ME AND JULIO DOWN BY THE SCHOOLYARD:[1] AN ANALYSIS OF SCHOOL LIABILITY FOR DISCRIMINATORY PEER SEXUAL HARASSMENT UNDER VERMONT LAW

"Children's talent to endure stems from their ignorance of alternatives."[2]

INTRODUCTION

Discriminatory peer-to-peer sexual harassment remains a pervasive problem in this country's educational system. Peer sexual harassment occurs between students, may include verbal or physical abuse, and is considered discriminatory when the harassment occurs because of the victim's gender. Such harassment often has significant detrimental impacts upon the victim's well-being, and his or her performance in the classroom may suffer as a result of the abuse. This form of harassment is particularly concerning because of the implications that it may have on a student's academic performance and, especially in the case of young students, victims may not understand how to remedy instances of harassment.

In Vermont, victims of peer sexual harassment have a potential cause of action against school districts that fail to reasonably address the harassment under federal law through Title IX. Additionally, Vermont's Public Accommodations Act creates a private right of action for students who are the victims of peer sexual harassment, and the state's harassment statute creates administrative means of enforcement in schools. However, despite the layers of protection given to students in Vermont, victims of peer sexual harassment struggle to recover against schools that fail to address known incidents of harassment.

This Note will address the limitations of the current legal remedies available to victims of peer sexual harassment against schools in Vermont and will analyze those limitations in light of the statutory schemes in place in other states as well as relevant legislative and social-policy considerations. In particular, this Note argues that Vermont's current requirement that a victim exhaust his or her administrative remedies prior to the availability of a private right of action seriously limits the availability of redress for victims. Additionally, this Note will propose changes to Vermont's harassment statute which would reduce the burden placed upon the victims of peer sexual harassment by replacing the current exhaustion requirement with a modified constructive notice standard for school liability. Because "[education] is the very foundation of good citizenship,"[3]

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1. PAUL SIMON, *Me and Julio Down by the Schoolyard*, *on* PAUL SIMON (Columbia Records 1972).
2. MAYA ANGELOU, I KNOW WHY THE CAGED BIRD SINGS 111 (Random House, Inc. 1969).
3. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

Vermont should take a critical look at its available protections for schoolchildren against peer sexual harassment and, consequently, strengthen those protections.

I. WHY VERMONT NEEDS TO PROTECT STUDENTS FROM SEXUAL HARASSMENT AT SCHOOL

A. Sexual Harassment in Schools

Sexual harassment in schools is an alarmingly common occurrence and a regrettable reality for many schoolchildren.[4] Newspaper headlines are littered with disturbing incidents of sexual harassment and violence occurring in our nation's schools.[5] Recent studies indicate that the problem is widespread and suggest that a significant number of children are subjected to in-school sexual harassment.[6] Sexual harassment also appears

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4. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL (Jodi Lipson ed., 2001) [hereinafter AAUW, Hostile Hallways]; Nan Stein, *A Rising Pandemic of Sexual Violence in Elementary and Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. & POL'Y 33, 37 (2005) [hereinafter *Rising Pandemic*] ("Sexual harassment [in schools] is now accepted as an unfortunate fact of life."); CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (Susan K. Dyer, ed., 2005) (noting that sexual harassment is a common part of campus life in higher education).

5. *See, e.g.*, Richard Gonzales, *Rape at Schools Brings New Despair to Richmond*, NPR NEWS, Dec. 1, 2009, http://www.npr.org/templates/story/story.php?storyId=120967567 (discussing the aftermath of a gang rape that occurred on school grounds that was witnessed by at least 20 bystanders who failed to intervene); Matt Zapotosky, *High School Senior Charged With Rape*, WASH. POST, Feb. 6, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/05/AR2009020503492.html (detailing incident in which a high school senior raped a 16-year-old schoolmate in an empty classroom); Elizabeth Williamson & Lori Aratani, *As School Bus Sexual Assaults Rise, Danger Often Overlooked*, WASH. POST, June 14, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301642.html (discussing incidents of sexual harassment on school buses and noting that peer harassment commonly occurs in unsupervised locations such as buses).

6. *See, e.g.*, AAUW, Hostile Hallways, *supra* note 4, at 4 (finding that 81% of survey respondents experience some form of sexual harassment and 58% of respondents experience physical sexual harassment during their time in school); Tara Parker-Pope, *Sexual Harassment at School*, N.Y. TIMES WELL BLOG, May 1, 2008, http://well.blogs.nytimes.com/2008/05/01/sexual-harassment-at-school/ (describing a recent study in which 35% of respondents between the ages of 11 and 18 reported that they had been victim to sexual harassment); BONNIE FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000) (estimating that between one-fifth to one-quarter of college women will be victim to a completed or attempted rape). In Vermont, studies show that one out of ten students between grades 8–12 reported having been touched sexually or being forced to touch someone else sexually, and 21% of girls in grades 6–12 reported having been sexually harassed. A SNAPSHOT OF SEXUAL VIOLENCE PREVENTION IN VERMONT: PROGRAMS OFFERED BY K-12 SCHOOLS AND COMMUNITY-BASED AGENCIES 3 (The Vt. Approach Sexual Violence Task Force, 2008).

to be endemic in university settings, where incidents often include physical harassment such as sexual assault.[7]

The consequences of sexual harassment can be severe. Victims can suffer both emotional and physical problems as the result of harassment.[8] In the educational context, these consequences are especially concerning because they can "have far reaching implications and can seriously affect students' educations and futures."[9] The impact of harassment upon students varies and is usually dependent upon the severity of the harassment.[10] Victims of physical harassment may have a stronger negative reaction to harassment than those of non-physical harassment.[11] Victims of peer harassment may find it hard to pay attention in school, skip classes, talk less in class, take time off from school, transfer schools, or drop out altogether.[12] As a result, a victim's performance in school may suffer.[13] While declining performance certainly is problematic in the short-term, what is more concerning is that a victim's long-term educational and career goals may be negatively impacted as the result of peer harassment.[14] Given the

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7. HILL & SILVA, *supra* note 4, at 14 (discussing a study in which 62% of the respondents indicated that they had been sexually harassed in college and 5% reported having been forced to do something sexual other than kissing); Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary through the Ordinary*, 35 J.C. & U.L. 613, 616–17 (2009) (noting estimates that 20–25% of college women are victims of rape while in school and that college-aged women are "particularly vulnerable to sexual violence"). *See also* Ken Picard, *What Rape?*, SEVEN DAYS, Mar. 31, 2010, *available at* http://7dvt.com/2010college-sexual-violence-rape (discussing statistics of incidents of sexual assault in Vermont higher educational institutions and suggesting that actual numbers of assaults are likely far higher than reflected in reports by schools to the government).

8. Dara A. Charney & Ruth C. Russell, *An Overview of Sexual Harassment*, 151 AM. J. PSYCHIATRY 10, 13 (1994) (describing the effects of sexual harassment to include emotional distress, such as fear, depression, and anxiety, as well as physical symptoms like decreased appetite and loss of sleep); Andrea Giampetro-Meyer et al., *Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN'S L.J. 301, 305 (1997) (listing the physical, psychological, and social problems that may develop as the result of being the victim of sexual harassment).

9. Giampetro-Meyer et al., *supra* note 8, at 305.

10. Charney & Russell, *supra* note 8, at 13.

11. AAUW, Hostile Hallways, *supra* note 4, at 4.

12. *Id.*; Giampetro-Meyer et al., *supra* note 8, at 305; Susan Hanley Kosse & Richard H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53, 55 (2005). Some victims can suffer even more extreme consequences, such as the tragic Massachusetts case of Phoebe Prince, a teenager who hung herself after being taunted relentlessly about her perceived sexual promiscuity. Erik Eckholm and Katie Zezima, *Questions for School on Bullying and a Suicide*, N.Y. TIMES, Apr. 2, 2010, at A1.

13. *See generally*, Adrienne Nishina et al., *Sticks and Stones May Break My Bones, But Names Will Make Me Feel Sick: The Psychosocial, Somatic, and Scholastic Consequences of Peer Harassment*, 34 J. CLINICAL CHILD ADOLESCENT PSYCHOL. 37 (2005) (discussing a study finding that peer harassment may result in both emotional and physical consequences for victims and can have a negative influence on academic performance).

14. *See* Charney & Russell, *supra* note 8, at 13 (discussing the long-term impacts of sexual

considerable harmful impacts of peer sexual harassment, it is clearly a problem that needs to be addressed.

Despite the pervasiveness of in-school sexual harassment, "it is often largely dismissed as normal student behavior . . . ."[15] Part of the reason for institutional dismissal of sexual harassment may stem from an attitude that "boys will be boys," or that schoolchildren will inevitably tease each other.[16] Indeed, as schools and legislatures have recently focused on preventing *bullying* in schools, sexual harassment has been subsumed into the bullying discourse.[17] As a result, incidents of sexual harassment may be treated by schools as bullying. This trend is detrimental because attention is focused on punishing the bully rather than addressing sexual harassment more broadly in the school.[18] It is important, however, to recognize that sexual harassment and bullying are distinct concepts.

