation of implied fundamental rights under substantive due process was based largely on its holding in *Griswold v. Connecticut*.¹⁵³ In this case, the Supreme Court recognized that a "penumbra" of individual privacy rights emanates from the Bill of Rights.¹⁵⁴ These rights are related to procreation, family relations, marriage, and personal autonomy.¹⁵⁵ Moreover, the Court has expanded implied fundamental rights under the Equal Protection Clause by identifying such rights as the right to vote and the right to interstate travel.¹⁵⁶ Thus, expanding fundamental rights beyond the explicit language of the Constitution is possible.

150. See *Rodriguez*, 411 U.S. at 35–36 (reporting that critics argue that education is fundamental right because it is essential to exercising other fundamental rights).

151. See U.S. CONST. amend. I (declaring that free speech shall not be abridged); U.S. CONST. amend. II (proclaiming that right to bear arms shall not be infringed); U.S. CONST. amend. IV (granting right of people against unreasonable searches and seizures); *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963) (recognizing that "freedom of speech, press, religion, assembly, association, and petition for redress of grievances" are explicitly recognized as fundamental rights under First Amendment of United States Constitution).

152. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (suggesting that certain rights, like right to vote, are implicit); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that right of parent to instruct children is within liberty of Fourteenth Amendment); GERALD GUNTHER, *CONSTITUTIONAL LAW* 603 (12th ed. 1991) (explaining that equal protection, like substantive due process, "circumscribed legislative choice in the name of newly articulated values that lacked clear support in the constitutional text and history").

153. 381 U.S. 479 (1965).

154. See *Griswold*, 381 U.S. at 484 (holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

155. *Id.*; see *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that right of privacy under Fourteenth Amendment includes "women's decision whether or not to terminate her pregnancy"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (opining that restricting right to marry violates equal protection). *But see Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986) (indicating that Constitution does not extend fundamental rights to homosexual sodomy).

156. See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (noting that Court recognized long ago constitutional liberty to travel); *Harper*, 383 U.S. at 667 (recognizing right to vote as fundamental right).

Many have suggested that the right to an education should fall within the realm of implied fundamental rights, either under the Due Process or Equal Protection Clause.¹⁵⁷ The Supreme Court has viewed education as one of the most important aspects of a democratic society.¹⁵⁸ In *Brown v. Board of Education*,¹⁵⁹ the Supreme Court faced the issue of whether racial segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁰ In deciding whether the children's constitutional rights were violated when physical facilities and other tangible factors were technically equal, the Court considered the importance of education in American life.¹⁶¹ The Supreme Court determined that because education is instrumental in preparing an individual for later professional training and that providing an education is one of the most important functions of the government, children are deprived of equal educational opportunities when they are segregated.¹⁶²

In response to the Court's decision in *Brown*, some legal scholars claim that the Court's focus on the importance of an education implied that education was a fundamental right.¹⁶³ However, in *San Antonio Independent School District v. Rodriguez*,¹⁶⁴ the Court rejected this no-

157. See *Rodriguez*, 411 U.S. at 35–36 (identifying plaintiff's assertion that education can derive fundamental status from its connection with First Amendment); Susan H. Bitensky, *We "Had a Dream" in Brown v. Board of Education*, 1996 DET. C.L. REV. 1, 7 (suggesting that education should be elevated to constitutional interest under Equal Protection Clause).

158. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that education plays fundamental role in fabric of our society); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (noting that public schools are important in preparing individuals to be productive citizens and also in preserving values of our society); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (asserting that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government"); *Brown*, 347 U.S. at 493 (declaring that education is one of government's most important functions); *Meyer*, 262 U.S. at 400 (proclaiming that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted").

159. 347 U.S. 483 (1954).

160. *Brown*, 347 U.S. at 493.

161. *Id.* at 492–93. The Court explained that its decision could not be based on a comparison of tangible factors because these factors were supposedly equal. *Id.* at 492. Instead, the Court had to look to the effect that segregation had on public education. *Id.*

162. *Id.* at 493.

163. See Susan H. Bitensky, *We "Had a Dream" in Brown v. Board of Education*, 1996 DET. C.L. REV. 1, 6–7 (suggesting that Court in *Brown* intended for public education to be constitutional interest under Equal Protection Clause); Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 482–83 (1996) (indicating that Justice Warren "alluded to the fact that education is a right").

164. 411 U.S. 1 (1973).

tion.¹⁶⁵ In *Rodriguez*, the plaintiffs challenged the validity of the Texas system of financing public education, claiming that because education was financed through property taxes, those children who lived in poorer school districts were denied an equal education.¹⁶⁶ The Court upheld the Texas system of financing education for two reasons. First, it held that education is not a fundamental right.¹⁶⁷ Second, it held that wealth is not a suspect classification under the Equal Protection Clause.¹⁶⁸ Consequently, Texas's system of financing was subject to deferential scrutiny and easily passed this standard of review.¹⁶⁹

Although the *Rodriguez* Court held that education is not a fundamental right,¹⁷⁰ the Court's decision nine years later in *Plyler v. Doe*¹⁷¹ seriously undermined that opinion.¹⁷² In *Plyler*, the Court recognized that while education is not a "right" granted by the United States Constitution, it is also not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."¹⁷³ Furthermore, the Court reaffirmed the concept developed in *Brown* that education serves a fundamental role in preserving a democratic society.¹⁷⁴ Additionally, the *Plyler* Court noted that the denial of education creates an enduring disability that will handicap a child for the remainder of his or her life.¹⁷⁵ Consequently, the Court utilized intermediate scrutiny in striking down the Texas policy denying illegal aliens an education.¹⁷⁶

Due to the decisions in *Brown*, *Rodriguez*, and *Plyler*, the Supreme Court has created significant confusion as to the status of education

165. See *Rodriguez*, 411 U.S. at 30 (recognizing importance of education, yet finding that education is not fundamental right).

166. *Id.* at 4-5.

167. *Id.* at 18.

168. *Id.*

169. See *id.* at 55 (holding that Texas system satisfies rational basis standard where state action rationally furthers legitimate state purpose).

170. *Rodriguez*, 411 U.S. at 35.

171. 457 U.S. 202 (1982).

172. Compare *Plyler*, 457 U.S. at 221 (holding that education is more than social legislation), with *Rodriguez*, 411 U.S. at 45 (holding that education is not fundamental right under Constitution).

173. *Plyler*, 457 U.S. at 221.

174. See *id.* at 221 (stating that education serves fundamental role because it provides individuals with basic foundation to be productive in our society).

175. See *id.* at 222 (recognizing that denial of education creates handicap that affects individual "each and every day of his life").

176. See *id.* at 230 (holding that denial of education to discrete group does not further substantial state interest).

under the Constitution.¹⁷⁷ Currently, education is more than a privilege, but less than a right.¹⁷⁸ Although the *Plyler* Court applied intermediate scrutiny in a case involving deprivation of education, *Plyler* was unique because it involved a total deprivation of education.¹⁷⁹ Thus, unless plaintiffs are completely deprived of their education, their claims will trigger rational basis scrutiny,¹⁸⁰ giving schools a great deal of deference in controlling their institutions.¹⁸¹ As a result, female students, who bring a constitutional claim against their school for denial of their education, have little chance of success unless the Supreme Court declares education a fundamental right.

