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TITLE IX LIABILITY FOR ONLINE  
PEER- ON-PEER SEXUAL  
HARASSMENT.

Bunyad Bhatti



## I. INTRODUCTION

Sexual harassment is generally defined as unwelcome advances of sexual nature, “requests for sexual favors”, or any physical or verbal “conduct of a sexual nature”.<sup>1</sup> The conduct can occur during employment, education, or in a living environment, and the refusal or acceptance of such conduct is used as a factor in decisions affecting the individual’s role in these environments.<sup>2</sup> Sexual harassment can either unreasonably impact the individual’s work performance, or it can create an intimidating, hostile, or offensive environment.<sup>3</sup>

Sexual harassment can be viewed in the following three broad categories: gender harassment, unwanted sexual attention, and sexual coercion.<sup>4</sup> First, gender harassment is the unwelcome use of verbal and visual comments or remarks, which aim to insult individuals and provoke negative emotions based on their gender.<sup>5</sup> This can include sexual jokes, spreading sexual rumors, or making unwanted sexual statements online, in writing, or in person.<sup>6</sup> Secondly, unwanted sexual attention is in reference to unwelcome behavior that explicitly

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<sup>1</sup> UN Women, *What is Sexual Harassment*, U.N., <https://www.un.org/womenwatch/osagi/pdf/whatissh.pdf> (last visited Jan. 22, 2021).

<sup>2</sup> *Sexual Harassment – Legal Standards*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/sexual-harassment-legal-rights> (last visited Jan. 22, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> Azy Barak, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77, 78 (2005).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

communicates sexual desires or intentions towards another individual.<sup>7</sup> This category includes overt behavior and comments, such as inappropriate stares, comments, calls, or letters that make sexual intent evident.<sup>8</sup> Lastly, sexual coercion involves the use of physical or psychological pressure on the individual, in order to elicit sexual cooperation.<sup>9</sup> This category includes undesired physical touching of any sort, offerings of a bribe for sexual favors, or making threats to receive sexual cooperation.<sup>10</sup>

With the advancement of technology, all three of these categories of sexual harassment exist online.<sup>11</sup> Online sexual harassment is the unwanted sexual conduct on any digital platform, and it is inclusive of a wide range of behaviors that use technology to share digital content such as images, messages, videos, and posts, on a variety of different platforms.<sup>12</sup>

There are four ways in which online sexual harassment commonly occurs: the non-consensual sharing of images, exploitation and threats, sexualized bullying, and unwanted sexualization.<sup>13</sup> First, the non-consensual sharing of intimate images and videos occurs when a person's sexual images or videos are shared or taken without their consent.<sup>14</sup> Second, exploitation and threats occur when a person who is

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Barak, *supra* note 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Online Sexual Harassment*, CHILDNET INTERNATIONAL, <https://www.childnet.com/teachers-and-professionals/for-working-with-young-people/hot-topics/online-sexual-harassment> (last visited March 3, 2020).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

receiving sexual threats, is coerced or blackmailed into participating in sexual behavior online.<sup>15</sup> Third, sexualized bullying occurs when a person is being targeted by and systematically excluded from a group with the use of humiliating or discrimination sexual content online.<sup>16</sup> Lastly, unwanted sexualization occurs online when an individual receives unwelcome sexual requests, comments, and content.<sup>17</sup> While such forms of online sexual harassment can take place between adults and children, peer-on-peer online sexual harassment takes place between young people.<sup>18</sup> However, when such online sexual harassment interferes with a student's school and education, it can constitute title IX violations.<sup>19</sup>

## II. TITLE IX ELEMENTS

Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 are the laws used to combat such sexual and discriminatory behavior.<sup>20</sup> Specifically, Title VII protects

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Online Sexual Harassment*, *supra* note 12.

<sup>19</sup> *Cyber Abuse and Title IX: A Resource for Campus Safety Officials*, The Cyber Abuse Project, <http://www.endtechabuse.org/wp-content/uploads/2018/12/Cyber-Abuse-and-Title-IX-1.pdf> (last visited March 5, 2021).

<sup>20</sup> *Overview of Employment Litigation*, The United States Department of Justice, <https://www.justice.gov/crt/overview-employment-litigation> (last visited March 5, 2021); *Title IX of The Education Amendments of 1972*, The United States Department of Justice, <https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination> (last visited March 5, 2021).

individuals in the workplace against sexual harassment, and Title IX protects individuals in the scope of educational activities and institutions.<sup>21</sup> In order to seek recovery for a Title IX violation, a plaintiff must prove that the funding recipient acted deliberately indifferent to the known acts of student-on-student sexual harassment, and that the harassment was so severe and pervasive that it barred the victim's access to educational opportunity.<sup>22</sup> The Supreme Court defined the elements of a peer-on-peer sexual harassment claim, and they are: (1) that the recipient had actual knowledge of, and; (2) was deliberately indifferent to; (3) harassment that was so severe, pervasive and objectively offensive that it; (4) deprived the victim of access to educational benefits or opportunities.<sup>23</sup> This note will analyze whether schools should be liable under Title IX for solely online peer-on-peer sexual harassment.

In order for the school to be liable for a peer-on-peer Title IX claim, it must exercise substantial control over the harasser and the context in which the harassment occurs.<sup>24</sup> This element depends on "a constellation of surrounding circumstances, expectations, and relationships."<sup>25</sup> Next, the sexual conduct must be unwelcome and it must be "so severe, pervasive, and objectively offensive, that it can deprive the victim of access to the educational benefits or opportunities provided by the school."<sup>26</sup> Furthermore, Title IX liability only allows a case to proceed if the recipient itself caused the sexual harassment

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<sup>21</sup> *Overview of Employment Litigation*, *supra* note 20; *Title IX of The Education Amendments of 1972*, *supra* note 20.

<sup>22</sup> 20 U.S.C. §§ 1681–88 (2018).

<sup>23</sup> *Murrell v. School District No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999).

<sup>24</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

<sup>25</sup> *Id.* at 651.

<sup>26</sup> *Id.* at 650.

through its deliberate indifference, and there is no liability for what the school should have known, but only for remaining deliberately indifferent to acts of harassment of which it had actual knowledge about.<sup>27</sup> A Title IX plaintiff must prove “actual knowledge of misconduct, not just actual knowledge of the risk of misconduct.”<sup>28</sup> Title IX liability “may be imposed only upon a showing that the appropriate officials had actual knowledge of the discriminatory conduct in question.”<sup>29</sup> Lastly, the appropriate official with actual knowledge of the sexual harassment occurring in the recipient’s institution, does not have to take any particular remedial actions and the victims of student-on-student harassment do not have a right under Title IX to make particular remedial demands.<sup>30</sup> Thus, the evidence must show that an official “made a conscious decision to allow discrimination in its schools.”<sup>31</sup> Additionally, liability is also appropriate when “administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of discrimination and make the intentional choice” to do nothing about it.<sup>32</sup> Overall, liability only exists “where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>33</sup>

In the case of online peer-on-peer sexual harassment and Title IX liability, institutions may have a potential defense if the online sexual

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<sup>27</sup> *Id.* at 642.

<sup>28</sup> *Delgado v. Stegall*, 367 F.3d 668, 672 (7th Cir. 2004).

<sup>29</sup> *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001).

<sup>30</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

<sup>31</sup> *Murrell v. School District No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999).

<sup>32</sup> *Bryant v. School District No. I-38*, 334 F.3d 928, 933 (10th Cir. 2003).