Sexual harassment is "conduct (speech and actions) intended to disparage someone based on their . . . gender . . . ."[19] The Federal Office for Civil Rights defines sexual harassment as conduct that is sexual in nature; is

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harassment in schools and noting that a victim's educational and career opportunities may be inhibited due to harassment in school); ROBERT R. SHOOP & DEBRA L. EDWARDS, HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS: A HANDBOOK AND CURRICULUM GUIDE FOR ADMINISTRATORS AND TEACHERS 57 (1994) (discussing the impacts of peer sexual harassment upon a victim's education and career and noting that female victims may have a weakened sense of self-worth and difficulty working with men).

15. Parker-Pope, *supra* note 6.

16. Bernice Resnick Sandler, *Student-to-Student Sexual Harassment*, *in* SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 50, 50 (Bernice Sandler & Robert Shoop eds., 1997).

17. *See generally*, *Rising Pandemic*, *supra* note 4, at 43–46 (discussing the recent trend of a discourse centered on bullying and noting that a focus on bullying, rather than sexual harassment, serves to degender the issue and may undermine the protections offered by anti-harassment laws).

18. Parker-Pope, *supra* note 6 ("Title IX protects everybody in school against [sexual harassment], but as soon as you call something 'bullying,' then it's just viewed as ill behavior that one student does to another student.") (quotations omitted); *Rising Pandemic*, *supra* note 4, at 51 ("[A]nti-bullying laws take attention away from a larger discourse of collective civil rights by focusing on individual peoples' feelings . . . . The ideology of these anti-bullying laws punishes and excludes the bully; no one is reformed, only demonized."); Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783, 789 (2003) [hereinafter *The Missing Discourse*] ("[S]ometimes egregious behaviors are framed by school personnel as bullying, when in fact they may constitute illegal sexual or gender harassment . . . . [Today,] naming the illegal behaviors as 'bullying' serves to deflect the school's legal responsibility for the creation of a safe and equitable learning environment onto an individual or group of individuals as the culprit(s) liable for the illegal conduct."); Leah Christensen, *Sticks Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 NEV. L.J. 545, 551 (2009) (discussing the need to adopt "whole-school approach[es] towards conflict resolution" instead of focusing on "what school administrators knew about specific incidents" of bullying).

19. American Civil Liberties Union of Vermont, *Students Rights—Equal Protection and Discrimination*, ACLUVT.ORG, http://www.acluvt.org/pubs/students_rights/equal_protection.php (last visited Nov. 10, 2009).

unwelcome; and denies or limits a student's ability to participate in or benefit from a school's educational program.[20] Sexual harassment may be verbal or physical conduct,[21] including "unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical conduct of a sexual nature . . . ."[22] Some examples of sexual harassment common in the school setting include sexual innuendos, inappropriate touching or grabbing, displaying sexually explicit materials, circulating explicit material electronically, and sexual assault and rape.[23] Sexual harassment can be "a single serious incident or a series of incidents."[24] A single incident, such as rape, *may* be sufficient to establish a hostile environment for purposes of school liability.[25]

In contrast, "[b]ullying is conduct meant to hurt or humiliate any student in any way."[26] Sexual harassment should be distinguished from bullying because of the element of sexuality present in sexual harassment that may be absent from bullying.[27] For purposes of this Note, peer sexual harassment means sexual harassment that is perpetrated by one student against another student.

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20. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF ED., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 1, 3 (2008), http://www2.ed.gov/about/offices/list/ocr/docs/orshpam.pdf.

21. *Id.*

22. Giampetro-Meyer et al., *supra* note 8, at 302.

23. *Id.* at 303–04; Sandler, *supra* note 16, at 52–53.

24. Sandler, *supra* note 16, at 53.

25. OFFICE FOR CIVIL RIGHTS, *supra* note 20, at 7 (noting that the "[harassing] conduct does not necessarily have to be repetitive" and providing an example of a single incident of sexual assault which would be sufficiently severe to create a hostile environment). A hostile environment is one that is "so hostile or offensive that it interferes with a student's ability to learn, his or her living conditions, and the ability to partake in any and all of the opportunities offered by the institution." Sandler, *supra* note 16, at 51.

26. American Civil Liberties Union of Vermont, *supra* note 19. *See also* Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 148 (2009) (defining bullying as "aggressive acts made with harmful intent, repeatedly inflicted by one or more students against another" and noting that "[a]cts may be physical, verbal, indirect (such as social exclusion), or electronic"); Kosse & Wright, *supra* note 12, at 54 (noting that bullying is when a "child or group of children repeatedly picks on another child") (internal citations omitted).

27. *But see* Kosse & Wright, *supra* note 12, at 55 (defining peer sexual harassment as "one form of bullying," but noting that peer sexual harassment is "much more explicit and concerning" than other types of bullying); Sacks & Salem, *supra* note 26, at 148–49 (defining bullying as a term used "interchangeably" with peer harassment).

B. Why Federal Law is Inadequate to Protect Schoolchildren from Discriminatory Peer Harassment

It is important for Vermont and other states to develop and implement strong protections for students against peer sexual harassment because federal law in this area imposes a "high hurdle for students to overcome" when making a claim against a school for in-school peer sexual harassment.[28] Title IX provides: "[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 . . . ."[29] The underlying purpose of Title IX was to "help women gain access to the same educational opportunities as their male counterparts."[30]

The Supreme Court determined in *Davis v. Monroe County Board of Education*, that Title IX applies to instances of in-school peer sexual harassment.[31] In *Davis*, the Court held that schools may be held liable for peer sexual harassment, but only where a school had actual notice of the harassment and acts with "deliberate indifference" such that its response is "clearly unreasonable in light of the known circumstances."[32] Further, a plaintiff alleging a violation of Title IX against a school must show that he or she was subject to harassment "so severe, pervasive, and objectively offensive that it effectively bars [his or her] access to an educational opportunity or benefit."[33]

Thus, federal law offers some protections for students against peer harassment, but the safeguards are insufficient to offer meaningful protection for students subjected to sexual harassment because many instances of harassment will fall outside the scope of Title IX.[34] Additionally, Title IX does not require schools to adopt written policies

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28. Gigi Rollini, Note, Davis v. Monroe County Board of Education: *A Hollow Victory for Student Victims of Peer Harassment*, 30 FLA. ST. U. L. REV. 987, 1015 (2003).

29. 20 U.S.C. § 1681(a) (2006).

30. Kosse & Wright, *supra* note 12, at 57 (citing Kelly Titus, *Students, Beware:* Gebser v. Lago Vista Independent School District, 60 LA. L. REV. 321, 327 (1999)); *see generally*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (discussing the purpose of Title IX to eliminate the effects of discrimination).

31. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

32. *Id.* at 633, 648.

33. *Id.* at 633.

34. *See, e.g.*, Kosse & Wright, *supra* note 12, at 70 (noting that instances of sexual harassment may not rise to the "extreme level" of severity required under Title IX); Rollini, *supra* note 28, at 1015 (stating that the narrow construction of the *Davis* standard by federal circuit courts has led to "the dismissal of many students' Title IX claims even though the student has been subjected to what should amount to actionable sexual harassment").

prohibiting harassment.[35] Given the shortcomings of Title IX and the importance of education, Vermont and other states should develop laws and policies which protect those students who are subjected to peer harassment but may be unable to recover under the strict requirements of Title IX.

II. OTHER STATE LAWS

In analyzing Vermont's anti-discrimination statutory scheme, it is useful to consider approaches taken by other states. This section gives a general overview of the types of state laws that offer protection from peer sexual harassment. Furthermore, this section briefly discusses common forms and features of such laws—though it is important to remember that a state's particular anti-discrimination scheme may be complex and unique to that state.

Many states have general anti-discrimination laws like the Vermont Public Accommodations Act (VPAA), which prohibit discrimination in places of public accommodation.[36] Some states include an explicit cause of action for persons who are victims of violations of anti-discrimination laws.[37] If educational institutions are considered a "[p]lace of public accommodation" under a particular state's statute, a victim of sexual harassment in schools may potentially recover under these statutes.[38] Like Vermont, many states have also enacted laws that are specifically aimed at addressing discrimination or harassment in schools.[39] The focus of these laws varies. For instance, New Hampshire has a law directed at "pupil harassment, also known as 'bullying . . . .'"[40] Other states, such as Vermont,[41] have more general prohibitions on harassment in schools that directly reference or define sexual harassment. Still other states prohibit

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35. Kosse & Wright, *supra* note 12, at 68.

36. *See, e.g.*, FLA. STAT. ANN. § 760.08 (West 2009); N.H. REV. STAT. ANN. § 354-A (West 2009); TENN. CODE ANN. § 4-21-501 (West 2009) (providing examples of state laws prohibiting discrimination on the basis of factors such as gender in places of public accommodations).

37. *See, e.g.*, FLA. STAT. ANN. § 760.11 (West 2009); TENN. CODE ANN. § 4-21-311 (West 2009) (providing examples of state statutes that explicitly preserve a cause of action for violations of state anti-discrimination laws).

38. For instance, the VPAA explicitly identifies "any school" in the definition of a place of public accommodation. VT. STAT. ANN. tit. 9, § 4501(1) (West 2009).

39. *See, e.g.*, ALASKA STAT. § 14.18.010 (2009); ARK. CODE ANN. § 6-18-514 (West 2009); CAL. EDUC. CODE § 201 (2009); CONN. GEN. STAT. ANN. § 10-15c (West 2009); IOWA CODE ANN. § 216.9 (West 2009); LA. REV. STAT. ANN. § 416.13 (2009); MASS. GEN. LAWS ANN. ch. 151C, § 2 (West 2008); N.H. REV. STAT. ANN. § 193-F:3 (2009); R.I. GEN. LAWS § 16-21-26 (2009); W. VA. CODE § 18-2C (2009) (exemplifying various state statutes that address discrimination or harassment in schools).