C. Title IX

Because peer harassment denies young women the benefits of an education, Title IX of the Educational Act of 1972¹⁸² is violated when schools fail to take action to prevent peer harassment. Like the Equal Protection Clause, Title IX strives to ensure equal opportunity, specifically in the public educational setting.¹⁸³ Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁸⁴ In passing Title IX, Congress sought to avoid funding schools that permit sexual discrimination to occur. Therefore, when schools violate Title IX, they risk losing federal funding.¹⁸⁵

177. Compare *id.* at 221 (holding that education is not “some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation”), with *Rodriguez*, 411 U.S. at 35 (holding that no fundamental right to education exists).

178. *Plyler*, 457 U.S. at 221.

179. See *id.* at 205 (discussing that Texas statute in question may deny public education to undocumented school age children).

180. See *Rodriguez*, 411 U.S. at 40 (asserting that proper standard of review for denial of education is rational basis).

181. See *Cumming v. Board of Educ.*, 175 U.S. 528, 545 (1899) (holding that education is matter of state province and any interference by federal government cannot be justified unless there is disregard of rights secured by law of land); Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America’s Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 491 (1996) (recognizing that courts leave practice of educational policy to schools).

182. 20 U.S.C. § 1681(a) (1994).

183. *Id.*

184. *Id.*

185. *Id.* § 1682.

1. History of Title IX

Like the Fourteenth Amendment, Title IX was invoked infrequently. Initially, Title IX claims arose when students sued schools to adopt equitable gender funding for sports programs.¹⁸⁶ However, the scope of Title IX began to expand to include other forms of sex discrimination, including teacher-to-student and student-to-student harassment.¹⁸⁷ Using the sexual harassment policy derived under Title VII of the Civil Rights Act as a model, some courts have recognized two types of peer sexual harassment under Title IX: quid pro quo and hostile environment.¹⁸⁸ Quid pro quo harassment occurs when a job, benefit, or punishment is conditioned upon the receipt of sexual favors.¹⁸⁹ In the educational context, this type of harassment generally occurs between a teacher and student, as the teacher is in an authoritative position where he or she can condition grades or advancement on sexual favors.¹⁹⁰

Hostile environment harassment occurs when "harassing conduct so infuses the academic or work atmosphere with hostility toward members of one sex that it alters the victim's educational experience or conditions of

186. See Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2123 (1993) (stating that Title IX is generally used in connection with equality in sports programs and vocational classes).

187. See *Alexander v. Yale Univ.*, 631 F.2d 178, 182 (2d Cir. 1980) (holding that sex discrimination occurs when teacher conditions academic advancement on performing sexual favors); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 706 (discussing how Title IX has broader scope that includes sexual harassment); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2123 (1993) (explaining that Title IX may be potential weapon against sexual harassment).

188. See *Alexander*, 631 F.2d at 182 (holding that quid pro quo harassment, or "academic advancement conditioned upon submission to sexual demands[,] constitutes sex discrimination in education"); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1366-67 n.2 (E.D. Pa. 1985) (explaining that Equal Employment Opportunity Commission recognizes quid pro quo and abusive environment harassment under Title VII and that these guidelines appear equally applicable to Title IX), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

189. Kimberly L. Limbrick, Comment, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 608 (1995).

190. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 566 (1996) (explaining that classic example of quid pro quo harassment occurs when teacher promises student letter grade to sleep with him or her); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2126 (1993) (describing that teacher bribing student with "A" for submitting to sexual favor is example of quid pro quo harassment).

employment.”¹⁹¹ Yet, because Title IX does not specifically address peer harassment, courts are divided as to whether hostile environment harassment exists under Title IX, and if it does exist, whether it includes peer harassment.¹⁹² Furthermore, because the Supreme Court has not granted certiorari to a student-to-student harassment claim under Title IX, the status of peer harassment under a hostile-environment harassment analysis remains unclear.¹⁹³ As a result, courts have had a difficult time determining whether student-to-student harassment violates Title IX.¹⁹⁴

The United States Court of Appeals for the Second Circuit first addressed sexual harassment under Title IX in *Alexander v. Yale University*.¹⁹⁵ In this case, five female students alleged both quid pro quo and hostile environment sexual harassment against male faculty members and administrators at Yale University.¹⁹⁶ Since the women had already graduated from Yale University, the court opined that the plaintiffs could not

191. Kimberly L. Limbrick, Comment, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 608 (1995).

192. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 572-73 (1996) (explaining that it is unclear whether hostile environment harassment is recognized under Title IX); Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2152 (1993) (noting that state of peer harassment is unclear).

193. See *Justices Keep Hands Off School Sex Harassment*, SAN ANTONIO EXPRESS-NEWS, Oct. 8, 1996, at 1A (reporting that Supreme Court refused to hear controversial peer harassment case); see also Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (stating that courts are split in deciding whether schools are liable for peer harassment), available in 1996 WL 12570076; Tamar Lewin, *Inside America: Hard Lessons on Harassment*, GUARDIAN (London), Oct. 8, 1996, at 012 (explaining that law regarding peer harassment is murky), available in 1996 WL 13380264; *Schools Walk a Tightrope over Sex Harassment Law*, PORTLAND PRESS HERALD, Oct. 6, 1996, at 4A (stating that sex discrimination is muddled area of law and is currently more uncertain than ever), available in 1996 WL 13304858.

194. See Debera Carlton Harrell, *Kiss May Be a Kiss, but Teen Sex Harassment No Joke*, SAN DIEGO UNION & TRIB., Oct. 12, 1996, at E5 (stating that courts are split in deciding peer harassment claims), available in 1996 WL 12570076; Tamar Lewin, *Inside America: Hard Lessons on Harassment*, GUARDIAN (London), Oct. 8, 1996, at 012 (explaining that courts are divided on whether schools are liable for peer harassment under Title IX), available in 1996 WL 13380264.

195. 631 F.2d 178 (2d Cir. 1980).

196. See *Alexander*, 631 F.2d at 180-81 (reporting that female students alleged claims of sexual demands and sexually hostile environment against male faculty and administrators). The female victims claimed that they had to choose between tolerating sexual demands or sacrificing educational opportunities. *Id.* at 181. The women also stated that they were subjected to a discriminatory atmosphere that interfered with their educational development. *Id.*

recover because their injuries could not be corrected.¹⁹⁷ In other words, the case was moot.¹⁹⁸ Nevertheless, the court recognized that quid pro quo harassment is actionable under Title IX.¹⁹⁹ However, the court refused to recognize any hostile environment claims under Title IX because it reasoned that hostile environment sexual harassment does not deny students the benefits of an educational program.²⁰⁰

Lower courts began recognizing the existence of teacher-to-student hostile environment harassment under Title IX with the United States Court of Appeals for the Third Circuit's decision in *Moire v. Temple University School of Medicine*.²⁰¹ In *Moire*, the court recognized a hostile environment action under Title IX in the context of teacher-to-student harassment.²⁰² Because this case involved teacher-to-student harassment, the question of whether hostile environment encompasses peer harassment was not addressed by the court.²⁰³ Therefore, the question of whether hostile environment includes peer harassment remains uncertain.