<sup>33</sup> *Davis*, 526 U.S. at 648.

conduct occurred outside of school hours and through electronic media that is beyond the control of the institution.<sup>34</sup>

For institutions of higher education, the two potential factors that could establish the requisite degree of control for Title IX liability are: (1) if the cyber-bullying occurs through electronic media under the college or university's control, such as through e-mail accounts provided to students; and (2) in contrast to K-12 districts, institutions of higher education often assert disciplinary jurisdiction over off-campus conduct.<sup>35</sup>

Although there are no published court decisions on Title IX violations through solely online peer-on-peer sexual harassment, it is likely that institutions can be responsible for such conduct, if they have the necessary control required by the statute.

#### **A. Forms of Online Sexual Harassment**

Online sexual harassment creates a hostile online environment, as the ease of posting comments behind a screen allows for more aggressive and vulgar harassment.<sup>36</sup> Posting inappropriate sexual comments online is a common form of online sexual harassment, as social media is the most common online venue where harassment takes

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<sup>34</sup> DAN WILKERSON ET AL., THE NEW FRONTIERS OF PEER-TO-PEER SEXUAL HARASSMENT: SEXTING, CYBER-BULLYING, AND ELECTRONIC HARASSMENT 8 (2011), <https://www.higheredcompliance.org/wp-content/uploads/2018/10/x-11-03-6.doc>.

<sup>35</sup> *Id.*

<sup>36</sup> Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOWARD L. J. 773, 789–88 (2018).

place.<sup>37</sup> Furthermore, online sexual harassment allows the perpetrator to remain anonymous while communicating their hurtful messages to a wide audience”<sup>38</sup>

Online sexual harassment comes with an increased danger, as the victim becomes dehumanized in the online environment and it allows for other perpetrators to join the harassment. The elements of showing Title IX liability for online sexual harassment cases remains the same any other Title IX claim.<sup>39</sup> However, the element of substantial control can likely become a challenge in the realm of online sexual harassment, as the school must exercise substantial control over the harasser and the context in which the harassment occurs.<sup>40</sup> Since schools provide their students with laptops and tablets, which students keep throughout the school year and are able to take home with them, the lines of where and when the control of the platform begins and ends, can become tricky, but such an occurrence during school hours will likely satisfy the control element.

Another challenge that victims of online sexual harassment will encounter is with the element of the “severe and pervasive sexual harassment causing a systematic effect of denying the victim equal

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<sup>37</sup> Emily A. Vogels, *The State of Online Harassment*, Pew Research Center, <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> (last visited March 5, 2021).

<sup>38</sup> Chaffin, *supra* note 36 at 787.

<sup>39</sup> See Cyberbullying and Sexual Harassment: FAQs About Cyberbullying and Title IX, National Women’s Law Center, [https://equity.siu.edu/\\_common/documents/resources/cyberbulling-sexual-harassment.pdf](https://equity.siu.edu/_common/documents/resources/cyberbulling-sexual-harassment.pdf) (last visited March 5, 2021).

<sup>40</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

access to educational programs.”<sup>41</sup> The Supreme Court found an example of severe and pervasive harassment where daily physical threats from male students successfully prevented female students from using a computer lab or an athletic field.<sup>42</sup>

Furthermore, if the victim does not demonstrate absences, a decline in grades, or avoidance of school activities, then there is no bar to educational opportunity.<sup>43</sup> The Supreme Court ruled that even if the harassment was severe and pervasive, there was no systematic effect of the victims being denied equal access to educational opportunity, because the victims did not suffer a decline in their grades or a change in their classroom participation.<sup>44</sup> An example of a victim being deprived access to educational opportunities, was where the student was in the hospital and unable to attend school.<sup>45</sup> There is likely going to be difficulty for a victim who aims to demonstrate this element through solely online harassment, as there is no physical deprivation of equal access to educational opportunity.

However, while this element may seem like a challenge for victims of online sexual harassment to demonstrate, the Supreme Court held that the severe and pervasive harassment barred a victim’s access to educational opportunity, in a case where the victim attended counseling sessions, avoided school activities, faced depression, and ultimately transferred from the school.<sup>46</sup> Some courts, such as the 10th Circuit, have held that this element was also satisfied when the harassment deprived the victim access to educational opportunities, as

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<sup>41</sup> *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1288 (11th Cir. 2003).

<sup>42</sup> *Davis*, 526 U.S. at 650–51.

<sup>43</sup> *Hawkins*, 322 F.3d 1279 at 1289.

<sup>44</sup> *Id.*

<sup>45</sup> *Murrell v. School District No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999).

<sup>46</sup> *Hill v. Cundiff*, 797 F.3d 948, 976 (11th Cir. 2015).



she spent time in the hospital and had to miss school.<sup>47</sup> Thus, it is likely that where a victim of online sexual harassment is able to demonstrate that the severity of the conduct caused them to miss school, avoid activities at school, or face psychological issues, they can satisfy this element.

There are several types of challenges that victims of online sexual harassment face. The most prevalent to Title IX cases include the inability to escape an environment in which they must be present at and the hindered ability to succeed in their careers and academics.<sup>48</sup> A nationwide survey conducted by the AAUW on sexual harassment amongst grades ranging from middle school to high school analyzed the negative results of online sexual harassment amongst these students.<sup>49</sup> The following are the effects of online and in person sexual harassment amongst the students: the students did not want to attend school, stayed at home to avoid school, felt unwell or sick, found it difficult to study, got into trouble at school, changed their route to or from school, stopped participation in a sport or activity, or switched schools.<sup>50</sup> These are the types of negative challenges that victims of online sexual harassment face, and these challenges will likely qualify for the element of the victim being barred from equal access to educational opportunity. The psychological effects that come from online harassment are the same, if not more significant and reoccurring, as compared to in person peer-on-peer sexual harassment cases.

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<sup>47</sup> *Murrell*, 186 F.3d at 1248.

<sup>48</sup> *Id.* at 1249.

<sup>49</sup> CATHERINE HILL & HOLLY KEARL, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL vii (AAUW), <https://files.eric.ed.gov/fulltext/ED525785.pdf>.

<sup>50</sup> *Id.* at 22.

### **B. Cases of Online Sexual Harassment**

Schools are generally limited in their liability for peer-on-peer sexual harassment that occurs solely online.<sup>51</sup> In the analysis of determining a school's liability for online sexual harassment, courts focus on the location of where the posts were accessed and not on the location of where they were created.<sup>52</sup> For example, in a case where a student created a site that harassed teachers off-campus, the court looked at the access point and the target audience of students.<sup>53</sup> Thus, schools are more likely to be liable in situations where students use cell phones in order to photograph peers in a sexual manner and harass them, as these points are more traceable to being on campus. Overall, as long as the victim of online sexual harassment can establish that the conduct occurred during school hours, in addition to the other statutory elements, they will likely be able to recover under a Title IX claim.

### **III. CONSTITUTIONAL ISSUES OF MONITORING ONLINE SPEECH THAT CONSTITUTES AS SEXUAL HARASSMENT**

The constitutionality of public schools monitoring student speech is an issue that will likely arise in cases regarding online sexual harassment. This question is important for many reasons, as everyday conversation between classmates now occurs over a variety of social media platforms. These interactions no longer end in the premises of

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<sup>51</sup>See Cyberbullying and Sexual Harassment: FAQs About Cyberbullying and Title IX, National Women's Law Center, [https://equity.siu.edu/\\_common/documents/resources/cyberbullying-sexual-harassment.pdf](https://equity.siu.edu/_common/documents/resources/cyberbullying-sexual-harassment.pdf) (last visited March 5, 2021).

<sup>52</sup> See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (Pa. 2002).