40. N.H. REV. STAT. ANN. § 193-F:3 (2009). *See also* ARK. CODE ANN. § 6-18-514 (West 2009) (providing another example of a bullying-specific state statute).

41. VT. STAT. ANN. tit. 16, § 565, tit. 16, § 11(26)(A) (West 2009).

discrimination in schools more generally, such as on the basis of membership in a protected class without specific reference to harassment.[42]

State statutes addressing harassment in schools are a somewhat recent trend and have sometimes been developed in the context of ensuring school safety.[43] Although the standard of liability for peer-to-peer sexual harassment under state anti-discrimination law is generally lower than that of Title IX,[44] the exact standard applied and the effectiveness of a state scheme varies considerably depending on the state.[45]

State anti-discrimination statutes also have various enforcement mechanisms that may impact the overall effectiveness of the law.[46] Generally, a state anti-discrimination law will be enforced either through the establishment of a private right of action or administrative remedies.[47] Some states, like Vermont, use a combination of both enforcement methods.[48]

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42. *See, e.g.*, ALASKA STAT. § 14.18.010 (2009) (prohibiting discrimination in schools on the basis of race or sex, but not including other classes such as religion or sexual orientation). Alaska recently implemented the Harassment, Intimidation, and Bullying Law, which requires school districts to adopt policies prohibiting harassment in schools, but the extent of the protections offered by and administrative remedies included in such policies seems to be largely discretionary on the part of districts. ALASKA STAT. § 14.33.200-14.33.250 (2009). *See also* WASH. REV. CODE ANN. § 49.60.400 (West 2006) (providing that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of . . . sex . . . in the operation of . . . public education"). Notably, in 1989, Washington enacted the Gender Equality in Higher Education Act, which specifically prohibits discrimination on the basis of gender in institutions of higher education. WASH. REV. CODE ANN. § 28B.110.010 (West 2006). The law requires that such institutions "develop and distribute policies and procedures for handling complaints of sexual harassment." § 28B.110.030(8). Additionally, violation of the chapter is considered a violation of the law against discrimination, § 49.60 *et seq.*, and a private right of action is retained for violation of this chapter, § 28B.110.050.

43. *See, e.g.*, COLO. REV. STAT. ANN. § 22-32-109.1 (West 2009) (requiring school boards to develop and implement "safe school plan[s]" which include a specific policy on bullying prevention and education). Commentators have reflected that this trend may be reactionary to recent publicized school violence. *See The Missing Discourse*, *supra* note 18, at 786 (noting that many state laws dealing with school safety were passed following the Columbine High School shootings in 1999, and "[r]ecently, as an additional strategy to create safe schools, state legislatures . . . have passed new laws against 'bullying'").

44. *See* Asaf Orr, Note, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN'S RTS. L. REP. 117, 119 (2008) (stating that "[t]he standard of liability generally applied in sexual harassment cases brought under state anti-discrimination law requires a showing that a person or people in control failed to respond in a reasonable manner, a standard significantly lower than Title IX's deliberate indifference standard"); Sacks & Salem, *supra* note 26, at 161 (noting that courts may apply a "less onerous district liability standard" under state law than Title IX's deliberate indifference standard).

45. *See* Kosse and Wright, *supra* note 12, at 62–68 (noting that laws deterring bullying "vary greatly from state to state" and providing a comprehensive survey of variations in such laws).

46. *See* Katie Feiock, Note, *The State to the Rescue: Using State Statutes to Protect Children from Peer Harassment in School*, 35 COLUM. J.L. & SOC. PROBS. 317, 327 (2002) ("The effectiveness of these state [anti-discrimination] laws differs depending on the laws' enforcement mechanisms.").

47. *Id.*

48. *See id.* (explaining that making both enforcement mechanisms available to students is

III. VERMONT STATE LAW

A. Vermont's Statutory Scheme

Vermont has several statutory provisions in place that offer protections for students who are victimized by peer-on-peer harassment in schools. The VPAA creates a private right of action for discrimination claims.[49] It provides, in pertinent part, that:

> An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the . . . sex . . . of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.[50]

Notably, a place of public accommodation is defined to include "any school,"[51] thus including educational institutions explicitly within the reach of the statute's mandates. A private right of action is available to "[a] person aggrieved by a violation of this chapter," who may either file a discrimination charge with the state's human rights commission or pursue a civil claim for injunctive relief and "compensatory and punitive damages and any other appropriate relief."[52]

In 1994, Vermont enacted a statute directly addressing harassment in schools.[53] This statute has the broad policy objective of preventing harassment and hazing in Vermont schools[54] and requires that all schools adopt a harassment policy and mechanisms for addressing harassment.[55] The policy must state that harassment, as defined by Vermont law,[56] is

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preferable because it offers greater choice on the part of students for which method they wish to pursue).

49. VT. STAT. ANN. tit. 9, § 4506 (West 2009).

50. *Id.* § 4502(a).

51. *Id.* § 4501(1).

52. *Id.* § 4506(a).

53. VT. STAT. ANN. tit. 16, § 565 (West 2009).

54. *Id.* § 565(a) ("Harassment, hazing and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school."). *See also* Daniel Greene, *"You're so gay!": Anti-Gay Harassment in Vermont Public Schools*, 27 VT. L. REV. 919, 949 (2003) (suggesting that the language of § 565(a) "impl[ies] a sort of zero tolerance policy towards harassing conduct").

55. tit. 16, § 565.

56. *See id.* § 11(a)(26) (defining harassment as an "incident or incidents of verbal, written, visual, or physical conduct based on or motivated by a student's . . . sex . . . that has the purpose or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment").

prohibited, and include procedures for informing "students and staff how to report violations and file complaints."[57] Further, the policy must include "[a] procedure for investigating reports of violations and complaints," and include time limits within which a school must investigate and resolve claims.[58]

The Vermont legislature directly addressed student harassment claims brought under the VPAA in a statute enacted in 2004.[59] Section 14 of title 16 states that "[a]n educational institution that receives actual notice of alleged conduct that may constitute harassment shall promptly investigate to determine whether harassment occurred."[60] Upon receiving such notice, the school must provide a copy of their harassment policy to the alleged victim and perpetrator, and their parents if they are minors.[61] If the school finds that the alleged conduct indeed occurred and constitutes harassment, the school must take "prompt and appropriate remedial action reasonably calculated to stop the harassment."[62]

Importantly, the harassment statute references actions brought under the VPAA and requires that the victim exhaust his or her administrative remedies before seeking redress under the VPAA.[63] The statute also lays out five exceptions for when a showing of exhaustion may be unnecessary.[64] Additionally, the statute defines "notice"[65] and requires that such notice be provided to a "designated employee."[66] At this point it is worth pointing out that the VPAA is an anti-discrimination statute. Thus, a potential plaintiff must have actually been harassed on the basis of their

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57. *Id.* § 565(b)(1)(D).

58. *Id.* § 565(b)(1)(E).

59. *See id.* § 14 (establishing procedures for responding to sexual harassment allegations in Vermont schools).

60. *Id.* § 14(a).

61. *Id.*

62. *Id.* § 14(b).

63. *See id.* ("No action shall be brought pursuant to 9 V.S.A. chapter 139 until the administrative remedies available to the claimant under the policy adopted by the educational institution . . . have been exhausted.").

64. *See id.* ("Such a showing shall not be necessary where the claimant demonstrates that: (1) the educational institution does not maintain such a policy; (2) a determination has not been rendered within the time limits established under subdivision 565(b)(1) of this title; (3) the health or safety of the complainant would be jeopardized otherwise; (4) exhaustion would be futile; or (5) requiring exhaustion would subject the student to substantial and imminent retaliation.").

65. *See id.* § 14(c)(3) ("'Notice' means a written complaint or oral information that harassment may have occurred which has been provided to a designated employee from another employee, the student allegedly subjected to the harassment, another student, a parent or guardian, or any other individual who has reasonable cause to believe the alleged conduct may have occurred.").

66. *See id.* § 14(c)(1) ("'Designated employee' means an employee who has been designated by an educational institution to receive complaints of harassment pursuant to subdivision 565(c)(1) of this title or in accordance with the harassment policy of a postsecondary school.").

membership in a certain class, such as gender, rather than generalized bullying or teasing unrelated to a protected class.

The University of Vermont's sexual harassment policy illustrates how § 565's mandate that schools implement harassment policies and guidelines works at the institutional level. The current policy opens with the broad statement that "[i]t is the policy of the University of Vermont that no member of the University community may sexually harass any University student."[67] The policy also provides a definition of sexual harassment[68] and discusses the procedures for reporting and investigating complaints of harassment. In order to initiate an investigation into a harassment claim, "actual notice" of conduct that may constitute harassment must be provided to an official specially designated by the University to "receive complaints of harassment."[69] Once such notice is provided to the designated employee, the policy states that a copy of the sexual harassment policy will be provided to the alleged victim and perpetrator and that the University will "promptly investigate" the claim.[70] The policy also states that if the University concludes after investigation that the conduct alleged occurred and constitutes harassment, "prompt and appropriate remedial action" will be taken that is "reasonably calculated to stop the sexual harassment."[71] The University of Vermont's sexual harassment policy resembles the language of 16 V.S.A. § 14, and the University's general harassment policy is similar.[72] However, some Vermont schools adopt more comprehensive harassment policies.[73]

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67. *Sexual Harassment: Students*, THE UNIVERSITY OF VERMONT (Jan. 2, 2008), *available at* http://www.uvm.edu/policies/student/sexharasstudent.pdf.