Although the Supreme Court finally addressed a Title IX harassment case in *Franklin v. Gwinnett County*,²⁰⁴ the case again involved teacher-to-student harassment.²⁰⁵ Hence, the Court did not clarify whether a hostile environment claim encompasses student-to-student harassment.²⁰⁶ In *Franklin*, the Court held that a student could recover monetary dam-

197. *Id.* at 183. The court explained that a case becomes moot when the injury has been healed or when it becomes impossible for the courts to correct the injury. *Id.* Since the girls had graduated from school, the court held that their cases were moot. *Id.* at 184.

198. *See id.* at 183 (declaring that sexual harassment case is moot because injury has been healed and it has become impossible for court to correct injury).

199. *See id.* at 182 (holding that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education").

200. *See id.* at 184-85 (upholding district court ruling that students failed to show they were deprived of benefits cognizable under Title IX).

201. *See Moire*, 613 F. Supp. at 1366-67 n.2 (explaining that since quid pro quo and hostile-environment harassment are recognized under Title VII, they should also be recognizable under Title IX).

202. *Compare id.* (acknowledging that hostile-environment claims under Title VII are recognizable under Title IX), with *Alexander*, 631 F.2d at 184 (refusing to recognize environmental harassment under Title IX by requiring detailed allegation of injuries).

203. *See Moire*, 613 F. Supp. at 1367 (describing situation involving student who clerked for teacher).

204. 503 U.S. 60 (1992).

205. *See Franklin*, 503 U.S. at 63 (describing that claim of sexual harassment involved teacher and student).

206. *See* Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 572-73 (1996) (stating that Title IX is still ineffective to combat peer sexual harassment because case law, including *Franklin*, has not fully accepted hostile environment harassment).

ages under Title IX from a school when a teacher sexually harasses a student, and the school takes no action to prevent this harassment.²⁰⁷ The Court stated that a teacher harassing a student constitutes sex discrimination.²⁰⁸ Yet, the claim in *Franklin* was not quid pro quo in nature,²⁰⁹ the teacher never demanded or conditioned the student's academic advancement on her performance of sexual favors.²¹⁰ Furthermore, the teacher did not threaten or punish the student for not acquiescing to his demands.²¹¹ Thus, the sexual harassment claim was based on the harassment's interference with the plaintiff's education, a hostile environment claim.²¹² Therefore, when the Court recognized the teacher's behavior as actionable harassment, it implicitly recognized hostile environment harassment under Title IX.²¹³ However, because the Court did not formally recognize hostile environment claims, no standards or guidelines exist to determine what constitutes a hostile environment under Title IX.

2. Interpretation of Title IX

While many, if not most, courts have recognized that quid pro quo harassment violates Title IX,²¹⁴ the status of hostile environment claims under Title IX remains unclear primarily because of the ambiguity created by the Supreme Court in *Franklin*.²¹⁵ In fact, lower courts interpret-

207. *Franklin*, 503 U.S. at 76.

208. *See id.* at 75 (explaining that when employer harasses employee it is sexual harassment and same rule should apply to teacher-student harassment). The Court stated that Title IX places a duty on the school not to discriminate on the basis of sex and that when a teacher harasses a student, that teacher discriminates on the basis of sex. *Id.*

209. *See id.* at 63–64 (describing that teacher engaged in sexual conversation with student, propositioned her, forcibly kissed her, and “subjected her to coercive intercourse,” but he did not condition her academic achievement on performance of sexual favors).

210. *Id.*

211. *See id.* (implying that student suffered no direct retaliation from teacher).

212. *Cf. Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (stating that one element of hostile environment is determining if it unreasonably interfered with employee's work performance).

213. *See* Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 577–78 (1996) (noting that in *Franklin*, Supreme Court may have indirectly recognized hostile environment claims under Title IX).

214. *See Alexander*, 631 F.2d at 182 (holding that advancement conditioned on sexual favors constitutes sex discrimination).

215. *See* Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 286 (1994) (concluding that while harassment claims may be heard, there are few standards to follow); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 701 (discussing uncertainty of hostile environment peer harassment because Supreme Court has not heard peer harassment claim); *see also* Rowinsky v.

ing *Franklin* have had difficulty determining whether peer harassment violates Title IX.²¹⁶ Consequently, courts have developed numerous modes of analyzing whether a school is liable under Title IX for failing to prevent peer harassment.²¹⁷ This confusion became most apparent in

Bryan Indep. Sch. Dist., 80 F.3d 1006, 1023 (Dennis, J., dissenting) (arguing that Court's discussion of intentional and unintentional discrimination in *Franklin* was unclear), *cert. denied*, 117 S. Ct. 165 (1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1418 (N.D. Cal. 1996) (asserting that intentional discrimination standard under *Franklin* is unclear); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 582 (1996) (stating that *Franklin* did not make it clear what standards are necessary to constitute requisite hostile level under hostile environment claim).

216. See *Petaluma City Sch. Dist.*, 949 F. Supp. at 1418 (stating it is not clear what *Franklin* Court meant by "intentional discrimination" standard); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 581 (1996) (commenting that lower courts have had difficult time interpreting Supreme Court's decision in *Franklin*); see also *Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 72 (D. N.H. 1997) (describing that Supreme Court has not provided guidance for interpreting scope of Title IX).

217. The Tenth Circuit requires that a plaintiff prove the following elements to succeed in a Title IX claim:

- (1) that the plaintiff is a member of a protected group;
- (2) that the plaintiff was subject to unwelcome harassment;
- (3) that the harassment was based on sex;
- (4) that the harassment was sufficiently severe or pervasive so as unreasonably to alter the conditions of the plaintiff's education and create an abusive educational environment; and
- (5) that some basis for institutional liability has been established.

Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996). On the other hand, the Fifth Circuit, in *Rowinsky*, stipulated that in order for a Title IX violation to occur, the school must respond "to sexual harassment claims differently based on sex." *Rowinsky*, 80 F.3d at 1016. The United States District Court for the District of New Hampshire established another mode of analysis in analyzing a Title IX claim and requires that:

- (1) the plaintiff was a student in an educational program or activity receiving federal financial assistance within the coverage of Title IX;
- (2) the plaintiff was subjected to unwelcome sexual harassment while a participant in the program;
- (3) the harassment was sufficiently severe or pervasive that it altered the conditions of the plaintiff's education and created a hostile or abusive educational environment; and
- (4) the school district knew of the harassment and intentionally failed to take proper remedial action.

Londonderry Sch. Dist., 970 F. Supp. at 74. The Northern District of Iowa has a similar test to the other established modes of analysis, but the court varies the test and requires that the following is shown by a plaintiff claiming a Title IX violation:

- (1) that the plaintiff is a member of a protected group;
- (2) that the plaintiff was subject to unwelcome sexual harassment;

1996 when the Eleventh and Fifth Circuits reached two conflicting decisions on peer harassment claims within two months of each other. In *Davis v. Monroe County Board of Education*,²¹⁸ a case that has since been vacated, the United States Court of Appeals for the Eleventh Circuit extended the elements of sexual harassment under Title VII of the Civil Rights Act to Title IX by holding that a school is liable if it knowingly fails to take action to correct a hostile environment for female students.²¹⁹ However, the Fifth Circuit, in *Rowinsky v. Bryan Independent*

-
- (3) that the harassment was based on sex;
 - (4) that the harassment was sufficiently severe or pervasive that it altered the conditions of the plaintiff's education and created an abusive educational environment; and
 - (5) that the educational institution knew of the harassment and intentionally failed to take the proper remedial measures because of the plaintiff's sex.

Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1420 (N.D. Iowa 1996). Yet another variation of a Title IX analysis is seen in the Western District Court of Missouri which requires the following elements for a successful Title IX action:

- (1) the plaintiff was subject to unwelcome sexual harassment;
- (2) the harassment was based on sex;
- (3) the harassment occurred during the plaintiff's participation in an educational program or activity receiving federal financial assistance; and
- (4) the school district knew of the harassment and intentionally failed to take proper remedial action.

Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995); *see also* Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039 (1997) (establishing test for Title IX violation). The Office of Civil Rights has established the following test to determine school liability for peer harassment. *Id.* A school will be held liable for peer harassment if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action. *Id.*

218. 74 F.3d 1186 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996). On rehearing, the Eleventh Circuit held that schools and teachers are not responsible "for remedying student-to-student sexual harassment when they cho[ose] to accept federal financial assistance under Title IX." *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997). Although the *Davis* decision has been vacated, the decision is still followed by other courts. *See Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1377 (N.D. Cal. 1997) (adopting *Davis* approach of holding schools liable for peer harassment if plaintiff alleges school knew or should have known of harassment and schools do not take action reasonably calculated to end harassment); *Petaluma City Sch. Dist.*, 949 F. Supp. at 142 (stating, "[This] Court does find persuasive the . . . *Davis* courts' decision to utilize Title VII standards and principles in Title IX cases.").

219. *See Davis*, 74 F.3d at 1193-94 (holding that Title VII standards apply to school that knowingly fails to prevent peer harassment); *see also Nicole M.*, 964 F. Supp. at 1377 (adopting Title VII standards for peer harassment cases because this approach is consistent with purpose of Title IX); *Petaluma City Sch. Dist.*, 949 F. Supp. at 1421 (deciding Title VII standards are appropriate for Title IX claims).

School Districts,²²⁰ refused to recognize Title VII standards.²²¹ Instead, the *Rowinsky* court held that the student "must demonstrate that the school responded to sexual harassment claims differently based on sex."²²² Thus, a school is only liable if it treats a boy's sexual harassment claim more seriously than a girl's sexual harassment claim.²²³

The numerous modes of analyzing peer harassment claims have created a great deal of confusion. Yet, when the Supreme Court had the opportunity to clarify this matter by hearing *Rowinsky*, a case which squarely presented the issue of whether a school's failure to prevent peer harassment violates Title IX, it denied certiorari to this case and further complicated the state of peer harassment.²²⁴ Thus, the fact remains that female students are denied the full benefits of an education when they are subjected to peer harassment.²²⁵

The Equal Protection and Due Process Clauses and Title IX have not provided any significant relief in response to peer harassment claims. This lack of relief is partly due to the lack of guidance in a widely growing area of litigation. However, the current application of the laws is a bigger culprit because it leaves female victims of peer harassment virtually helpless even though the Equal Protection and Due Process Clauses and Title IX unquestionably provide relief for these inequities. As a result, the Supreme Court must modify the application of the Equal Protection and Due Process Clauses of the Fourteenth Amendment or Congress should amend Title IV to prohibit peer harassment.

V. PROPOSAL

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [sic] is denied the opportunity of an education."²²⁶

220. 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

221. *See Rowinsky*, 80 F.3d at 1010 n.8 (expressing disagreement with Eleventh Circuit's interpretation of Title IX).

222. *Id.* at 1016.

223. *See id.* (emphasizing that plaintiff must show not only sexual harassment, but also varying treatment of harassment by gender).

224. *See High Court Rejects Appeal of Harassment Suit*, SAN ANTONIO EXPRESS-NEWS, Oct. 8, 1996, at 1A (reporting that Supreme Court declined to hear *Rowinsky v. Bryan Independent School District*).

225. *See* Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 279 (1994) (recognizing that peer harassment interferes with education); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1157 (1994) (explaining how schools that do not stop peer harassment are not providing equal education).

226. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

A. *Expand the Intent Requirement Under Equal Protection*

1. Why Should the Intent Requirement Be Expanded?

The standard of intent required to succeed under an equal protection claim is so stringent that courts indirectly allow schools to discriminate against female students without an important justification.²²⁷ Currently, plaintiffs who bring peer harassment claims under the Equal Protection Clause must prove that school officials discriminated against them because of their gender.²²⁸ This burden is especially difficult to prove in student harassment claims because the harassment suffered by female students has become so common that many school officials are not aware that their neglect to take action in peer harassment incidents has discriminatory effects.²²⁹ Legal scholar Catharine A. MacKinnon commented that “intimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible.”²³⁰ As a result of the widespread practice and acceptance of harassment against women, it is nearly impossible for female students to prove that a school intentionally discriminated against them. Consequently, the possibility of recovery for peer abuse under an equal protection claim is bleak, unless the intent standard is expanded by the Court.

If the intent requirement is not expanded, schools have no incentive to take action in peer harassment claims because inaction brings no legal consequences.²³¹ As a result, schools have and will continue to ignore peer harassment against female students, thus perpetuating the idea that

227. Cf. Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1816 (1995) (arguing that expanding intent requirement under Title IX is necessary, because traditional standard “effectively handcuff[s] a victim of peer sexual harassment” by leaving her without remedy).

228. See *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (stating that under gender-based inquiry, if statute is neutral, courts look to invidious gender discrimination); cf. Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1816 (1995) (indicating that under Title IX intent requirement, victim must prove that school official intended male students to harass female students).

229. See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1158 (1994) (claiming that schools do not think they are discriminating because they treat boys and girls in same manner).

230. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979).

231. See Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1816 (1995) (noting that schools have no incentive to stop peer harassment under intent requirement some courts impose under Title IX).

“the education of boys is more important than the education of girls.”²³² School inaction teaches male students that it is socially and legally acceptable to discriminate against girls.²³³ Hence, when peer harassment goes unpunished, the schools legitimize male sexual dominance of women.²³⁴ As a result, a woman's right to an education is subordinated to that of a male.²³⁵ Furthermore, when harassing behavior is permitted to continue, generations of men and women are socialized to believe stereotypes of male dominance and superiority.²³⁶ These stereotypes deny each successive generation of women the rights they are entitled to under the United States Constitution and legislative enactments.²³⁷

Although some courts have held that reinforcing stereotypes is unacceptable and may help prove intent under the Equal Protection Clause,²³⁸ acts that reinforce stereotypes, alone, are not sufficient to prove intent.²³⁹ In fact, the Supreme Court has held that while *discriminatory impact* provides an “important starting point,” *purposeful discrimi-*

232. Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1146 (1994).

233. See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (1994) (expressing that students learn aspect of life from school and therefore when certain type of environment is tolerated, it serves as influential lesson); Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1808 (1995) (suggesting how schools' inaction to sexual harassment serves as “seal of approval”).

234. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN 1* (1979) (stating that “American society legitimizes male sexual dominance of women”). In describing how peer harassment affects a girl's self-esteem, one Mineola middle school student stated that when she was harassed and the teacher or school did not take action to stop the harassment, “[the boy] is in a sense rewarded because he's never punished.” Joan Oleck, *Sinking Feelings of Self-Esteem*, NEWSDAY, Apr. 6, 1996, at B01.