<sup>53</sup> See *id.*

the schools, as they continue to occur off campus between students. Complications over monitoring on and off campus online communications exist, as there is a strong possibility of the institution violating a student's First and Fourth Amendment Rights. Although the Supreme Court of the United States has not decided any cases with issues regarding online communications in public schools, the foundational rule of student speech in public schools holds that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>54</sup> However, the same decision provides school administrators broad power to monitor and prevent any conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."<sup>55</sup> Thus, the application of this power held by public school administrators becomes tricky when applied to online communication between students. In order to answer this, the First Amendment and the Fourth Amendment will be analyzed in regard to students' and their online speech.

### A. The First Amendment

While courts have not decided on the limitations of students' online speech, it is established that public schools must respect students' rights to freedom of speech and expression, as they are guaranteed under the First Amendment to the U.S. Constitution.<sup>56</sup> The First Amendment holds that, "Congress shall make no law respecting an establishment of

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<sup>54</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>55</sup> *Id.* at 513.

<sup>56</sup> E.A. Gjelten, *When Can Schools Limit Students' Free Speech Rights*, LAWYERS.COM (Feb. 5, 20219), <https://www.lawyers.com/legal-info/research/education-law/when-can-schools-limit-students-free-speech-rights.html>.

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.”<sup>57</sup> However, students often face restrictions on their speech that are particular to the school setting.<sup>58</sup> Since public schools have the responsibility of keeping students safe, the institution must balance between respecting the students’ rights to freedom and expression, while protecting children and the learning environment.<sup>59</sup> Thus, it is likely that courts would apply the same holdings for students’ speech in schools to their online speech during school as well.

In four different Supreme Court decisions, the Court decided on when a public school is allowed to restrict students’ speech without violating the First Amendment. First, the school is allowed to restrict student speech when it creates a substantial disruption at the school, or would violate other students’ rights.<sup>60</sup> In *Tinker v. Des Moines Independent Community School Dist.*, the Court held that the school violated the students’ First Amendment rights when it suspended them for wearing black armbands as an anti-war protest.<sup>61</sup> Such speech is considered to be symbolic speech and not disruptive, as it may simply cause discomfort or unpleasantness.<sup>62</sup> There are several factors that courts consider when deciding if there is a substantial disruption that occurs from a student’s speech.<sup>63</sup> These factors include: whether the speech interfered with classwork or other school activities, if it causes a

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<sup>57</sup> U.S. CONST. amend. I.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>61</sup> *Id.* at 516.

<sup>62</sup> *Id.* at 508.

<sup>63</sup> Gjelten, *supra* note 56.

disorder on campus, if other students were so upset that they could not concentrate or visited the school counselors, and whether the administrators or teachers had to take considerable time away from their duties to deal with the effect of the students' speech.<sup>64</sup> Furthermore, school officials do not have to prove that the students' speech already caused an interference or disruption, and only have to show that it is reasonable for such a disruption to happen.<sup>65</sup>

Second, school officials may monitor students' speech when it is vulgar.<sup>66</sup> In *Bethel School Dist. No. 403 v. Fraser*, the Supreme Court held that the school did not violate the student's First Amendment rights, when it disciplined the high school student for his offensively lewd and indecent speech, which included explicit sexual metaphors.<sup>67</sup> The Court established that society's interest in teaching "the boundaries of socially appropriate behavior," outweighs the student's rights to express his views and speech in a way that is highly offensive to his classmates.<sup>68</sup>

Third, the Supreme Court held that public schools can monitor students' speech that is dangerous, without violating the First Amendment.<sup>69</sup> In *Morse v. Frederick*, the Supreme Court held that the principal of the school did not violate the student's First Amendment rights when he suspended the student for refusing to take down a banner that said "Bong Hits 4 Jesus" at a school event.<sup>70</sup> The Court held that it

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>67</sup> *Id.* at 685.

<sup>68</sup> *Id.* at 681

<sup>69</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>70</sup> *Id.*

is part of the school's mission to protect students from messages that can be seen as promoting or celebrating illegal drug use, as the school has a fair amount of power to decide whether a student's speech poses as a danger to their classmates or teachers.<sup>71</sup>

Finally, the Supreme Court held that teachers and school authorities are allowed to censor or change what students write or say in a school-sponsored publication.<sup>72</sup> These publications may include a school newspaper, a yearbook, a school play, or any other activities that involve the expression of ideas that are part of the curriculum of the school.<sup>73</sup> However, the Court held that the school must have a legitimate educational purpose for the censorship and the control will not apply where a school authority has a policy or practice that allowed a school paper or online publication to become a public forum.<sup>74</sup> Thus, if the school publication is an open platform for students to freely express themselves and make decisions about content without prior approval from administrators, then the school cannot monitor it.<sup>75</sup> In conclusion, schools generally have less control of underground student journalism, whether it is print or online.

While the current Supreme Court decisions on Title IX cases deal with in school and off-line student speech, the same principles are likely to apply to online student speech made in the school setting. However, the issue arises when deciding how these decisions would apply to off-campus online speech made by students. It is likely that, similar to these decisions, if the speech causes a substantial disruption, brings vulgarity, or danger to the students, then it can be monitored by

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<sup>71</sup> *Id.* at 403.

<sup>72</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>73</sup> *See generally Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>74</sup> *See generally id.*

<sup>75</sup> *Id.* at 270.

the school without violating the students' First Amendment rights. Thus, it is likely that when a student is making online speech that sexually harasses another student, whether it is made during school or off-campus, the student is causing substantial disruption to the victim and the classroom environment, and the school can monitor it.

In *D.J.M. v. Hannibal Public School District*, the court held that the *Tinker* holding applied to off-campus online student speech, where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.<sup>76</sup> In this case, a student sent instant messages to a school friend about threats involving him obtaining a gun and shooting students at his school.<sup>77</sup> Although these were sent from his home and off-campus, the principal suspended the student when he was reported.<sup>78</sup> Here, the court held that the school did not violate the student's First Amendment rights, as it was reasonably foreseeable that his speech would create a risk of substantial disruption, which it did.<sup>79</sup>

On the other hand, in *J.S. v. Blue Mountain School District*, the Third Circuit held that the school district did violate the student's First Amendment rights, when it suspended the student for creating an online profile that mocked the school principal.<sup>80</sup> Although the student made the online profile off-campus and it contained adult language and sexually explicit content about the principal, the speech in this case did not cause a substantial disruption at the school.<sup>81</sup> The court held that

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<sup>76</sup> *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 766 (8th Cir. 2011).

<sup>77</sup> *Id.* at 756.

<sup>78</sup> *Id.* at 759.

<sup>79</sup> *Id.* at 766.

<sup>80</sup> *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920–21 (3d Cir. 2011).

<sup>81</sup> *Id.* at 928–29.

the profile was so outrageous that nobody would take it seriously, and it was not reasonably foreseeable that the speech would create a substantial disruption or material interference in the school.<sup>82</sup> Thus, the Tinker rule applied and the court found a violation of the student's First Amendment Rights.

In conclusion, it is likely that courts will apply the same standard to off-campus online speech from students regarding online sexual harassment cases. Such speech would likely cause a substantial disruption to the victim, the classmates who see and engage in it, and the authorities at the institution. Thus, it is likely that monitoring such speech would not violate a student's First Amendment rights.

### **B. The Fourth Amendment**

The Fourth Amendment is another constitutional right that public schools are at risk of violating, when monitoring students' online on and off campus speech. The Fourth Amendment states that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>83</sup> Majority of the cases that deal with a Fourth Amendment violation in the public school setting, are in regards to random drug tests at school. While courts have not decided any cases on schools monitoring online speech that may constitute sexual harassment, the holdings from the violation of Fourth Amendment cases in public schools can likely be applied to such circumstances as well.