68. Sexual harassment is defined to include "unwelcome sexual advances, requests for sexual favors, and other verbal, written, visual, or physical conduct of a sexual nature" and examples given include "unwelcome sexual propositions," "sexually graphic comments about a person's body," and "unwelcome touching, patting, pinching, or leering." *Id.*

69. *Id.* Notice is defined as "a written complaint or oral information that sexual harassment may have occurred" and may be provided to the designated employee by the alleged victim of harassment or "any other individual who has reasonable cause to believe the alleged conduct may have occurred," including other students or employees. *Id.*

70. *Id.*

71. *Id.*

72. *Harassment: Students*, THE UNIVERSITY OF VERMONT (Oct. 25, 2006), http://www.uvm.edu/~uvmppg/ppg/ student/studentharas.pdf. It is worth noting that § 565 applies to public school districts, while § 166(e) applies to the University since it is an independent post-secondary institution, so the specific mandates of § 565, which include timelines for addressing complaints of harassment, do not apply. Allen v. Univ. of Vermont, 2009 VT 33, ¶ 22, 185 Vt. 578, 973 A.2d 1183.

73. *See, e.g.*, WOODSTOCK UNION HIGH SCHOOL, HARASSMENT OF STUDENTS POLICY (June 11, 2008), *available at* www.wuhsms.org/policies (click "Harassment of Student" hyperlink) (providing a useful example of a protective school harassment policy which includes mandatory reporting by adult employees of witnessed or reported incidents of harassment). *See also Policy on Prevention of Harassment of Students*, VT. DEP'T OF EDUC., http://education.vermont.gov/new/pdfdoc/resources/model_harassment.pdf (last visited Nov.

B. Application of Vermont's Statutory Scheme

1. *Washington v. Pierce's* Establishment of the Standard of Liability

In 2005, the Vermont Supreme Court established a two-pronged standard of liability for an action brought under VPAA based on peer-on-peer harassment.[74] When *Washington* came before the court, lower court decisions had reached varying conclusions about the applicable standard for peer harassment cases brought under VPAA[75] and *Washington* presented a needed "opportunity to clarify the standard for such claims going forward."[76]

In *Washington*, the plaintiff brought suit against her former high school principal, alleging violations of the VPAA and 16 V.S.A. § 565 on the basis of in-school peer-on-peer harassment.[77] Specifically, she witnessed other students using a "wide array of racially and sexually inappropriate terms" and had been targeted by such expressions twice.[78] The plaintiff failed to complain of the conduct to any school official or teacher despite possessing the awareness that administrative remedies were available to her.[79] The court held that the plaintiff was precluded from recovery under VPAA due to her failure to exhaust administrative remedies and her inability to demonstrate applicability of any of the exceptions to the notice requirement.[80]

In deciding *Washington*, the Vermont Supreme Court made several conclusions that are important to peer harassment cases brought under Vermont law. First, the court recognized that "the VPAA encompasses claims against school officials . . . for . . . in-school [peer] harassment . . . ."[81] In so

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30, 2009) (providing a model policy for schools to use when formulating their own harassment policies).

74. Washington v. Pierce, 2005 VT 125, 179 Vt. 318, 895 A.2d 173.

75. *Id.* ¶ 24 (noting that "[s]everal Vermont trial courts have decided student-student harassment cases . . . and reached different conclusions about which standard applies," ranging from application of a deliberate notice standard to holding that a plaintiff need show that a school had notice, but not demonstrate deliberate indifference).

76. *Id. See also* Feiock, *supra* note 46, at 338 (noting that the interaction between the VPAA and anti-harassment statute would "remain unclear until case law develops" and that courts might condition availability of a private right of action on exhaustion of administrative remedies); Greene, *supra* note 54, at 949–50 (suggesting that application of a deliberate indifference standard to peer harassment claims brought under VPAA would be at odds with the strong language of the anti-harassment statute and that objective criteria should be incorporated into a liability standard).

77. *Washington*, 2005 VT 125, ¶¶ 1–12.

78. *Id.* ¶ 6.

79. *Id.* ¶ 41.

80. *Id.* ¶ 48.

81. *Id.* ¶ 19.

holding, the court noted that 16 V.S.A. § 11(a)(26)'s definition of harassment was sufficiently broad to include harassment perpetrated by students and to find otherwise would "conflict with the Legislature's stated purpose to rid Vermont schools of harassment."[82] The court concluded that since 16 V.S.A. § 14(b) references VPAA claims for in-school harassment,[83] and peer-on-peer harassment is within the statutory definition of harassment, peer harassment claims thus fall under the umbrella of the VPAA.[84]

The court next addressed the standard of liability for schools facing a claim under VPAA based on peer harassment and established the two-prong standard that currently applies to VPAA claims based on in-school peer-to-peer harassment. A plaintiff must show that "he or she was the victim of harassing conduct so severe, pervasive, and objectively offensive that it deprived him or her of access to the educational opportunities or benefits provided by the school . . . ."[85] Further, a plaintiff must show that he or she "exhausted the administrative remedies available, or that circumstances existed that relieved the plaintiff of the exhaustion requirement."[86] Accordingly, exhaustion may be seen as a precondition for bringing suit under VPAA under this standard. Once exhaustion is established, the plaintiff must also demonstrate that he or she was subjected to harassment of sufficient severity.

In adopting the two-pronged standard, the court offered several reasons why it was preferable to other possible standards. One reason was that it would utilize objective criteria to evaluate conduct of parties, and thus would "rest[] on a more easily-ascertainable set of facts" than a "knew or should have known" or deliberate indifference standard.[87] The court noted that this would eliminate the requirement that courts analyze the level of the school's knowledge or sufficiency of notice of conduct that might constitute harassment.[88] Another identified benefit of the adopted standard was that it "promot[es] compliance with the anti-harassment provisions of Title 16."[89] The court stated its belief that the standard would provide an incentive for schools to "adopt, publicize, and enforce" anti-harassment policies while

82. *Id.* ¶ 19. The "stated purpose" to which the court refers is the objective of tit. 16, § 565(a).

83. *Id.* ¶ 22. The court noted that "the addition of 16 V.S.A. § 14 confirms that the Legislature envisioned the VPAA as the means of legal redress for victims of in-school harassment." *Id.*

84. *Id.*

85. *Id.* ¶ 35.

86. *Id.*

87. *Id.* ¶ 37.

88. *Id.* ¶ 36 (the court explained that such an inquiry is eliminated because "notice on the part of the school would follow logically from a showing that the plaintiff exhausted his or her remedies" and a plaintiff who established that an exception to the exhaustion requirement would have "implicitly proven" that the action should proceed "regardless of whether the school had notice").

89. *Id.* ¶ 38.

still encouraging plaintiffs to "mitigate harm" by using available administrative remedies.[90] In short, the court believed that this standard would synthesize Title 16 and the VPAA into "complementary parts of a scheme to combat harassment in Vermont schools."[91]

2. The Consequences of the Washington Standard: *Allen v. University of Vermont*

The Vermont Supreme Court had a chance to apply the liability standard established in *Washington* in the 2009 case of *Allen v. University of Vermont.*[92] In this case, the court considered an appeal from a grant of summary judgment in favor of the defendant University by the Chittenden Superior Court, which was granted on the basis of the plaintiff's failure to exhaust her administrative remedies.[93] The Vermont Supreme Court utilized the *Washington* standard in affirming the grant of summary judgment based on failure to meet the "precondition" of exhaustion to her cause of action.[94]

In *Allen*, the plaintiff was a former student of the University who sued the school for discrimination under the VPAA in response to the school's failure to investigate her rape report as a harassment claim.[95] The plaintiff was an eighteen-year-old freshman at the University when she reported to the Women's Center that she had been raped after being given a date rape drug at a fraternity party.[96] She then met with the Center's Victim's Advocate.[97] The Advocate filled out a standard intake form indicating that the plaintiff was there due to "Sexual Assault," and did not check off the box for "Sexual Harassment."[98] The Advocate then advised the plaintiff of options for pursuing further action,[99] but did not inform the plaintiff of the school's harassment policies or reporting procedures.[100] The plaintiff then

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90. *Id.*

91. *Id.* ¶ 39.

92. Allen v. Univ. of Vt., 2009 VT 33, 185 Vt. 578, 973 A.2d 1183.

93. *Id.* ¶ 1.

94. *Id.* ¶¶ 20, 31.

95. *Id.* ¶¶ 2–6.

96. *Id.* Her initial report to the Women's Center was sent via e-mail. *Id.* ¶ 2.

97. The University's student handbook identified the Victim's Advocate as "the person who can provide information about available services when a student experiences any form of sexual violence, including sexual assault or sexual harassment." *Id.* The handbook "stated that the Victim's Advocate would provide assistance and information 'about what services exist on and off campus' and that she would 'help you decide what to do after an assault.'" *Id.* ¶ 37 (Johnson, J., dissenting).

98. *Id.* ¶ 3.