235. See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1160 (1994) (suggesting that when schools do not provide safe environment for female students, they allow subordination of women).

236. See *id.* (indicating that failing to provide environment free from peer abuse allows discrimination against females to begin with each generation).

237. *Id.*

238. See *McKee v. City of Rockwall*, 877 F.2d 409, 422 (5th Cir. 1989) (Goldberg, J., concurring in part and dissenting in part) (arguing that “[c]ontinuity of a stereotype through the generations combined with a person's action pursuant to the alleged ‘truth,’ may be purposeful action on the person's part within the meaning of the Equal Protection Clause”).

239. See *Feeney*, 442 U.S. at 274 (holding that in gender-based discrimination, impact is “important starting point,” but purposeful discrimination is “the condition that offends the Constitution”).

nation alone is “the condition that offends the Constitution.”²⁴⁰ However, because women have faced a long history of discrimination resulting in significant inequalities,²⁴¹ school officials should not be permitted to hide behind the purposeful discrimination standard. Instead, the Court should allow a lesser proof of intent to demonstrate that schools discriminated against female students based on gender.

2. What Would Constitute Intent?

If a school has knowledge of peer harassment and if a reasonable or practical alternative to a school’s inaction is available, the school’s inaction should demonstrate intent under the Equal Protection Clause of the Fourteenth Amendment.²⁴² This expansion not only would allow female students to recover for their injuries, but would also enforce the proposition that when schools fail to prevent peer sexual harassment, they deny young women an equal opportunity to obtain an education.

Moving toward an expansive standard of intent is necessary to end the oppression of female students.²⁴³ By expanding the definition of intent, schools would have to adopt and enforce policies prohibiting peer harassment or face liability.²⁴⁴ Yet, before liability is imposed on a school, female plaintiffs would bear some burden of proving intent. However, they would not have to prove the school’s general knowledge of peer harassment.²⁴⁵ In peer harassment claims, a school should be presumed to have general knowledge of peer harassment because the Office of Civil Rights of the Department of Education, the agency which enforces Title IX, has placed schools on constructive notice of the likelihood that peer harass-

240. *Id.*

241. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (recognizing that “our Nation has had a long and unfortunate history of sex discrimination”); CATHARINE A. MACK-INNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 9–10 (1979) (explaining that sexual harassment of women can occur because women occupy inferior positions, and harassment keeps women in these positions).

242. *Cf. Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1420–21 (N.D. Cal. 1996) (holding Title VII’s standard of intentional discrimination that imposes liability where entity knew or should have known of hostile environment and that fails to take remedial action to be appropriate standard for Title IX).

243. See Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 *GEO. L.J.* 1799, 1816 (1995) (speculating that if standard of intent is not expanded, victims of peer harassment will go uncompensated).

244. See *Petaluma City Sch. Dist.*, 949 F. Supp. at 1426 (stating that if schools have knowledge about harassment and do nothing, it should be inferred that they intended to discriminate).

245. See *id.* (stating that due to staggering statistics concerning commonality of peer harassment, schools should have knowledge of peer harassment).

ment occurs in schools.²⁴⁶ Furthermore, because statistics clearly illustrate that peer harassment affects a majority of students, schools should not be allowed to feign lack of knowledge of the existence of peer harassment.²⁴⁷ Nonetheless, female students would still bear the burden of proving that reasonable alternatives to inaction existed.²⁴⁸ To meet this burden, students could argue that the school should have enforced a sexual harassment policy or immediately suspended the alleged sexual offenders. Additionally, the plaintiff could bring evidence forward illustrating the school's failure to take girls' peer harassment claims seriously.²⁴⁹ This evidence may be shown through a school's pattern of inaction in peer harassment cases.²⁵⁰ Other patterns of school behavior should be examined, including whether a school treated male complaints more favorably than female complaints or whether action was taken in all other disciplinary problems. While these examples are not exhaustive, allowing a more lenient standard of intent would permit females to demonstrate that a school's inaction in peer harassment cases constitutes discriminatory conduct.

B. *Declare Education a Fundamental Right*

Due to the importance of education in our society, the Supreme Court should declare education a fundamental right.²⁵¹ As a result, a denial of an individual's education would trigger strict scrutiny, thereby forcing a

246. *Cf.* Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (1997) (stating that when school fails "to respond to the existence of hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.").

247. *Cf. Petaluma City Sch. Dist.*, 949 F. Supp. at 1426 (recognizing that statistics show harassment is very common, and therefore, schools should have knowledge of this problem).

248. *See Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) (considering alternatives in order to validate regulation in question); *Chrapliwy v. Uniroyal Inc.*, 458 F. Supp. 252, 270 (N.D. Ind. 1977) (indicating that plaintiff had initial burden of suggesting reasonable alternatives); *Crockett v. Green*, 388 F. Supp. 912, 920 (E.D. Wis. 1975) (providing that plaintiff bears initial burden of proposing reasonable alternatives where available).

249. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-267 (1977) (explaining that clear pattern of discrimination may help prove discriminatory purpose).

250. *Id.*

251. *See Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (recognizing that education is important in preparing individuals to be self-reliant and self-sufficient members of society); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (declaring regard for education of supreme importance and that education should be diligently promoted).

school to give a compelling reason for such a denial.²⁵² Thus, female victims of peer abuse would have some protection when schools refuse to prevent peer abuse.

While the right to an education is not specifically granted under the Constitution, it could easily fall under several fundamental rights granted under the Constitution.²⁵³ Specifically, many believe a nexus exists between education and exercising fundamental rights such as free speech and voting.²⁵⁴ Without an education, the right to speak and vote is meaningless as individuals lack the basic skills to exercise these rights.²⁵⁵ Thus, it is logical for the Court to find education a fundamental right because it is the key to exercising other fundamental rights.

While education could derive its fundamental status from a right specified in the Constitution, the Supreme Court rarely expands its definition of what constitutes a fundamental right.²⁵⁶ This hesitancy to recognize new rights is partly due to the fact that critics argue that the guarantees under the Constitution are negative rights.²⁵⁷ In other words, the United States Constitution imposes a negative duty on the government from infringing upon the rights of citizens, but it does not impose an affirmative duty to grant rights.²⁵⁸ Nevertheless, the Court has expanded fundamental rights in the past.²⁵⁹ Generally, this expansion occurs when the liber-

252. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (stating that fundamental rights, like voting, must be closely scrutinized); GERALD GUNTHER, CONSTITUTIONAL LAW 603 (12th ed. 1991) (indicating that government must provide compelling interest to infringe upon fundamental right).

253. See *Goss v. Lopez*, 419 U.S. 565, 586 (1975) (recognizing that education can be property interest under substantive due process); *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 35 (1973) (disclosing appellee's contention that education is fundamental right because it is essential to exercise of First Amendment).

254. See *Rodriguez*, 411 U.S. at 35 (noting plaintiff's argument that nexus exists between education and other constitutional rights, like those under First Amendment).

255. See *id.* (reporting plaintiff's argument that fundamental rights are hollow if there is no right to education).

256. See *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) (recognizing Court's desire not to expand fundamental rights).

257. See *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (suggesting that constitutional rights are negative rights, not positive rights).