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<sup>82</sup> U.S. CONST. amend. IV.

<sup>83</sup> *Id.*



In the seminal case on the issue of the Fourth Amendment violations by public schools, *Vernonia School District 47J v. Acton*, the court held that the privacy interests of students are limited "in a public school environment where the State is responsible for maintaining discipline, health, and safety."<sup>84</sup> The court elaborated and said that, "It must be borne in mind that the relationship between the child and the school authorities is not a voluntary one, but is compelled by law."<sup>85</sup> The child must attend school and is subject to school rules and disciplines, and the school authorities are obligated to take reasonable precautions for his safety and well-being."<sup>86</sup> However, the school's obligation of safety and well-being comes with certain limitations. Thus, the school officials do not enjoy absolute constitutional immunity.<sup>87</sup> Rather, courts have held that constitutional protections extend to students within the public-school context, but not to the full extent that such protections extend to adult citizens in other settings.<sup>88</sup>

In the case of *State in Interest of T.L.O.*, the court illustrates the evolution of case law in which courts have sought to balance the rights of students against the duty to maintain a safe and orderly school environment.<sup>89</sup> In this case, an assistant principal at a high school conducted a warrantless search of a student's purse, in which he found rolling papers that he suspected were drug paraphernalia.<sup>90</sup> Then, he looked further into the purse and found a metal pipe of the kind used for

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<sup>84</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>85</sup> See *id.* at 654.

<sup>86</sup> *Id.* at 654–55.

<sup>87</sup> See *id.* at 655.

<sup>88</sup> *Id.*

<sup>89</sup> See generally *State in Interest of T.L.O.*, 94 N.J. 331, 352 (1983).

<sup>90</sup> *Id.* at 336.

smoking marijuana, empty plastic bags, and one plastic bag containing a tobacco-like substance.<sup>91</sup> The court here held that school officials are authorized to conduct such administrative searches without a warrant and without probable cause, provided that they have "reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order."<sup>92</sup> Furthermore, in *Board of Education v. Earls*, the Supreme Court held that the school did not violate the Fourth Amendment when it drug tested its students.<sup>93</sup> However, the United States Supreme Court held that the policy did not constitute an unreasonable search because it reasonably served the board's important interest in detecting and preventing drug use among its students.<sup>94</sup>

Most importantly, in *R.S. v. Minnewaska Area School District No. 2149*, the court analyzed the movement of student speech from on campus to off campus.<sup>95</sup> The Court held that while student speech moving to the internet poses some new challenges, "the transition has not abrogated the clearly established general principles which have governed schools for decades."<sup>96</sup> The court reiterated "that true threats of physical violence are generally not protected under the First Amendment from government proscription."<sup>97</sup> A true threat is defined here as a "statement that a reasonable recipient would have interpreted

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 346.

<sup>93</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822, 836, 838 (2002).

<sup>94</sup> *Id.* at 825.

<sup>95</sup> *See R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128 (D. Minn. 2012).

<sup>96</sup> *Id.* at 1139.

<sup>97</sup> *Id.*

as a serious expression of an intent to harm or cause injury to another."<sup>98</sup> Thus, this standard can likely be applied to online comments by a student that would constitute as sexual harassment, which causes injury or harm to the victim and allows others to engage in it as well.<sup>99</sup>

Furthermore, although the Supreme Court applied the *Tinker* holding and stated that, "while the school officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech," the calculus may change where serious and violent threats which substantially disrupt the school environment are concerned.<sup>100</sup> Thus, in regards to online sexual harassment, whether it is made on campus or off campus by a student, the conduct will likely cause a substantial disruption to the school environment and can be monitored by the school without violating the Fourth Amendment.

#### IV. THE PSYCHOLOGICAL EFFECTS OF ONLINE SEXUAL HARASSMENT

In order for a successful Title IX claim, a victim has to establish that the harassment is severe and pervasive, causing a systematic effect of denying the victim equal access to educational programs.<sup>101</sup> Although this element is shown through a physical lens in the cases discussed, the psychological impacts of online sexual harassment can likely cause the same effects and allow a victim to fulfill this element.

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<sup>98</sup> *Id.* (citing *Doe v. Pulaski Cnty. Special Sch. Dist.*, 206 F.3d 616, 624 (8th Cir. 2002)).

<sup>99</sup> *See generally Doe v. Pulaski Cnty. Special Sch. Dist.*, 206 F.3d 616 (8th Cir. 2002).

<sup>100</sup> *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 765-66 (8th Cir. 2011).

<sup>101</sup> *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1288 (11th Cir. 2003).

A study done by the Pew Research Center found that “people who have experienced more severe forms of online harassment in the past are particularly likely to indicate that their most recent experience had a pronounced negative impact.”<sup>102</sup> Unlike physical harassment, online harassment can have long-term effects.<sup>103</sup> In a time when everyone from future employers to future romantic partners can potentially find personal information on others with a simple Google search, online harassment can cast a long shadow and can likely limit the accessibility of equal access and educational programs in schools.<sup>104</sup> In this study, “[t]hose who found their most recent experience with online harassment ‘extremely’ or ‘very’ upsetting were more likely than those who found it ‘a little’ or ‘not at all’ upsetting to say they have had an experience with online harassment that hurt their reputation.”<sup>105</sup> “A quarter, 26%, of those who found it extremely or very upsetting said their reputation has been hurt by online harassment, compared with just 10% of those who only found their harassment a little or not at all upsetting.”<sup>106</sup> Thus, while the element of severe and pervasive harassment initially seemed to be a challenge for victims of online sexual harassment to establish in a Title IX claim, it is likely that the psychological impacts from the harassment will fulfill this element.

## V. GUIDANCE FOR PREVENTING ONLINE SEXUAL

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<sup>102</sup> Maeve Duggan, *Part 4: The Aftermath of Online Harassment*, PEW RSRCH. CTR. (Oct. 22, 2014), <https://www.pewresearch.org/internet/2014/10/22/part-4-the-aftermath-of-online-harassment/>.

<sup>103</sup> *Id.*

<sup>104</sup> *See Generally* Duggan, *supra* note 102.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 36.

### HARASSMENT ACTION IN SCHOOL

Sexual harassment of any sort in the school environment, including online, causes students to have trouble studying, avoid school, and drop extracurricular activities.<sup>107</sup> In a survey completed by the AAUW, suggestions that students provided in order to prevent and reduce sexual harassment in public schools are analyzed.<sup>108</sup> These suggestions include creating ways for students to report problems anonymously, having punishments enforced for people who harass, appointing a faculty member as the contact for such issues, offering workshops at school on the topic, and offering information about sexual harassment.<sup>109</sup> The study further guides that school administrators can take the following actions to prevent and reduce sexual harassment:

“enforce Title IX of the Educational Amendments of 1972, address sexual harassment in the school’s official agenda, create and publicize a sexual-harassment policy that is sent to the students’ parents, provide clear guidelines on how staff should handle sexual harassment when it is reported, provide staff with the time and financial resources necessary to follow the guidelines, organize a school assembly on sexual harassment that has students involved in the planning and implementation, post or distribute information about sexual harassment, including what it is, what the school’s

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<sup>107</sup> HILL & KEARL, *supra* note 49, at 30–40.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 30–31.

policy is, and what students can do if they experience or witness it, invite students to create posters, use the ACLU's fact sheet titled "Gender-Based Violence and Harassment: Your School, Your Rights," designate a person to administer the school's sexual-harassment policy and receive complaints, let all students know who the person is, tell students what to do if they experience or witness any kind of sexual harassment, and give a training on sexual harassment for both staff and students."<sup>110</sup>

Educators can enforce simple methods that allow students to address and prevent any form of sexual harassment and challenge discriminatory comments, such as stereotyping and discriminatory jokes.<sup>111</sup> These methods can likely be paralleled to online sexual harassment in school as well, since the challenged comments apply to any platform.<sup>112</sup> Furthermore, teachers can create a code of conduct for their classroom that includes prohibiting sexual harassment, holding students accountable for adhering to that code, and incorporating sexual-harassment issues into the curriculum.<sup>113</sup>

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<sup>110</sup> HILL & KEARL, *supra* note 49, at 31 (citing BERNICE R. SANDLER & HARRIETT M. STONEHILL, STUDENT-TO-STUDENT SEXUAL HARASSMENT, K-12: STRATEGIES AND SOLUTIONS FOR EDUCATIONS TO USE IN THE CLASSROOM, SCHOOL, AND COMMUNITY (2005)).