99. The Victim's Advocate informed the plaintiff that she could either lodge a report of the rape as a violation of the student code of conduct with the University's Center for Student Ethics and Standards, or report the assault to a local police task force. *Id.*

100. The school's harassment policies and reporting procedures were only available online and

filed a formal complaint with the Center for Student Ethics and Standards and participated in a hearing that resulted in a conclusion that the plaintiff failed to prove her charge of rape.[101] Subsequently, the plaintiff's father contacted University officials, including the school's general counsel,[102] for review of his daughter's case. He was unsuccessful, and the plaintiff eventually withdrew from the University.[103]

In affirming the grant of summary judgment in favor of the University, the court relied on the *Washington* standard to conclude that the plaintiff's VPAA suit was precluded by a failure to exhaust administrative remedies.[104] In response to the plaintiff's assertion that the University should have provided her with a copy of its harassment policy following her rape complaint, the court strongly emphasized the point that the plaintiff's complaint was couched in terms of sexual assault rather than harassment.[105] The court rejected the plaintiff's argument that the University should have automatically viewed her rape report as a harassment complaint on the grounds that rape would not necessarily rise to the level of severity contemplated by the *Washington* standard.[106]

While this was stated in dicta, the court's conclusion strongly suggests that it would be difficult for a plaintiff to recover under VPAA where the discrimination complaint is based on a single incident of peer-on-peer sexual assault.[107] Ultimately, the court rejected a theory of actual notice.[108]

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required that notice be given to a "designated harassment official," who is a University official specially designated to handle harassment complaints. *Id.* ¶ 18.

101. *Id.* ¶ 4.

102. The school's general counsel informed the plaintiff's father that "the university had done nothing wrong, and that there was nothing more to do." *Id.* ¶ 5.

103. *Id.*

104. *See id.* ¶¶ 11, 12 (discussing the VPAA and the standard for liability in actions brought under it based on peer-on-peer harassment claims established in *Washington*).

105. *Id.* ¶ 15 ("The reality is that plaintiff never expressed her complaint in terms of 'harassment,' and, not too surprisingly, the Victim's Advocate . . . did not view plaintiff's report of rape as one of civil harassment rather than a criminal rape and a violation of expected student conduct."). The court also noted that they adopted the exhaustion requirement in *Washington* to avoid having to "examine [a] report of sexual assault and determine whether university officials should have understood it to be a claim of harassment." *Id.* ¶ 14.

106. *Id.* ¶ 16 ("[N]othing in the instant complaint would necessarily lead the responding university staff to be cued to sexual harassment when reacting to an expressed complaint of an isolated and criminal rape.").

107. *Id.* ("[I]solated incidents of misconduct ordinarily are not 'pervasive' in nature and thus will not support an action under the VPAA alleging a hostile school environment created by student-student harassment."). The court noted that the *Washington* severity standard was based on Title IX's analogous provisions and cited federal cases supporting the inference that single incidents of misconduct are insufficient to meet Title IX's severity standard. *Id.* n.1 ("[A] single incident of alleged sexual assault is not sufficient to demonstrate pervasive discrimination because, however traumatic to [the] victim, it is not likely to have systematic effect on educational activities.") (citing Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1357–58 (M.D. Ga. 2007)).

It resolved that in order to meet the exhaustion requirement under *Washington*, a plaintiff would need to follow a school's harassment policy precisely.[109] Thus, a plaintiff must file a report of harassment with the school's designated officials rather than providing notice to "persons who were capable of responding to a harassment claim, or capable of referring it to the proper officials."[110] The court echoed the reasoning in *Washington*, stating its intent to utilize objective criteria and avoid a subjective inquiry into the knowledge or notice of school officials.[111] Further, the Court concluded that the plaintiff failed to establish that any of the statutory exceptions under 16 V.S.A. § 14(b) were applicable.[112] Accordingly, the Court concluded that the plaintiff's civil suit under VPAA was precluded due to her failure to exhaust her administrative remedies.[113]

3. *Allen* as an Example of the Shortcomings of Vermont's Anti-Discrimination Laws

The *Allen* case demonstrates that Vermont's anti-discrimination statutory scheme, as interpreted by *Washington*, is not sufficiently effective in addressing peer-on-peer sexual harassment in schools. This fact is made clear by the dismissal of the plaintiff's VPAA claim based on a narrow reading of 16 V.S.A § 14(b)'s exhaustion requirement, despite the Court's prior recognition that "a remedial statute . . . must be liberally construed."[114] The majority faults Allen for failing to "follow 'the precise procedure

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108. *Id.* ¶ 18.

109. *Id.*

110. *Id.*

111. *Id.* ¶ 20 (The court notes that if the exhaustion requirement were to be waived because the plaintiff's rape complaint could have been viewed as a harassment complaint, "we would effectively mandate a subjective examination of what school officials knew, or should have known, at the time—exactly the debate we intended to foreclose and avoid in *Washington*").

112. *See id.* ¶¶ 21–28 (discussing the statutory exceptions to the notice requirement and explaining why the plaintiff's claim failed to fall within any recognized exception). Notably, the court rejected the plaintiff's claim that exhaustion would be futile based on the premise that her complaint was for sexual assault rather than harassment, and because "UVM is entitled to have its designated employees answer an express harassment claim before its opportunity to examine and correct its position is foreclosed." *Id.* ¶ 27. The court also declined to create an additional exception and reasoned that even if the University "dropped the ball" by failing to refer plaintiff to the appropriate procedure for reporting harassment, it would only have "been but a slight burden" for her to postpone her civil suit and go back to file a claim of harassment with the University. *Id.* ¶ 29. Additionally, the court noted that the statutory exceptions do not "recognize constructive notice to designated persons through reports to other, nondesignated employees." *Id.* ¶ 30.

113. *Id.* ¶ 31.

114. *See* Human Rights Comm'n v. Benevolent & Protective Order of Elks, 2003 VT 104, ¶ 13, 176 Vt. 125, 131, 839 A.2d 576, 581 (discussing construction of the Fair Housing and Public Accommodations Act).

contemplated by the statute'"[115] by not filing an explicit claim of harassment with the University's designated officials. Indeed, the majority expressly rejected the notion that actual notice to persons who may be capable of dealing with a harassment claim or of referring plaintiff to the appropriate procedures would be sufficient to meet the notice requirement, and it maintained the position that a harassment claim must be filed with a school's designees.[116]

However, the goal of providing notice underlying the exhaustion requirement was not seriously at issue in the case.[117] As the dissent points out, the University "plainly ha[d] notice" of and responded to conduct which may constitute harassment.[118] The dissent noted that "[t]here is nothing talismanic about the two individuals designated by the university to receive harassment complaints . . . ."[119] Because § 14(b) requires plaintiffs to notify a designated official,[120] the University escaped the potential for civil liability—despite possessing notice of the harassing conduct—as a result of the plaintiff's failure to file a complaint with the University's official designees.[121]

The majority also faults the plaintiff because she "never expressed her complaint in terms of 'harassment'" and posited that in adopting the exhaustion requirement, the *Washington* court sought to avoid having to "examine [a] report of sexual assault and determine whether university officials should have understood it to be a claim of harassment."[122] Further, the *Allen* court rejected the argument that the plaintiff's assault complaint should have been automatically construed as harassment based on the premise that an isolated incident of rape would not be actionable under the VPAA since it is not "pervasive."[123] The court noted that "nothing in the instant complaint would necessarily lead the responding university staff to

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115. *Allen*, 2009 VT 33, ¶ 17 (internal citation omitted).

116. *Id.* ¶ 18. The court also noted that "the difficulty in determining if there was proper notice of harassment claims is why, in *Washington*, we adopted as an element of a VPAA action claiming peer harassment the express statutory requirement that complaints be made to the person explicitly designated to accept such complaints." *Id.*

117. The dissent notes that the majority "relies on a statutory provision designed to protect schools that have *no* notice of conduct that may constitute harassment and, thus, have no opportunity to take appropriate action to investigate the claims before being accused of discrimination." *Id.* ¶ 42 (Johnson, J., dissenting).

118. *Id.* ¶ 44. In addition to the formal report filed by plaintiff with the Center, a student hearing was conducted, school officials were contacted by plaintiff's father, and the school's general counsel was notified of, and responded to, the conduct complained of. *Id.*

119. *Id.* ¶ 45.

120. VT. STAT. ANN. tit. 16, § 565(c)(1) (West 2009).

121. *Allen*, 2009 VT 33, ¶ 45.

122. *Id.* ¶ 14–15.

123. *Id.* ¶ 16.

be cued to sexual harassment when reacting to an expressed complaint of an isolated and criminal rape."[124] However, § 14(b) imposes an obligation on schools to investigate conduct that *may* constitute harassment.[125]

Rape and other sexual assault, even if isolated, may constitute harassment under Vermont law as "physical conduct" motivated by the victim's sex.[126] The Federal Office for Civil Rights has recognized that for purposes of Title IX, "[s]exual harassment includes conduct that is criminal in nature, such as rape . . . . The conduct does not necessarily have to be repetitive. If sufficiently severe, single or isolated incidents can create a hostile environment."[127] Indeed, rape and other forms of sexual assault appear to fall within the University's own definition of sexual harassment set out in its harassment policy.[128] Because a school must investigate complaints of conduct which *may* constitute harassment, rather than conduct which may be actionable under the VPAA, the University should not have been relieved of the duty to investigate Plaintiff's complaint and provide her with a copy of its harassment policy simply because her complaint was presented in terms of sexual assault rather than harassment.