258. See *Alston v. Redman*, 34 F.3d 1237, 1247 (3d Cir. 1994) (asserting that rights guaranteed by Constitution are primarily negative and do not impose positive obligations on government to act); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (stating that Constitution grants negative, rather than positive, liberties); *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 812 F.2d 298, 301 (7th Cir. 1987) (holding that "the Constitution is a charter of negative rather than positive liberties . . .").

259. See *Roe v. Wade*, 410 U.S. 113, 129 (1973) (recognizing privacy rights that relate to family matters); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding right to marry as fundamental freedom); *Harper*, 383 U.S. at 665 (asserting that right to vote is fundamental).

ties in question are either deeply rooted in the nation's history and tradition²⁶⁰ or "implicit in the concept of ordered liberty."²⁶¹ In *Harper v. Virginia Board of Elections*,²⁶² the Supreme Court recognized that voting is a fundamental right even though it is not expressly mentioned as a right in the Constitution.²⁶³ In recognizing a new right, the Court noted that the right to vote is "implicit [in the Constitution], particularly by reason of the First Amendment. . . ."²⁶⁴ Education, like voting, should be implicit from the First Amendment because it gives life to the guarantees of the Constitution.²⁶⁵ Essentially, education, like voting, allows individuals to express their right to freedom of speech. Furthermore, education has such a strong tradition within our nation's history that all but one state in the union mandate that "the state maintain[] a system of free public education."²⁶⁶ Consequently, declaring education a fundamental right is consistent with the standards set forth by the Supreme Court.

C. Amend Title IX to Address Peer Sexual Harassment

Because the lower courts have had a particularly difficult time interpreting whether a school's failure to prevent peer harassment violates Title IX, Title IX should be amended to specifically prohibit peer harassment.²⁶⁷ Under this proposed amendment, peer harassment should

260. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

261. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

262. 383 U.S. 663, 665 (1966).

263. See *Harper*, 383 U.S. at 665 (recognizing that right to vote is implicit fundamental right).

264. *Id.*; see *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"). But see *Bowers*, 478 U.S. at 191 (holding that homosexual sodomy is not fundamental right).

265. See Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 82 (1982) (indicating that education is essential to effective exercise of First Amendment).

266. Marcia A. Brown Thunberg, *Raising Revenue for an Adequate Education in New Hampshire*, 20 VT. L. REV. 1001, 1002 (1996). Every state but Mississippi mandates that their state maintain free public education. *Id.*

267. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 584-89 (1996) (defining proposed amendment to Title IX); Jollee Faber, Comment, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 141 (1992) (proposing amendment to Title IX that would clarify that all forms of sexual harassment, including hostile environment, are prohibited); cf. Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 826 (1994) (describing that states such as Minnesota have amended their discrimination statutes to end sexual harassment in schools).

be defined so that schools and students have a working definition of what constitutes peer harassment.²⁶⁸ As a result, insignificant instances of name-calling and hair-pulling will not be mistaken for peer harassment. Additionally, the proposed amendment should mandate that all schools implement and enforce a sexual harassment policy.²⁶⁹ Not only would this amendment allow schools to control peer harassment, but it would also keep schools from impeding a female student's educational path.

The proposed amendment should begin by defining sexual harassment and specifying that harassment may take two forms: quid pro quo harassment and hostile environment harassment.²⁷⁰ The amendment may state:

1. Definition: Sexual harassment is a form of sex discrimination that violates Title IX. Sexual harassment encompasses both quid pro quo harassment and hostile environment harassment.²⁷¹
 - a. Quid pro quo harassment occurs when a school, its employees, or its agents condition academic advancement either explicitly or implicitly on submitting to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.²⁷²

268. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 585 (1996) (proposing that peer harassment should be defined in sexual harassment policy); Jollee Faber, Comment, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 142 (1992) (indicating first step in implementing harassment policy is to define what constitutes sexual harassment); Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 828 (1994) (suggesting that clear definition and examples of peer harassment must be included in sexual harassment policy).

269. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 21 (1993) (stating, at very least, schools should implement sexual harassment policy); AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT* 153 (1992) (suggesting that schools should develop strong policies against sexual harassment).

270. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 584–85 (1996) (defining harassment and its two forms: quid pro quo and hostile environment).

271. *Id.*

272. See *Alexander v. Yale Univ.*, 631 F.2d 178, 182 (2d Cir. 1980) (holding that when academic advancement is conditioned on performing sexual favors, this behavior constitutes sex discrimination); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. L. REV. & WOMEN'S STUD. 549, 585, (1996) (describing quid pro quo sexual harassment).

- b. Hostile environment harassment includes intimidating, threatening, or offensive verbal and/or physical conduct of a sexual nature by a school, its employees, its agents, or students sufficiently severe and pervasive that the harassment interferes with a student's education.²⁷³ The trier of fact must consider the facts and circumstances of each incident.
2. Sexual harassment by any school official, including administrators, teachers, teaching assistants, and employees is strictly prohibited.²⁷⁴ Furthermore, a school district will be held liable for this conduct regardless of whether a school or its agents had knowledge of the harassment.
3. Schools are on constructive notice of the possibility of peer harassment occurring in their schools.²⁷⁵ Thus, if a school fails to take action when a student complains of a specific instance of student harassment, the school will be liable.²⁷⁶ However, the school's liability may be dismissed or lessened if the school can prove that it took appropriate action when the school had specific knowledge of an incident or instances of peer harassment.²⁷⁷ When considering the school's action, the trier of fact must consider the facts and circumstances surrounding the incident, including the severity of the conduct and whether this behavior has occurred on a repeated basis.²⁷⁸ The fact-finder may also consider whether the school has a history of failing to take appropriate action in sexual harassment claims.²⁷⁹
4. Each school receiving federal funding must implement and enforce a sexual harassment policy.²⁸⁰ The policy must be imple-

273. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 585 (1996) (describing environmental harassment).

274. See *id.* (noting that schools would be liable in peer harassment suits for acts committed by their agents or employees).

275. Cf. *Petaluma*, 949 F. Supp. at 1426 (indicating that staggering statistics of peer harassment should put schools on notice of peer abuse).

276. See *id.* (asserting that school's failure to take action will constitute intent because knowledge is inferred).

277. See *id.* (holding that if school takes action, strict liability may be disallowed).

278. See *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (listing factors that may be taken into consideration when determining whether abusive environment existed).

279. See *Carrero v. New York City Hous. Auth.*, No. 96 Civ. 1535 (LAK), 1997 WL 523595, at *6 (S.D.N.Y. Aug. 19, 1997) (recognizing in sexual harassment case that history of mishandling situations involving harassment is considered by court in imposing liability).

280. Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12044 (1997). In evaluating whether a harassment policy is effective, the Office for Civil Rights considers the following elements:

mented at all levels, including elementary school; however, the policy must be age-appropriate. The sexual harassment policy must include the definition of sexual harassment²⁸¹ and should also include age-appropriate examples of what constitutes sexual harassment.²⁸² Examples may include but are not limited to:

- a. Unwelcome sexual gestures, staring, leering, or ogling;²⁸³
- b. Frequently commenting on personal appearance or body parts in a lewd or suggestive manner;²⁸⁴
- c. Touching out of context;²⁸⁵
- d. Deliberately seeking inappropriate encounters with a student;²⁸⁶
- e. Persistently emphasizing sexuality in all contexts;²⁸⁷
- f. Solicitation of sexual favors;²⁸⁸

-
1. Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
 2. Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
 3. Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
 4. Designated and reasonably prompt timeframes for the major stages of the complaint process;
 5. Notice to the parties of the outcome of the complaint; and
 6. An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Id.

281. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS* 6 (1993) (giving definition of sexual harassment in survey depicting problem of sexual harassment in schools); MARY BECKER ET AL., *FEMINIST JURISPRUDENCE* 714 (1994) (illustrating sexual harassment policy of University of Chicago that provides definition of sexual harassment).

282. See MARY BECKER ET AL., *FEMINIST JURISPRUDENCE* 714 (1994) (listing examples of what might constitute sexual harassment) (quoting Billie Wright Dzeich & Linda Weiner, *The Lecherous Professor: Sexual Harassment on Campus* 92-94, 118-19 (1984)); Stacey R. Rinstine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 *DUQ. L. REV.* 799, 828 (1994) (suggesting that schools include examples of what constitutes sexual harassment in sexual harassment policy).

283. MARY BECKER ET AL., *FEMINIST JURISPRUDENCE* 713 (1994); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 *U. ILL. L. REV.* 699, 708.

284. MARY BECKER ET AL., *FEMINIST JURISPRUDENCE* 714 (1994).

285. *Id.*

286. *Id.*

287. *Id.*

288. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 *S. CAL. REV. L. & WOMEN'S STUD.* 549, 587 (1996) (suggesting that unwelcome

- g. Coercing sexual acts;²⁸⁹ or
- h. Retaliation against a student or students who report sexual harassment.²⁹⁰

This list is not exhaustive; yet, it provides examples of what may constitute punishable harassment.

5. A school's sexual harassment policy must be included in the student handbook and should be distributed to each student at the beginning of each academic year.²⁹¹ Also, all students and their parents should sign the policy to indicate they have read and understand the policy.

- a. The sexual harassment policy should be located in an accessible place in every school and should include detailed information on reporting harassing behavior.²⁹²
- b. The policy should name a counselor who deals with sexual harassment claims and how to contact this individual.²⁹³ The

propositions may be activity that constitutes sexual harassment); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708 (identifying sexual propositions as form of sexual harassment).

289. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 587 (1996) (indicating that impeding one's normal movements or touching in sexual manner may constitute harassment); Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together As a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 708 (noting that physical assault and rape easily constitute sexual harassment).

290. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 587 (1996) (stating that acts of retaliation against those who report harassment will not be tolerated).

291. *Id.* at 586.

292. See Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12040 (1997) (relaying that schools are required by Title IX to publish grievance procedures for reporting sexual harassment); Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 587 (1996) (noting that sexual harassment policy should be located in prominent location and identify how to report harassing behavior); Stacey R. Rinstine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 828-29 (1994) (suggesting that detailed "chain of command" is developed to allow easier method for students to report sexual harassment).

293. See Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12045 (1997) (mandating that schools should designate employee to carry out Title IX); Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL.

policy should also include information on how to contact a local community counselor who may provide assistance.

6. When harassment occurs, the school must handle the peer harassment incident immediately with an action designed to rectify the abuse.²⁹⁴ For example, the policy must clearly state that the repercussions of harassment may include suspension or counseling.²⁹⁵ Additionally, the school must keep records of these cases and how the incidents have been resolved.²⁹⁶ Furthermore, the school counselor must schedule follow-up sessions or investigations to ensure that the harassment has stopped.²⁹⁷

7. Complying with this provision is required under Title IX. Any violation of these items will result in school liability and possible denial of federal funding.

8. The following are suggested measures:

- a. Schools may include sexual harassment lectures or videos in an orientation program.²⁹⁸
- b. Schools may ask students to sign a contract not to sexually harass fellow students.
- c. Schools may create a grievance committee where selected students, faculty, and administrators may hear complaints and determine appropriate action. A student or teacher who believes that his or her complaint has not been dealt with ade-

REV. L. & WOMEN'S STUD. 549, 586 (1996) (specifying that school harassment policy should include name of individual designated to handle harassment complaints); Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 829 (1994) (suggesting that schools designate Title IX counselor who is responsible for handling peer harassment complaints).

294. See Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12043 (1997) (announcing that schools must take corrective action when sexual harassment is reported); Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 830 (1994) (stating that schools must develop strategy that immediately deals with harassment complaints).

295. See Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 829 (1994) (indicating that schools should establish penalties for students found guilty of sexually harassing schoolmates).

296. See *id.* (noting that counselor should include harassment complaints in written report).

297. See Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12043 (1997) (declaring that school should at minimum schedule follow up appointments after incidents of peer harassment).

298. See Shelley Donald Coolidge, *In Halls of Learning, Students Get Lesson in Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, at 1 (noting that high school in Anchorage, Alaska, conducts day-long sexual harassment workshop every other month).

quately by the grievance committee may continue to pursue his or her claim outside the school system.

Amending Title IX to prohibit peer harassment will allow female students to receive equal educational benefits. By implementing a harassment policy to control or eliminate peer harassment, schools will eliminate the impediments girls face when they are sexually harassed. Furthermore, if harassment does persist, students will have a formal policy to protect their rights. In addition, because the sexual harassment policy specifies schools' responsibilities to their students, schools will no longer be able to shirk their duties. If schools avoid their responsibilities to students, they will be held accountable to students for violating their rights and to taxpayers who have an interest in ensuring that schools do not have to bear the costs of large liability settlements. Ultimately, amending Title IX ensures that any complaint a student makes will be taken seriously.

VI. REBUTTING ARGUMENTS THAT LIMIT SCHOOL LIABILITY IN PEER SEXUAL HARASSMENT CLAIMS

Objections to explicit protection for young women suffering sexual harassment include the argument that schools should not be held responsible for preventing peer harassment.²⁹⁹ Others argue that peer harassment is too common for schools to control.³⁰⁰ Finally, opponents of holding schools responsible for peer harassment argue that provisions designed to protect girls from this abuse give them special privileges.³⁰¹

A. *Schools Are Responsible for Preventing Peer Sexual Harassment*

School officials are responsible for preventing peer harassment because these individuals not only educate students, but also play a significant role in teaching appropriate behavior, self-image, and personal develop-

299. See *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1367, 1377 (3d Cir. 1992) (supporting proposition that school has no affirmative duty to prevent action like peer abuse); Bill Maxwell, *Pity the Schools in These Litigious Times*, ST. PETERSBURG TIMES, Oct. 6, 1996, at 1D (criticizing fact that schools are threatened unnecessarily by litigious society), available in 1996 WL 11944656.

300. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 564 (1996) (recognizing that segments of society believe peer harassment is beyond control).

301. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1014-15 (5th Cir.) (holding that Title IX is not panacea for all sex discrimination and allowing peer harassment to be included in Title IX would be unnecessary remedy), cert. denied, 117 S. Ct. 165 (1996).

ment.³⁰² Thus, it is inappropriate for schools to send students a message of gender inequality.³⁰³ However, when peer sexual harassment is condoned, schools send a biased message.³⁰⁴ For example, a fourteen-year-old male student, who was questioned about sexual harassment in school, responded by saying: "I don't care. People do this stuff every day. No one feels insulted by it. That's stupid. We just play around. I think sexual harassment is normal."³⁰⁵ Based on this statement, it is apparent that when a school does not prevent peer harassment, it sends a message that harassment is appropriate behavior. Essentially, schools are reinforcing the notion that girls do not deserve respect. Gender-biased messages go beyond condoning harassment of women to manifest themselves in a gender-biased curriculum. Studies indicate that teachers pay more attention to male students and "give boys more praise, criticism, and more detailed

302. See *Racial Incidents and Harassment Against Students at Educational Institutions*; Investigate Guidance, 59 Fed. Reg. 11448, 11449 (1994) (opining that schools teach students about aspects of human life; thus, if school tolerates or encourages certain environment, it sends strong message to students of what appropriate behavior is); AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT 105* (1992) (reporting that school curriculum is message giving instrument that creates images of self and world for students).