<sup>111</sup> HILL & KEARL, *supra* note 49, at 32.

<sup>112</sup> *See generally id.* at 31 (citing BERNICE R. SANDLER & HARRIETT M. STONEHILL, STUDENT-TO-STUDENT SEXUAL HARASSMENT, K-12: STRATEGIES AND SOLUTIONS FOR EDUCATIONS TO USE IN THE CLASSROOM, SCHOOL, AND COMMUNITY (2005)).

<sup>113</sup> *Id.* at 32.

The AAUW study also advises educators to lead by example as well, as students noted that even when sexual harassment happens right in front of teachers, few teachers do anything about it.<sup>114</sup> “When educators ignore their personal and professional obligations as adults and as school authorities, they create a culture in which sexual harassment is acceptable and students feel that they cannot trust teachers to help them.”<sup>115</sup> There are different ways in which educators can respond when students report sexual harassment and when educators observe the sexual harassment.

Educators can do the following when students report the sexual harassment:

listen to the students carefully and respectfully, avoid voicing judgment or using victim-blaming language, answer questions fully, freely acknowledge when an answer is unknown, find the answer and share it with the students, advise students to record the incident in writing, including as much detail as possible about what happened and listing anyone who saw the incident, advise students about their rights and options, assist students as necessary if they choose to report the harasser to school officials, assist or check up on students as they take the next steps and remind them to report any future sexual harassment.<sup>116</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> HILL & KEARL, *supra* note 49, at 32.

On the other hand, when educators observe sexual harassment, they can respond in the following ways:

name the behavior, state that it must stop immediately, suggest an appropriate alternative to an offensive word or phrase and advise students to use it going forward, use the incident as a reason for talking to students about sexual harassment, what it is, and why it's not okay, follow the school policy for handling sexual harassers, send the person to the principal or guidance counselor, and notify the families of the students involved as necessary.<sup>117</sup>

Furthermore, teachers carry the opportunity to prevent sexual harassment at school by educating students about the issue and teaching them about respect and prevention as well. Teachers should educate students on what the effects of sexual harassment at school are, and what the punishments for harassers are, while trying to enforce that “being funny and acting stupid are not excuses for sexual harassment.”<sup>118</sup> Additionally, teachers can also educate the students on how to handle sexual harassment happening in the classroom, when they experience it or witness it.<sup>119</sup> This is beneficial, as the AAUW study showed that half the students who experienced sexual harassment ignored the harasser and the other half did nothing after the incident.<sup>120</sup> Thus, the study recommends that “providing students with assertiveness and self-defense training could empower and equip them to challenge the

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<sup>117</sup> *Id.* at 32–33.

<sup>118</sup> *Id.* at 33.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 33–34.



behavior of harassers and stand up for each other, as could informing them how and to whom to report harassers.”<sup>121</sup>

In addition to teachers, parents can also play a significant role in preventing sexual harassment in school and online. “Parents and other concerned adults should respond sensitively and appropriately when students tell them about a sexual-harassment incident.”<sup>122</sup> The AAUW study suggests the following ways for parents to handle such discussions: “listen to the students carefully and respectfully, avoid voicing judgment or using victim-blaming language, answer questions to the best of your ability, advise students to record the incident in writing, including as much detail as possible about what happened and listing anyone who saw the incident, advise students what their options are for next steps (look them up in the school’s policy manual or on the U.S. Department of Education’s website if you are unsure), assist students as necessary if they choose to report the harasser to school officials, and provide continual emotional support for students, no matter what course of action they choose to pursue.”<sup>123</sup> Furthermore, parents can help to prevent sexual harassment and help their children by helping to:

“foster feelings of empathy and respect for others in your children; talk to your children about what healthy friendships and dating relationships look like; explain what sexual harassment and sexual assault are; take an interest in your children’s day, their friends, and the activities they’re involved in at school;

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<sup>121</sup> *Id.* at 34.

<sup>122</sup> HILL & KEARL, *supra* note 49, at 35.

<sup>123</sup> *Id.* at 34.

encourage your children to know how to stand up for themselves and teach them assertiveness and self-defense; find out what your school's sexual-harassment policy is, and make sure your children understand it."<sup>124</sup>

Furthermore, the AAUW study shows that parents are in the best position to help their children deal with cyber-harassment because it usually occurs on devices such as phones or computers purchased by parents themselves.<sup>125</sup> The study further shows that During the 2010 - 2011 school year, "most students who faced sexual harassment experienced it in person, but 30 percent said they experienced it online (36 percent of girls and 24 percent of boys)."<sup>126</sup> Thus, parents can do the following things: "talk with their children about appropriate online etiquette and learn as much as they can about the technology their children are using, so that they can help when problems arise and make sure their children understand potential dangers."<sup>127</sup>

Furthermore, the AAUW study provides some recommendations for families that are concerned about cyber-bullying, and state the following suggestions:

"keep an open dialogue with children about their online activities, make sure children know that their computer or phone privileges won't be revoked if they tell you they are experiencing cyber-harassment, keep the computer in a busy area of the home so that it's easier to see

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<sup>124</sup> *Id.* at 35.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 35.

<sup>127</sup> *Id.* at 36.

what children are doing, set rules about which websites and online activities children can participate in, learn about your children's online friends, and create an action plan detailing what children should do if they become the target of sexual harassment by someone they know or by someone they do not know."<sup>128</sup>

Students themselves can also take action and help to bring change in terms of sexual harassment at their schools. Ignoring sexual harassment in school is very common, and that is a step that students can actively take in order to help administrators learn of sexual harassment that occurs at school.<sup>129</sup> Students help to prevent sexual harassment by stopping the cycle of harassment, and by not sexually harassing other students in retaliation for sexual harassment that they experience or witness.<sup>130</sup> Most of the harassers said that they had been sexually harassed themselves (92 percent of girls and 80 percent of boys).<sup>131</sup> Thus, more appropriate responses or avenues for students include seeking help, reporting harassers, or assertively standing up to harassers.<sup>132</sup>

The AAUW study states that:

“students can take action to prevent sexual harassment at school in many ways, including the following: find out

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<sup>128</sup> HILL & KEARL, *supra* note 49, at 36.

<sup>129</sup> *See generally* HILL & KEARL, *supra* note 49.

<sup>130</sup> *See generally id.*

<sup>131</sup> *Id.* at 36.