In summary, *Allen* exemplifies the shortcomings of Vermont's anti-discrimination statutory scheme. The plaintiff was precluded from her VPAA claim based on her failure to file a complaint that expressly made an allegation of harassment with a designated official, despite the fact that she had notified the University of conduct which may constitute harassment: rape. Further, the University escaped potential civil liability even though the officials and employees who knew about her rape complaint, including the school's general counsel, failed to direct her to a designated official or suggest that she should restate her complaint as one of harassment. The *Allen* decision punishes a plaintiff who made a clear attempt to utilize the administrative processes known to her before initiating a private action, and "allows the university to avoid liability under the VPAA if it succeeds in frustrating a student's ability to make a harassment complaint."[129]

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124. *Id.*
125. VT. STAT. ANN. tit. 16, §14(b).
126. *Id.* § 11(a)(26)(A).
127. OFFICE FOR CIVIL RIGHTS, *supra* note 20, at 4, 7.
128. *See supra* notes 115–24 and accompanying text (discussing the University's harassment policy).
129. *Allen*, 2009 VT 33, ¶ 44 (Johnson, J., dissenting).

IV. DISCUSSION

This Section will take a critical look at Vermont's anti-discrimination statutory scheme and will consider why the standard applied in *Washington* and *Allen* does not sufficiently protect students from discriminatory harassment. The approaches taken by other states and the effectiveness of these approaches will be incorporated into the analysis, as well as the policy reasons that exist in favor of or against different approaches. Additionally, the shortcomings of the statutory scheme will be looked at in the context of the *Allen* case. Ultimately, statutory amendments will be suggested that would offer greater protections for students in Vermont while still addressing concerns associated with an increased potential for school liability.

A. Why Vermont's Standard is Insufficient to Protect Students and Should be Improved

Vermont's standard of liability for peer sexual harassment under the VPAA as applied in *Allen* offers greater protections for students than federal law under Title IX, or than states like California, which apply the Title IX standard to state anti-discrimination law.[130] Unlike Title IX's "deliberate indifference" and severity standards, which set a high bar for recovery for plaintiffs,[131] Vermont succeeds in offering the potential of recovery to students who are victimized by discriminatory harassment but may be unable to meet the burdens imposed by Title IX. However, the *Allen* decision illustrates that Vermont's standard "is certainly a step in the right direction [but] falls short in several important areas."[132] Importantly, the inclusion of an absolute exhaustion requirement and the use of Title IX's standard for the level of severity of harassment needed to state a claim seriously limit both the possibility of recovery for plaintiffs and the effectiveness of the Act in advancing the remedial goals of the Legislature[133] in enacting Vermont's anti-discrimination statutes.

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130. *See* Donovan v. Poway United Sch. Dist., 84 Cal. Rptr. 3d 285, 306–16 (Cal. Ct. App. 2008) (concluding that because the California Legislature relied on Title IX when developing its anti-discrimination laws, Title IX's elements govern a damage claim for peer sexual orientation harassment under § 220 of the California Education Code).

131. *See* discussion *supra* Part I-B (discussing the Title IX standard).

132. Orr, *supra* note 44, at 144.

133. *See, e.g.*, Human Rights Comm'n v. Benevolent & Protective Order of Elks, 2003 VT 104, ¶ 13, 176 Vt. 125, 131–32, 839 A.2d 576, 581–82 (stating that "a remedial statute . . . must be liberally construed in order to suppress the evil and advance the remedy intended by the Legislature") (internal quotes omitted).

1. The Requirement of the Exhaustion of Administrative Remedies

The precondition of administrative exhaustion required by § 14(b), and as interpreted in the *Washington* standard before a private cause of action becomes available to a peer harassment plaintiff under VPAA, is problematic for several reasons. The most concerning problem associated with such a requirement is that a plaintiff, as in *Allen*, may be precluded from civil recovery even where he or she has made a good faith effort to utilize known administrative remedies. A plaintiff may be unaware of the exact reporting procedures required in order to exhaust his or her remedies.[134] Thus, the plaintiff will be precluded from recovery where he or she does not notify the appropriate "designated employee"[135] and is not referred to the designee by any school employees who are notified of such conduct, as was the case in *Allen*. Worse, a school can be effectively shielded from liability where a school employee fails to refer an alleged victim to the appropriate reporting and administrative procedures despite knowledge of "conduct that may constitute harassment,"[136] and the victim subsequently fails to follow the policy's procedures.

Additionally, the exhaustion requirement can negatively impact plaintiffs who do successfully state a claim under VPAA following exhaustion of administrative remedies because "[i]f a state requires students to exhaust administrative remedies before pursuing a private right of action, some of the benefits of a private right of action will be lost."[137] For instance, the administrative process could be lengthy, and a student may be foreclosed from initiating suit until considerable time has passed since the conduct at issue occurred.[138] Where an ongoing administrative process fails to adequately address the complained-of conduct in a timely manner, the exhaustion requirement harms victims of peer harassment by preventing them from initiating a civil suit for injunctive relief.

This scenario could be avoided by providing an exception to the exhaustion requirement that private enforcement may be pursued where a

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134. It is worth noting that this scenario is probable in the case of young victims, such as those in grades K–12, and perhaps more concerning than in the case of older students who are assumed to have a greater ability to recognize what conduct may constitute inappropriate sexual harassment and better access to administrative procedures and policies.

135. VT. STAT. ANN. tit. 16, § 14(c)(1) (West 2009). Although § 565(b) requires that school boards "make available" written harassment policies, it is not clear in what manner these policies must be publicized and how apparently accessible they must be. *Id.* § 565(b). Accordingly, a student may not necessarily be able to access the school's harassment policy without direction from school employees, especially in the case of minor children.

136. *Id.* § 14(a).

137. Feiock, *supra* note 46, at 339.

138. *See id.* (noting that the administrative process can "take a long time").

plaintiff seeks injunctive relief regardless of whether the administrative process has been fully exhausted. For instance, while California's Education Code provides for a 60-day "moratorium" on initiation of a civil suit for discriminatory harassment following the filing of an appeal with the State Board of Education, this provision "does not apply to injunctive relief."[139] A similar provision could be formulated in the context of exhaustion that would allow a plaintiff to seek injunctive relief through private enforcement despite non-exhaustion, thus protecting plaintiffs in situations where an administrative process is not effectively responding to complaints of harassment in a timely manner. Additionally, a plaintiff "who wishes to pursue a private suit might want to retain counsel from the beginning, which would entail involving counsel in the administrative process as well."[140] However, this option may impose a financial burden on plaintiffs who may want to retain counsel through a potentially lengthy administrative process before initiating private suit.

The exhaustion requirement also fails to incentivize preventative measures. Preventative measures, such as including harassment education in a school's curriculum, may help to curb harassment in school by informing students of what conduct is not permitted. In contrast, a heightened potential for civil liability in the form of monetary damages incentivizes preventative measures because schools would likely take more pro-active measures to prevent harassment in order to avoid liability.[141] New Jersey's liability standard, which is based on constructive notice, also incentivizes prevention by allowing a school to avoid liability where its "preventative and remedial actions are reasonable."[142] This standard encourages schools to adopt preventative measures because it factors the school's efforts to prevent harassment into the determination of whether a school is liable for peer harassment.[143] Although the VPAA is considered to be a remedial statute, the encouragement of preventative measures should be considered as an important and effective way to curb discriminatory harassment in schools.[144]

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139. CAL. EDUC. CODE § 263.2(d) (West 2009) (repealed 2010).

140. Feiock, *supra* note 46, at 339. *See also* Orr, *supra* note 44, at 144 (noting that a private right of action against schools incentivizes preventative measures).

141. Feiock, *supra* note 46, at 339.

142. L.W. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 553 (N.J. 2007).

143. *See* Orr, *supra* note 44, at 144 ("[T]he standard created by the New Jersey Supreme Court in *L.W.* is expansive and provides schools with incentives to implement a broad range of programs that together will help to create a more inviting, safe, and therefore more educational, school environment for . . . youth.").

144. *See* Rebecca A. Oleksy, Comment, *Student-on-Student Sexual Harassment: Preventing a National Problem on a Local Level*, 32 SETON HALL L. REV. 230, 231 (2001) (arguing that federally-funded schools should be required to implement preventative programs and discussing the importance of

2. Severe, Pervasive, and Objectively Offensive

The VPAA's prerequisite that a plaintiff show that he or she experienced harassment of this severity limits the potential for availability of a civil remedy for students who have experienced discriminatory peer harassment. The requirement that a plaintiff bringing a suit under VPAA show that he or she was subject to "harassing conduct . . . 'so severe, pervasive, and objectionably offensive that it . . . deprive[d] [him or her] of access to the educational opportunities or benefits provided by the school'" is imported directly from the language in *Davis*'s Title IX liability standard and was adopted in Vermont without much comment.[145] A similar use of Vermont's severity requirement appeared in *Donovan*'s interpretation of California anti-discrimination laws.[146]

The *Washington* court observed that in addressing the level of severity needed to state a claim under Title IX, "the *Davis* Court recognized that because 'students are still learning how to interact appropriately with their peers,' they may regularly engage in conduct that 'would be unacceptable among adults' and is 'upsetting to the students subjected to it.'"[147] While it may be true that students are more prone than adults to engage in name-calling and other activities which would be inappropriate among adults, the unfortunate result of this observation is that Title IX's severity requirement may often deny peer sexual harassment complainants a cause of action.[148] Given the reluctance to find instances of peer sexual harassment sufficiently severe to be actionable, "[s]uccessful peer harassment suits brought under Title IX typically involve criminal violence, including sexual assault or rape, accompanied by physical injuries to victims."[149] However, "[s]ince pervasiveness indicates a level frequency," a single incident of sexual harassment, even if involving sexual assault, may be insufficient to

using preventative, rather than corrective, measures in the context of peer sexual harassment).