303. See Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 216 (1994) (arguing that allowing harassment to continue perpetuates problem of peer harassment); Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1801 (1995) (explaining that when schools refuse to intervene, school implies that inaction and indifference are appropriate responses).

304. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT 106* (1992) (suggesting that sex-biased interactions are condoned more often than not); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1159–60 (1994) (indicating that teachers pay more attention to male students; textbooks stereotype or ignore female students; and standardized tests are biased against females); Melissa DeVaughn, *Teen-Age Girls Fight Harassment in Classroom*, ROANOKE TIMES & WORLD NEWS, Feb. 4, 1995, at NR1 (reporting that gender bias is occurring in classroom), available in 1995 WL 2623282. This article also describes a situation in which a group of eighth-grade girls began a petition to stop gender bias in the classroom. *Id.* Before starting this petition, the girls kept a tally for one week of the number of times their teachers made sexist remarks. *Id.* Some of the behavior recorded included ignoring girls who raised their hands, asking boys for favors, and making comments to girls like "[w]hat are you girls doing, trading recipes?". *Id.* Forty-eight students signed the petition, and the girls began to see some changes. *Id.*

305. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 24* (1993).

instructions.”³⁰⁶ Consequently, because schools play an instrumental role in socializing both male and female students, they should be held accountable for their failure to address and eradicate peer harassment.

Schools should also be held responsible for preventing peer abuse because denying female students an adequate education may impose a lifetime of hardship on them.³⁰⁷ The Supreme Court held in *Plyler* that denying illegal aliens a basic education poses an inestimable toll to an individual's “social economic, intellectual, and psychological well being . . .,” and may ultimately prevent these children from contributing in “even the smallest way to the progress of our nation.”³⁰⁸ When schools fail to prevent peer abuse, women are placed in the same position as the illegal aliens in *Plyler*. In essence, a female student who is denied an education because of peer harassment will not have the necessary tools to contribute to society. Therefore, schools should be held accountable for the serious repercussions caused by their failure to prevent peer abuse.

B. *Peer Sexual Harassment Can Be Prevented by School Officials*

While schools cannot eradicate all student-to-student harassment, they can control this behavior by implementing and enforcing sexual harassment policies.³⁰⁹ Increasingly, schools have begun to add courses and seminars that teach students what constitutes appropriate behavior.³¹⁰ Many of these schools have reported success in preventing peer abuse.³¹¹ For example, Brooke Ellison, a student who participated in a sexual harassment class at Framingham High School in Massachusetts, noted that students, especially boys, “think twice before they do something” as a

306. Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1159 (1994).

307. See *Plyler v. Doe*, 457 U.S. 202, 222–223 (1982) (explaining that denying illegal aliens education imposes lifetime of hardship).

308. *Id.*

309. See Shelley Donald Coolidge, *In Halls of Learning, Students Get Lessons in Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, at 1 (noting that while harassment policy cannot reach everyone, policy is helping to solve problem of harassment).

310. See *id.* (reporting that schools are adding coursework to teach young people appropriate behavior). Coolidge reports that Framingham High School in Massachusetts has incorporated five lessons for the past three years on sexual harassment; East High School in Anchorage, Alaska, has a day-long sexual harassment work shop for students every other month; and students at Stevens Point Area Senior High School in Wisconsin perform in a peer sexual harassment play called “Alice in Sexual Assault Land” throughout the state. *Id.*

311. See *Zero Tolerance for Harassment*, DES MOINES REG., June 11, 1996, at 8 (quoting school official who believes his school has run more smoothly since implementing zero tolerance harassment policy), available in 1996 WL 6241817.

result of the class.³¹² Additionally, Justin Kramer, a guidance counselor for Regis High School in Cedar Rapids, stated that since the school implemented a zero-tolerance harassment policy, the “school has run much more smoothly.”³¹³ These success stories indicate that while peer harassment is prevalent among students, if schools take these claims seriously and enforce sexual harassment policies, they can control peer harassment. Consequently, because of a school’s ability to prevent the denial of educational benefits to female students, schools should be held liable for failing to take appropriate action to prevent peer abuse.

C. *An Education Free from Harassment Is Not a Special Privilege*

Providing an education that is free from gender discrimination does not provide an additional right or privilege to female students.³¹⁴ In *Romer v. Evans*,³¹⁵ the Supreme Court held that preserving legislation which gives homosexuals equal rights does not give them special rights; rather, this legislation gives these individuals rights that everyone is entitled to but takes for granted.³¹⁶ Similarly, sexually harassed female students are being deprived of the educational rights that male students take for granted. Therefore, legislation amending Title IX to give female students equal educational rights by prohibiting peer harassment should not be considered a special privilege. Instead, legislation addressing peer harass-

312. Shelley Donald Coolidge, *In Halls of Learning, Students Get Lessons in Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, at 1.

313. *Zero Tolerance for Harassment*, DES MOINES REG., June 11, 1996, at 8, available in 1996 WL 6241817.

314. See *Romer v. Evans*, 116 S. Ct. 1620, 1626–27 (1996) (explaining that additional legislative protection does not give special rights to homosexuals).

315. 116 S. Ct. 1620 (1996).

316. See *Romer*, 116 S. Ct. at 1626–27 (recognizing that special protection for certain individuals does not give them additional rights; instead, it ensures those rights that are taken for granted by most people). In striking Amendment 2 of the Colorado Constitution, the Supreme Court stated:

[W]e cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

Id.

ment, like that permitted in *Romer*, facilitates equality where it does not currently exist.

VII. CONCLUSION

Peer sexual harassment is a widespread problem that has devastating effects on female students. While society and schools have blindly allowed abuse of females to occur in the past, this problem can no longer be ignored. Schools must take action to prevent violence against female students by their male classmates, or schools should face liability.

While legislative and judicial remedies exist to combat a school's failure to address peer harassment, the courts' current application of the Fourteenth Amendment of the United States Constitution and Title IX of the Educational Act of 1972 has not provided much relief. In fact, the courts' application of the law has permitted schools to continue to discriminate against female students seeking relief from peer abuse without the threat of punishment. This outcome seriously undermines the concepts of the Fourteenth Amendment and Title IX. Thus, courts should modify their application of these legislative and judicial tools in order to recapture their true meaning. In regard to the Fourteenth Amendment, the courts should loosen the intent standard to prevent schools from committing subtle forms of discrimination. Additionally, the Supreme Court should elevate education to the status of a fundamental right. Thus, any infringement of education would be subject to strict scrutiny. Furthermore, Title IX should be amended to address peer harassment. Amending Title IX would be the most practical approach to solving peer harassment problems because not only would the amendment create an immediate solution to peer harassment, but it would grant female students a safe and effective learning environment.