<sup>132</sup> *Id.*

what the school's sexual-harassment policy is and who the Title IX coordinator is, and share that information with friends and classmates, ... learn what rights students have and the definition of sexual harassment and post the information around school or online or both, create a 'respect for all' or 'stop sexual harassment' campaign by collecting students' stories and posting them on bulletin boards, on blogs, or in e-zones, survey classmates to find out where sexual harassment occurs and what students think could prevent it [and] take the findings to the principal or another staff person at school, ask parents to review the school's sexual-harassment policies and procedures [(]if these are not available or appropriate, to insist that they be rectified[)], request a workshop or school assembly on sexual harassment, or request class time to discuss sexual-harassment issues."<sup>133</sup>

In regard to online sexual harassment, students hold the power in dealing with how to handle the situation. They can simply report the activity to the advisors in charge at school and choose to not engage in the harassment or give the posts any online attention. This takes away the harasser's ability to continue to hurt the online victim.

The AAUW study provides guidance for students on how to respond to the harasser as well, in order to prevent the situation from getting more out of hand. The study suggests the following ways that students can handle the situation in school: firmly tell the person to stop

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<sup>133</sup> *Id.* at 36–37.

and point out exactly what behavior needs to stop; tell the harassers that they have crossed the line; seek for advice or help from a trusted person to stop the sexual harassment and provide emotional support; report the sexual harassment (especially if it involves touching or repeated comments) to a trustworthy teacher, a guidance counselor, or the Title IX coordinator at the school; do not respond to any of the harassing or threatening text messages, e-mails, or social media messages, and instead, save the messages and show them to a trusted adult.<sup>134</sup>

Overall, the AAUW provides many great ways for everybody involved to tackle sexual harassment. The main takeaways from the study provide that: “schools without a sexual-harassment policy must create one... all schools should make sure that the policy is publicized and enforced... and schools should notify parents of the policy and give them advice on how to discuss the implications of the policy with their children.”<sup>135</sup> Schools must ensure that students are aware of and educated about what sexual harassment is, what their rights are under Title IX, and how to respond if they experience or witness sexual harassment, since most students do nothing when they experience or witness sexual harassment, in large part because they do not know what to do or do not think doing anything will help.<sup>136</sup> Schools must train their staff and faculty to recognize and respond to sexual harassment, to know how to help students who come to them, and to know their obligations if they witness sexual harassment.<sup>137</sup> Most harassed students do not turn to anyone for help, especially not to their teachers,

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<sup>134</sup> *Id.* at 37–38.

<sup>135</sup> HILL & KEARL, *supra* note 49, at 39.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

counselors, or other school staff.<sup>138</sup> There are some students who did not ask for help, because those educators were unhelpful.<sup>139</sup> Thus, schools have the responsibility to work to create a culture of respect and gender equality, as girls are sexually harassed more than boys are, especially in upper grade levels.<sup>140</sup> Girls are a victim to more forms of physical harassment, and sexual harassment has a greater negative impact on them.<sup>141</sup> Therefore, it is important for girls to be taught how to respond assertively to sexual harassment and where they can find help.

Furthermore, schools must teach all students that sexual harassment is not funny. While both girls and boys can be harassers, boys are most often the harassers of both girls and boys, and many male harassers claimed they were just being funny.<sup>142</sup> “Schools must create a culture of acceptance and tolerance for all, without regard to gender presentation or sexual orientation, and must reinforce that culture by the attitudes, words, and actions of school officials, faculty, and staff.”<sup>143</sup> The sexual harassment incidence rates remain high, based on a student’s actual or perceived sexual orientation or gender expression.<sup>144</sup> It is important for schools to understand and address that the intersections of race, class, gender, and sexual orientation can cause some students to feel worse than others when they experience sexual harassment.<sup>145</sup> Thus, the schools should offer targeted help for these more vulnerable

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 39.

<sup>140</sup> *Id.* at 39 – 40.

<sup>141</sup> HILL & KEARL, *supra* note 49, at 40.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

groups.<sup>146</sup> There are student surveys that show how nonwhite racial-ethnic groups and those from families of lower socioeconomic status reported more negative effects from sexual harassment than did students in other groups.<sup>147</sup>

Most importantly, schools must teach students about cyber-harassment, what their rights are, and how to respond to or report instances.<sup>148</sup> Students who face sexual harassment both online and in person are much more negatively affected than students who face sexual harassment only online or only in person.<sup>149</sup> Thus, through these efforts, all individuals concerned with creating a harassment-free school climate can collaboratively achieve a more equitable learning environment for all students.

#### **A. Guidelines on How to Prevent and Respond to Online Sexual Harassment**

In a study conducted by Childnet International, schools are given advice on how to understand, prevent, and respond to online sexual harassment in general.<sup>150</sup> The advice and recommendations from this study are extremely beneficial in dealing with online sexual harassment, as there is a very small amount of case law that deals with decisions on

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<sup>146</sup> *Id.*

<sup>147</sup> HILL & KEARL, *supra* note 49, at 40.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> CHILDNET INT'L, ONLINE SEXUAL HARASSMENT: UNDERSTAND, PREVENT AND RESPOND 3 (2019), [https://www.childnet.com/ufiles/Guidance\\_for\\_Schools\\_Online\\_Sexual\\_Harassment.pdf](https://www.childnet.com/ufiles/Guidance_for_Schools_Online_Sexual_Harassment.pdf).

such matters. Overall, these methods provide helpful guidance for all adults on how to deal with online sexual harassment.

### Understanding Online Sexual Harassment

In order to help address online sexual harassment, it is important to understand the world of social media that young people from the ages of thirteen to seventeen years old use, as they are at risk of being exposed to unhealthy and upsetting online behavior from their peers, who use technology that has the potential to carry out harmful actions that include peer-to-peer online sexual harassment.<sup>151</sup> The study provides the following checklist to determine if school officials are able to understand online sexual harassment:

are school staff aware of the different forms where online sexual harassment can take place and the specific characteristics of online sexual harassment; does the school share a clear understanding of what online sexual harassment is and why it is not acceptable; are school staff aware that online sexual harassment can overlap with offline sexual harassment and other harmful sexual behaviors; does the school share a clear understanding of agreed terminology and how it should be used; does the school effectively address the range of issues relating to bias and prejudice; are school staff aware of the range of issues that may contribute to students displaying harmful sexual behavior online; and is the school familiar with the key laws and statutory guidance

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<sup>151</sup> *Id.*



which relate to online sexual harassment.<sup>152</sup>

It is important to acknowledge that in order for adults and school officials to be able to prevent and respond to online sexual harassment, they must be able to understand it.

The most common online platforms that are currently being used in this age group are classified as social networking services, communications and messaging services, and entertainment and gaming services. These categories include: social networking services such as Instagram, Snapchat, Facebook, Twitter, TikTok; communication and messaging services such as WhatsApp, Kik, iMessage, Facebook Messenger, Skype, Google Hangouts, Facetime; and entertainment and gaming services such as YouTube, Xbox Live, PlayStation Network.<sup>153</sup> In addition to the unwanted sexual behavior that occurs on these platforms, it is important to understand that factors such as gender, vulnerabilities, offline behavior, and the prevalence of such conduct can also affect the level of the online sexual harassment.<sup>154</sup>

The study provides common examples of the variety of ways in which online sexual harassment occurs. These examples include the following situations:

an anonymous account may be set up to collect and share sexual gossip and rumors in order to shame classmates or peers; after a relationship breaks down a young person may find an image they shared with an ex-boyfriend or ex-

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<sup>152</sup> *Id.* at 4.

<sup>153</sup> *Id.* at 6.