145. *Washington*, 2005 VT 125, ¶ 3. The Court noted that "[a]ll parties, and the trial court, agree that, under any standard, there must be harassing conduct 'that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.' We agree." *Id.* (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999)). It is unclear why this severity standard was deemed necessary in light of the fact that the court explicitly rejected the application of Title IX's "deliberate indifference" liability standard. *Id.* ¶ 29.

146. Donovan v. Poway United Sch. Dist., 84 Cal. Rptr. 3d 285, 293 (Cal. Ct. App. 2008).

147. *Washington*, 2005 VT 125, ¶ 26 (citing *Davis*, 526 U.S. 629, 651–52).

148. *See, e.g.*, Jialue Charles Li, ed., *Tenth Annual Review of Gender and Sexuality Law: Education Law Chapter: Sexual Harassment in Education*, 10 GEO. J. GENDER & L. 553, 564 (2009) (noting that "[the United States Supreme Court] seems to be reluctant to find harassment 'severe, pervasive, and objectively offensive' when the conduct occurs among children").

149. Sacks & Salem, *supra* note 26, at 162–63. *See also* Li, *supra* note 148, at 565 ("Sexual assaults and batteries qualify as the [peer sexual] harassment that is 'severe, pervasive, and objectionably offensive.'") (internal citation omitted).

establish actionable severity.[150]

Accordingly, a plaintiff may be unable to state an actionable claim under VPAA where, as in *Allen*, he or she has been victim of a single incident of rape perpetrated by a peer. Plaintiffs may also face this obstacle where a court considers the complained-of conduct not sufficiently severe or objectively offensive, no matter how traumatic the impact of the conduct might be to the plaintiff. Although "[o]ften sexual harassment will not rise to this extreme level . . . this behavior should not be tolerated" in Vermont schools.[151] As such, Vermont's adoption of Title IX's measure of sufficiency of severity needed to state an actionable claim under the VPAA is antithetical to the purpose underlying its anti-harassment statutes: that "[h]arassment, hazing, and bullying have no place and will not be tolerated in Vermont schools" and "[n]o Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school."[152]

In order to better protect students by allowing for increased availability of civil enforcement for victims of peer sexual harassment, Vermont should formulate a threshold severity requirement to state a claim under the VPAA that is less burdensome than that expressed in *Davis* for Title IX claims. One example of such a threshold is expressed in the New Jersey Supreme Court's interpretation of the New Jersey Law Against Discrimination (LAD) in *L.W. v. Toms River Regional Schools Board of Education*.[153] The *L.W.* court recognized that "isolated schoolyard insults or classroom taunts" would not be actionable under LAD and formulated a threshold severity requirement based on the state's standard for actionable sexual harassment in a hostile work environment.[154]

A plaintiff asserting a claim in New Jersey under LAD for peer harassment must show that a school district failed to reasonably address discriminatory harassment which would not have occurred "but for" his or her protected characteristic.[155] The plaintiff must also show that a "reasonable student" would have found the conduct "sufficiently severe *or* pervasive enough to create an intimidating, hostile, or offensive school

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150. Li, *supra* note 148, at 564. *See, e.g.*, *Davis*, 526 U.S. at 652–53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

151. Kosse & Wright, *supra* note 12, at 70.

152. VT. STAT. ANN. tit. 16, § 565(a) (2009).

153. L.W. v. Toms River Reg'l Schs. Bd. of Educ., 915 A.2d 535, 547 (N.J. 2007).

154. *Id.*

155. *Id.*

environment . . . ."[156] The use of the word "or" indicates that a student may show that he or she was subject to discriminatory harassment which was *either* severe *or* pervasive enough to create an intimidating, hostile, or offensive school environment. Accordingly, a plaintiff who was the victim of a single incident of peer sexual assault or rape, which a school district failed to reasonably address, would have a much greater chance of stating an actionable claim under the *L.W.* standard than he or she would under Vermont's *Washington* standard. While not "pervasive," an isolated incident of assault would likely be considered sufficiently severe to be actionable under *L.W.*

3. Applying a Constructive Notice Liability Standard

Vermont should adopt a modified constructive notice standard that would enhance the ability of victims of peer harassment to seek private redress against schools that do not adequately respond to instances of harassment and encourage schools to implement preventative measures. It is important to recognize that there are valid concerns associated with applying a constructive notice standard. Certainly, an unmodified "knew or should have known" standard, combined with unfettered access to damages, would raise serious concerns about "opening the floodgates" for litigation against schools by plaintiffs complaining that a school *should have known* about instances of harassment and would have the potential to subject schools to time-consuming and costly lawsuits that might interfere with their ability to execute their educational missions. These concerns, however, could be addressed by modification to a constructive notice standard that would limit liability. Given the prevalence of and negative consequences resulting from peer sexual harassment[157] and the legislature's underlying purpose in enacting § 565 to ensure that "[n]o Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school,"[158] it is evident that the concerns associated with a constructive notice standard are outweighed in favor of the more protective standard.

One critique of a constructive notice standard is that it could have the "potential to bankrupt schools."[159] It would be counterproductive to expose schools to undue liability. This point could be addressed by limiting the damages available in a private action against school districts. For instance,

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156. *Id.* (emphasis added).

157. *See* discussion *supra* Part I-A (discussing the problems associated with peer sexual harassment).

158. VT. STAT. ANN. tit. 16, § 565(a) (2009). *See also supra* note 82 and accompanying text (discussing the legislative purpose of § 565).

159. Orr, *supra* note 44, at 145.

several states, including New Jersey, have fashioned either statutory or judicial limitations on the amount of punitive damages.[160] Beyond limiting damages, however, modification to a constructive notice standard will help limit the situations in which a school may be subject to liability for peer sexual harassment.

Some critics have also voiced the concern that a constructive notice standard will have the effect of excessively burdening school officials and teachers with having to carefully monitor schoolchildren. Additionally, schools "would be expending scarce resources in dealing with student-on-student harassment that would, and should, be spent elsewhere."[161] Some argue that schools do not have the same kind of control over students that employers have over employees for purposes of Title VII and, thus, cannot be expected to be able to monitor or control student behavior.[162]

While it is true that "schools and the workplace are not completely analogous social environments,"[163] students should be given, at least, the same protections as adults in hostile work environments under Title VII and state law. "[S]chools have a greater duty of care to and level of control over students that employers do not have with employees."[164] Because of the educational mission of schools, the importance of education, and role of educators to stand in loco parentis, schools should owe a duty to students to protect them from sexual harassment that is at least equal to the duty owed by employers to employees.[165] Perhaps most importantly, "employees are generally expected to know their rights and to be capable of exercising them[, while children] require more in order to understand that they have a

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160. *Id.* (noting that restraints on damages "should be used to balance the student's ability to recover damages and a school's need to conserve resources").

161. *Id.* at 146.

162. Giampetro-Meyer et al., *supra* note 8, at 315–16.

163. Orr, *supra* note 44, at 147. Vermont's employment discrimination standard is analogous to Title VII. *See, e.g.*, Robertson v. Mylan Lab., Inc., 2004 VT 15, ¶ 16, 176 Vt. 356, 363, 848 A.2d 310, 318 ("The standards and burdens of proof to be applied under FEPA are identical to those applied under Title VII of the United States Civil Rights Act.").

164. Giampetro-Meyer et al., *supra* note 8, at 319.

165. *See, e.g.*, *id.* at 316–27 (arguing in favor of the application of a "knew or should have known" standard to peer harassment cases and noting that the similarities and differences between students and employees show that students should not be subject to a less protective standard than employees); Alison Bethel, Note, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 199–204 (2004) (arguing in favor of a limited duty for schools to protect students from harm by other students of which the school knew or should have known); Michael Buchwald, Comment, *Sexual Harassment in Education and Student Athletics: A Case for Why Title IX Jurisprudence Should Develop Independently of Title VII*, 67 MD. L. REV. 672, 703–08 (2008) (arguing that protections for students under Title IX should be *greater* than those for employees under Title VII).

right to complain if they are being harassed."[166] Employees are typically adults who may be expected to have an understanding of what constitutes harassment and what their remedies may be. In contrast, students may not be able to recognize that harm inflicted on them by other students is wrongful harassment, may be ill-equipped to wade through administrative or legal proceedings, or may be unaware that remedies are available at all. These considerations are especially salient in the case of minor students.

Students should not be afforded lesser protection than employees, and a constructive notice standard should be applied in instances of peer harassment. It is important to keep in mind the concerns voiced by critics of such an application and the *Washington* court that schools not be unduly subjected to litigation. To avoid such a result, modifications could be made to a constructive notice standard to account for a school's preventative and remedial efforts.