<sup>154</sup> *Id.*

girlfriend appearing online with their full name and the school they go to attached, as a way for their ex- partner to humiliate or shame them; a young person may fall out with a close friend and find a social media profile set up in their name that ‘outs’ them as gay, lesbian or bisexual; a young person may post a photo of themselves online and receive sexualized comments about their body and sexually explicit comments based on sexual acts or behaviors; a young person may feel more comfortable talking about their feelings with a stranger online only to find out it was a classmate and as a result their personal life is being shared and discussed online; or a nude image may be shared online attached with someone’s name, implying that the image is of them, however the image is taken from a random search online.<sup>155</sup>

The most common reasons that young people engage in online sexual harassment include the following: “acting in order to joke around, hurt somebody, retaliate because somebody else started it first, to get back at their own ex, or to get respect from their friends.”<sup>156</sup> Thus, it is important to analyze these factors in any situation that involves online sexual harassment between students.

### Preventing Online Sexual Harassment

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<sup>155</sup> *Id.*

<sup>156</sup> CHILDNET INT’L, *supra* note 150, at 11.

It is important for the whole school to be educated and involved in preventing online sexual harassment. Thus, the meaning of effectively addressing online sexual harassment includes that the school makes sure that everyone within the school community understands that such actions are not acceptable, considers the impact on young people and their relationships, and knows how to identify it and takes action to prevent it.<sup>157</sup> The school should create a culture of support and respect, where everybody in the school community is confident that “online sexual harassment can and will be challenged.”<sup>158</sup>

The study provides a checklist that schools can follow, in order to help prevent online sexual harassment.<sup>159</sup> The checklist includes the following:

“does the school ensure it is taking a whole school approach and embedding online safety and healthy relationships messages across the curriculum and community; are the senior leadership teams confident and up-to-date in their knowledge of understanding, preventing and responding to incidents of online sexual harassment, does the school support all staff in their duty to understand, prevent and respond to online sexual harassment through policy, procedures, and regular training and development opportunities, do pupils and staff understand the essentials of keeping themselves safe online – including

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<sup>157</sup> *Id.* at 14.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 21.

privacy settings, reporting, and getting material taken down; does the school ensure the whole school community is involved in prevention work, including the creation of related policies; do all members of staff understand how to report any incident of online abuse they become aware of; are students made aware of the different reporting routes available to them; are students aware of what happens after they make a report and how they would be supported; are parents made aware of the different reporting routes available to them; are parents aware of what happens after they/their child make a report and how they would be supported; do staff have an understanding of how young people in the school community use technology; is the school familiar with the devices, sites and apps the community use; does the school promote the positive use of technology; are there consequences for sexual harassment, including online, in your school; and is the whole school community clear about sanctions; are staff and students aware of the ways in which the school provides support for people who are sexually harassed online; and is the school monitoring and measuring the impact of its prevention work.<sup>160</sup>

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<sup>160</sup> *Id.*

The study recommends that students and staff should both be informed about the school's sexual harassment policy and be able to ask questions regarding it.<sup>161</sup> In order to provide a firm foundation for prevention, it is important to develop and agree on a "shared understanding of what respect, consent, and healthy relationships look like offline and online," and to provide support of a "school-wide discussion around how these issues connect with online sexual harassment."<sup>162</sup> It is beneficial for these discussions to have the purpose and approach of long-term goals in mind, such as aiming to "ensure that everyone in school can identify unacceptable online behavior, that all students feel confident enough in the school system to report it, and that all staff are confident in knowing how to respond to it."<sup>163</sup>

It is very important that parents are also educated on how to understand, prevent, and respond to the cases of online sexual harassment.<sup>164</sup> Students that did not seek help from the school when dealing with online sexual harassment give the following reasons for not doing so: they were too embarrassed, they did not want their parents to restrict them from using the internet, they did not want to be blamed, they feared about what would happen next, or they were worried that they would be targeted by the people involved in it.<sup>165</sup>

It is important for schools to ensure that they have reporting procedures in place, and that are known to all members of the school community.<sup>166</sup> Furthermore, the school should make sure that all

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<sup>161</sup> *Id.*

<sup>162</sup> CHILDNET INT'L, *supra* note 150, at 17.

<sup>163</sup> *Id.*

<sup>164</sup> *See* CHILDNET INT'L, *supra* note 150.

<sup>165</sup> *Id.* at 19.

<sup>166</sup> *Id.*

members of the educational community understand that asking for help is not failing or a weakness, but instead, that it is a strength that shows courage and good judgement.<sup>167</sup> The study advises that schools can take the following actions, in order to make reporting online sexual harassment easier for students:

publicize reporting routes to all members of the school community and share contact hours of appropriate staff members to contact; ensure students understand how a report would be treated and escalated if needed ... anonymous reporting routes can be a helpful option, but it is important that all members of the school community understand they are not a replacement for robust and effective safeguarding procedures ... consider having email addresses set up for reporting; ensure any anonymous reporting mechanism is set up with careful consideration to how it will be managed [...] clarify the reporting process to all members of the school community, ensure that the reporting is as transparent and clear as possible ... [since that] can help students feel more confident to disclose a concern; ensure there is a culture within your school that denounces victim-blaming or slut-shaming as a priority; [and] ensure bystanders feel empowered and able to

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<sup>167</sup> *Id.*

report without fear of consequences from their peers.<sup>168</sup>

Furthermore, schools are in the place to be able to promote the positive use of technology to students.<sup>169</sup> The study provides the following guidelines on how a school can do this:

invite students to deliver workshops or assemblies to the school community about the latest online trends and popular online platforms, invite students to share their online role models and where they go for information and inspiration online, use technology within the classroom and teach how to use it positively and safely, for example, students can research information, be creative and keep up to date with school news all through using the internet, consult with students on the creation and wording of school policies, or set up a peer-to-peer support program, or use existing groups such as the student council to focus on online sexual harassment to raise awareness and engage learners.<sup>170</sup>

Additionally, the school can take the following steps to ensure students that support is readily available:

ensure all students know who, when and where they can go to in school for support with a

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 20.

<sup>170</sup> CHILDNET INT'L, *supra* note 150, at 20.

concern around online sexual harassment, display posters around school and add a section on your school intranet or website promoting other organizations that offer support and guidance to students that can offer them alternative routes to seek advice and report, consider training from external partners with specific expertise, or share the preventative resources, practices and ideas with safeguarding leads from other schools and local authorities.<sup>171</sup>

Overall, the school administration and parents can take action in order to help students and children feel comfortable and aware that they will not be punished when they seek help for online sexual harassment, as that will allow them to report it and allow the prevention of such harassment to happen at school.<sup>172</sup>

### *Responding to Online Sexual Harassment*

The school should respond to incidents of online sexual harassment in a way that prevents further harmful behavior. The most effective responses enforce a positive and supportive school culture, while they work to minimize any lasting negative impacts for those involved.<sup>173</sup> The study explains that the reasons students do not tell their teachers about incidents of online sexual harassment include: “they were worried that the school would overreact, the were worried that the school would make it worse, they did not know which teacher to speak to, they did not think that they would be taken seriously, and that they thought the teachers were too busy to discuss it.”<sup>174</sup> Thus, the study

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 22.

<sup>174</sup> *Id.*



provides a checklist of suggestions that schools should consider when responding to incidents of online sexual harassment:

are staff familiar with the school's processes for responding to online sexual harassment; if there is a need to refer to school policies, can they access these easily and quickly; is the whole school community aware of how the school supports students who are victims of abuse out of school hours, and during the school holidays; are staff aware of current attitudes and barriers to reporting amongst students, and are they making efforts to improve these; are students who have been harassed being appropriately involved in the decision making and resolution process; are appropriate staff trained in carrying out a risk assessment to determine if the incident may be illegal; does the staff know what to do if they suspect online sexual harassment activity breaks the law; does the staff know how to escalate reports to appropriate senior staff members using school procedure; does the school consult with any other agencies to support their response; is one staff member acting as the point of contact if other agencies are involved; is there a clear plan on how to effectively facilitate multi-agency collaboration; are staff familiar with the school's processes in relation to searching students, confiscating devices and deleting materials; if they need to refer to school policies, can they access

these easily and quickly; are parents and carers being kept informed and involved in the resolution of any online sexual harassment incidents; and are students who have carried out online sexual harassment being supported to change their behavior?<sup>175</sup>

Furthermore, the study provides schools with beneficial tips on how to immediately respond to the reports of online sexual harassment. These tips include the following:

consider how the disclosure was made; acknowledge the barriers the young person has overcome to make a disclosure; take their report seriously and reassure them they have done the right thing; carefully consider the language used to support the victim and take a non-judgmental approach; avoid victim-blaming; remain calm and non-judgmental throughout the disclosure; involve the young person in decision making; explain who else may need to be informed about the disclosure, but also explain who will not need to be told; acknowledge what safeguarding support does the alleged perpetrator require; do any other young people need supporting; and do other schools or organizations need to be contacted.<sup>176</sup>

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<sup>175</sup> *Id.* at 28.

<sup>176</sup> CHILDNET INT'L, *supra* note 150, at 23.

The school plays an important role as the bridge between students and parents, when dealing with online sexual harassment cases. However, it is inevitable that parents may be upset with the incident that their child has experienced, “or possibly blame them for being involved, and it is important to prioritize safeguarding the victim and find ways to work with parents and careers to create an effective and supportive plan for the victim.”<sup>177</sup> Thus, the study provides schools with tips on how to deal with parents in such situations:

meet with parents to ensure they are aware of the incident and all aggravating factors, unless there are other factors to suggest informing them puts the student at risk of further harm, ask the student if they want to be involved in this process; consider if the victim is reluctant to tell their parents and why; give parents the details of what the school has done so far to support the victim, and provide clear information regarding the school’s safeguarding procedure; ask parents what they feel the school can do to best support their child and make suggestions on how they can best support their child at home; analyze whether the parents blame their child for the incident and if they do, then help them in understanding that the best way to help their child is not to focus on who is at fault, but to offer emotional support and a safe space to talk about their feelings; decide with parents how often they would like to be contacted by

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<sup>177</sup> *Id.* at 27.

the school with updates in the reporting process; if other agencies need to be involved, and if the police need to be informed, decide together how much support parents want from the school in this process.<sup>178</sup>

With these considerations in mind, upon finding the individual responsible for the harassment, the school should apply appropriate behavior sanctions that follow its policy.<sup>179</sup> Overall, the most important actions that schools can take in order to avoid Title IX liability for online sexual harassment, is to make sure that the institution is not deliberately indifferent to acts of known sexual harassment.<sup>180</sup>

## VI. CONCLUSION

In regard to online sexual harassment and Title IX liability, the most important step for parents and students to be aware of, is knowing their rights regarding Title IX and the resources that the school provides. The most common process for Title IX cases in schools and universities include the same few steps. First, there is an initial review of the situation.<sup>181</sup> Once the Title IX complaint is made and the sexual assault or sexual harassment is reported, the Title IX Coordinator, administrator, or school employee who is assigned and trained to handle Title IX investigations, should reach out to conduct an initial interview with the victim of sexual assault or harassment for

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *Know Your Rights at School: Sexual Assault & Sexual Harassment*, EQUAL RTS. ADVOCS., <https://www.equalrights.org/issue/equality-in-schools-universities/sexual-harassment/> (last visited Mar. 3, 2020).

information.<sup>182</sup> At this point, a school official or the Title IX Coordinator should provide you with information about the investigation process, your rights, your options to request interim measures to help you feel safe and supported at school, and your right to have an advisor of your choice assist you.<sup>183</sup>

Next, you may have an investigator assigned to your case and the other party (the person who harmed or harassed you or someone else) will be notified and interviewed, so that the investigator can then interview any witnesses and receive any evidence provided.<sup>184</sup> Then, the investigator might follow up with you if more questions come up during their investigation.<sup>185</sup> After the investigations, either the investigator or a school official will determine whether or not the violation took place.<sup>186</sup> This determination is based on a “preponderance of the evidence,” which means that it is more likely true than not true that it occurred.<sup>187</sup> If the school uses this standard and finds that the sexual assault or harassment occurred, it may recommend a sanction.<sup>188</sup> Finally, there is a process to appeal, which differs by state.<sup>189</sup> If you do not like the outcome of the investigation, you should

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Know Your Rights at School: Sexual Assault & Sexual Harassment, supra* note 181.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

see if your school district has an appeal process, or you could appeal to a state entity, such as your state's Department of Education.<sup>190</sup>

It is important that schools provide students and parents with the knowledge of what online sexual harassment is, how to prevent it, how to handle it, how to report it, and what resources are available. As this note analyzed, Title IX liability for schools is likely to be the same for online sexual harassment cases as it is for those that do not occur offline. In conclusion, the crucial factor for schools to prevent such harassment, is spreading knowledge and awareness to students regarding their resources, in every way possible.

### **A. Online Sexual Harassment During COVID-19 and Remote Learning**

Due to COVID-19 and remote learning through the course of the pandemic, it is crucial to remember that online sexual harassment amongst students exists at an even greater capacity. While courts have never before decided Title IX cases based solely on online sexual harassment, the nature of remote learning and online schooling will likely change this significantly. The U.S. Department of Education published new regulations on Title IX claims during the pandemic, and these require universities to permit live hearings and cross-examination of witnesses during sexual misconduct hearings.<sup>191</sup> This is likely to prevent victims from coming forth, especially in cases of online sexual harassment. While this is only applied to universities, such a change in Title IX policies will affect victims in every capacity. Thus, now more

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<sup>190</sup> *Id.*

<sup>191</sup> Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), <https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations>.

than ever, it is crucial that schools and universities provide knowledge of the resources to help victims available to students.

In an interview through Boston University Today, it becomes apparent that there has been a dramatic increase in the number of sexual harassments claims during COVID-19, due to the inability to meet with students in person.<sup>192</sup> It is important for schools and universities to have remote work plans for their Title IX offices, remote reporting facilities that are promoted to the students, and preventative measures put in place.<sup>193</sup> While these are necessary measures to allow students to report online sexual harassment during the remote learning experience in the pandemic, they are also necessary for future reports and claims. Just as it is easier for perpetrators to sexually harass their peers online and behind a screen, it may prove to be easier for victims to come forward and tell their truth online and behind a screen as well. Thus, schools should equip themselves to be able to provide Title IX support to students in any learning situation that comes their way.

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<sup>192</sup> Rich Barlow, *Pandemic Has Led to a Dramatic Increase in Students Seeking Help Says BU's New Sexual Assault Response & Prevention Center Director*, BU TODAY (Sep. 8, 2020), <http://www.bu.edu/articles/2020/pandemic-has-led-to-a-dramatic-increase-in-students-seeking-help-says-bus-new-sexual-assault-response-prevention-center-director/>.

<sup>193</sup> Guidance for Title IX Administrators During COVID-19, EQUAL RTS. ADVOCS., <https://www.equalrights.org/issue/equality-in-schools-universities/covid19-guidance-title-ix-administrators/> (last visited Mar. 3, 2020).