4. The Need to Maintain the Availability of Both Enforcement Mechanisms

One of the strengths of Vermont's current peer harassment statutory scheme is that it incorporates both a private right of action under the VPAA and a means of administrative enforcement under the harassment statute.[167] The availability of both methods of redress is important because it helps to address the dual concerns of offering effective protection for students and avoiding undue litigation.

Providing for administrative remedies alone, or requiring exhaustion of administrative remedies as a prerequisite to private action, is problematic for several reasons. First, "[g]iving students the ability to sue schools directly creates more of an incentive for schools to obey the law than an administrative remedy alone."[168] A private right of action is "the best way to ensure enforcement" because it encourages schools to comply with the law and to implement preventative measures, and has the potential to hold schools accountable where they fail to comply.[169] The structure and effectiveness of administrative remedies varies from school to school, and potential deficiencies in the administrative process may result in a failure to resolve problems associated with harassment. For instance, victims of peer harassment may be unaware that administrative procedures exist or, "[w]orse, they may not trust the institution to take their complaint seriously,

166. Feiock, *supra* note 46, at 326.
167. *See* discussion *supra* Part III-A (discussing Vermont's statutory scheme).
168. Feiock, *supra* note 46, at 339.
169. *Id.* at 336.

deal with it fairly, and protect them from retaliation."[170] Some students may believe that an administrative process is less effective than a legal remedy and thus be reluctant to pursue it.

Additionally, some administrative processes, such as the student-run hearing utilized in the *Allen* case, are ill-suited to deal with allegations of sexual harassment. Often these hearings are essentially credibility contests in which other students assess the believability of the accuser and the accused. Because "the alleged victim is as much on trial as the alleged perpetrator," a victim going through such proceedings may end up feeling "revictimized," regardless of whether there is a finding of guilt or not.[171] Though this may also be true in legal proceedings, the feeling of revictimization may be more pronounced where a victim feels that his or her complaint was not taken seriously by their school or feels stigmatized by his or her peers.[172] Indeed, the plaintiff in the *Allen* case later commented that she had "totally trusted the disciplinary board" initially, but ultimately felt as though "[her] rights and [] feelings especially, [and her] emotional well being was just completed [sic] neglected throughout the entire process."[173]

Despite the possible pitfalls of an administrative process, the availability of that method is important. Some students may not wish to engage in a formal legal proceeding due to cost, desire for immediate action, or preference for a less adversarial process. Further, administrative processes are crucial for limiting school liability because such processes allow schools a chance to respond to allegations of harassment and serve a notice function. Thus, Vermont should continue to maintain the availability of both mechanisms for enforcement, but should not condition private enforcement upon an absolute requirement of the exhaustion of administrative procedures.

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170. Sandler, *supra* note 16, at 58.

171. Cantalupo, *supra* note 7, at 677–78 (2009). *See also* Joseph Shapiro, *Campus Rape Victims: A Struggle for Justice*, NPR NEWS (Feb. 24, 2010), http://www.npr.org/templates/story/story.php?storyId=124001493 (noting that "[c]ampus disciplinary programs are not set up like a court of law" and often leave victims unsatisfied); Charney & Russell, *supra* note 8, at 14 (noting that complaint proceedings may cause a victim to experience "revictimization," or second injury, especially where there may be an unsatisfactory grievance procedure).

172. *See generally*, Cantalupo, *supra* note 7, at 674–90 (discussing the shortfalls of campus judicial proceedings in the context of peer sexual violence and arguing that the current model for student misconduct procedures are not suited to dealing with campus violence).

173. *No Means No . . . A NECN Investigation*, NECN, Feb. 25, 2010, http://www.necn.com/pages/landing?blockID=186827.

B. Specific Recommendations

The standard of liability for peer sexual harassment in Vermont should be changed in order to better protect students against harassment and provide them with a better chance of redress against a school that fails to adequately respond to harassment. Some changes could be made by statutory amendment, while others may require the overturn of *Washington* by the Vermont Supreme Court.

Statutorily, the Vermont Legislature should begin by eliminating the exhaustion requirement contained in § 14(b) of the harassment statute. It is a requirement that is "designed to protect schools that have *no* notice of conduct that may constitute harassment" and no opportunity to respond to the claims.[174] The intention to shield schools from undue liability is entirely justifiable. The *Allen* case, however, illustrates that in application, the requirement may harm students who undertake administrative processes in good faith but are nonetheless precluded from private action for failure to follow the rigid requirements of § 14(b), even where the school does have notice of conduct that may constitute harassment.

Additionally, the legislature should explicitly recognize rape and sexual assault as a form of sexual harassment. "Short of homicide, [rape] is the 'ultimate violation of self.'"[175] Because rape and sexual assault are associated with the victim's gender, they are forms of sexual harassment. Given the severity of sexual assault and its resultant consequences, it is nonsensical to conclude that a student that was repeatedly subject to gender-specific name-calling could recover where he or she notified a school of conduct that "may constitute harassment," but a one-time rape victim may be precluded because of the pervasiveness standard applied to VPAA peer harassment claims. If the legislature gave specific recognition that sexual assault constitutes sexual harassment, the result in *Allen*—where UVM did not treat plaintiff's rape claim as one of sexual harassment—could be avoided because schools would be required to treat sexual assault as a form of harassment.

Section 565 should be amended to include a provision that requires school employees to report to a designated official whenever they witness, suspect, or are notified of severe *or* pervasive harassment. The imposition

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174. Allen v. Univ. of Vt., 2009 VT 33, ¶ 42, 185 Vt. 518, 538, 973 A.2d 1183, 1196 (Johnson, J., dissenting).

175. Coker v. Georgia, 433 U.S. 584, 597 (1977) (quoting U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION REPORT, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975)).

of a mandatory reporting requirement would be beneficial for students because it would help ensure that instances of harassment would be brought to the attention of a designated official. This would help take care of situations where students may be unaware of the appropriate reporting procedures or are otherwise reluctant to report harassment themselves. Limiting the requirement to where the harassment is severe or pervasive, however, would reduce the instances in which an employee is required to report to a designated official. An employee would not have to come forward every time he or she witnessed an isolated recess-time taunt. He or she would, however, have an obligation to come forward if informed that a student was experiencing daily gender-based insults.

The Vermont Supreme Court should adopt a modified constructive notice standard based on Title VII. In *Washington*, the Vermont Supreme Court rejected application of the federal Title IX "deliberate indifference" standard[176] and then rejected the plaintiff's proposed "knew or should have known" standard based on Title VII.[177] The court based its rejection of plaintiff's "truncated" Title VII standard on its failure to contemplate the corrective measures taken by schools after harassment occurs or the efforts made by the plaintiff to use available administrative remedies and concluded that such a standard would "expose schools to far greater liability than the VPAA can be construed to allow."[178] In determining which standard should apply, the court expressed a desire to preserve a school's ability to respond adequately to allegations of harassment and noted that the standard applied to peer harassment claims under the VPAA "must accommodate both a student's right to be 'free of harassment in educational institutions' and a school's opportunity to respond to alleged harassment before being subject to litigation."[179]

Modification to a pure constructive notice standard could address the concerns voiced by the *Washington* court. Specifically, Vermont should adopt a standard similar to that enunciated by the New Jersey Supreme Court in *L.W.* A school should be held liable where its response to

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176. Washington v. Pierce, 2005 VT 125, ¶ 29, 179 Vt. 318, 330, 895 A.2d 173, 184 (stating that "the VPAA is sufficiently distinguishable from Title IX in its structure and purpose that we are not inclined to apply the liability standard fashioned under those federal statutes to a VPAA claim").

177. *Id.* ¶¶ 30–31; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17. The court noted that the VPAA is a "remedial statute" whereas Title VII is meant to "influence primary conduct" and "not to provide redress but to avoid harm." *Id.* ¶¶ 29–30 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998)).

178. *Washington*, 2005 VT 125, ¶ 31.

179. *Id.* ¶ 32 (quoting 16 V.S.A. § 14). *See also id.* ¶ 34 ("By the plain language of 16 V.S.A. § 14(b), the Legislature balanced the coordinate duties of the school to provide a harassment-free environment and the harassment victim to look first to the school's mechanisms to redress in-school harassment.").

harassment of which it knew or should have known is unreasonable in light of all the circumstances and where the complainant experienced sexual harassment that was so severe *or* pervasive that a reasonable student would find that a hostile environment was created. By utilizing a totality-of-the-circumstances approach, courts could factor the availability of administrative remedies and whether or not a plaintiff utilized those remedies into their analysis of the reasonableness of a school's response. Additionally, the availability of administrative procedures or a plaintiff's failure to utilize those procedures could be considered an affirmative defense. Thus, the creation and maintenance of robust administrative processes would be encouraged because a school with effective programs could mitigate liability by showing that it had such procedures in place, that a plaintiff failed to utilize those procedures, or that it took corrective measures after harm occurred.

CONCLUSION

Discriminatory peer sexual harassment is a serious problem and can interfere with a student's overall education. Given the importance of education in modern society, it is crucial that students be protected against such harassment as much as practicable and that preventative measures are implemented by schools in order to avoid the damaging consequences associated with sexual harassment. Vermont law provides a means of redress for victims of peer sexual harassment against schools that fails to adequately respond to instances of harassment, but the protections available in Vermont should be strengthened so that the unjust result reached in *Allen* will no longer be a threat to other victims.

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