Third Circuit Holds That Prayer at Graduation Is Unconstitutional Even If It Results from a Student Vote

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CONSTITUTIONAL LAW — ESTABLISHMENT OF RELIGION — THIRD CIRCUIT HOLDS THAT PRAYER AT GRADUATION IS UNCONSTITUTIONAL EVEN IF IT RESULTS FROM A STUDENT VOTE. — ACLU v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996).

Despite the Supreme Court’s 1992 holding in Lee v. Weisman1 that state-sponsored prayer during a public school graduation ceremony violates the Establishment Clause,2 the issue of graduation prayer has recently resurfaced. Seeking to avoid Lee’s prohibition, school boards have allowed students to decide by majority vote whether prayer will occur at graduation.3 The Third Circuit recently held, however, that these state-authorized student referenda regarding prayer violate the Establishment Clause.4 In ACLU v. Black Horse Pike Regional Board of Education,5 the court properly recognized the danger that popular votes could pose to the protections of the Establishment Clause, yet wisely stopped short of forbidding all forms of graduation prayer.

In May 1993, the Black Horse Pike Regional Board of Education ("Board") ended its tradition of including an invocation in its high school graduation ceremony.6 Instead, the Board adopted a policy that allowed the graduating students to decide whether to include prayer in the ceremony, as well as what the content of that prayer would be.7 Shortly thereafter, a slim plurality of the Highland Regional High School senior class voted to have a prayer at graduation.8 The ACLU and a Highland graduating senior subsequently petitioned a federal court in New Jersey to enjoin any student-led prayer as a violation of the First Amendment.9 After the district court denied this request, the plaintiffs filed an emergency appeal with the Third Circuit, where a two-judge panel reversed and entered a preliminary injunction prohib-

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2 See id. at 586–87. The Establishment Clause states that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I.
5 84 F.3d 1471 (3d Cir. 1996).
6 See id. at 1474.
7 See id. at 1475. The policy allowed the senior class to choose among offering a prayer, observing a moment of reflection, or having nothing at all. See id.
8 See id. One hundred twenty-eight seniors voted for prayer, one hundred twenty voted for a moment of silence, and twenty voted to have neither. See id.
9 See id. at 1475–76.

iting prayer at the graduation. The district court then made the injunction permanent, and the Board appealed.

Sitting en banc, nine judges for the Third Circuit affirmed. The court analyzed the implications of the Establishment Clause for student-led prayer under both the framework articulated in Lee and the test announced in Lemon v. Kurtzman. Although it conceded that the state's involvement was "certainly less evident" in this case than in Lee, the court relied heavily on Lee's language and logic. It detailed the ways in which the state immersed itself in the planning, organization, and coordination of the Highland ceremony, and it concluded that the prayer subjected those students who did not vote for prayer to the coercion criticized by the Supreme Court in Lee.

Turning to the Lemon test, the court responded skeptically to the Board's purported secular purpose — to solemnize the occasion — by expressing doubt that "graduation would be any less solemn if students were not permitted to vote for prayer." The court emphasized that the voting procedure was unconstitutional — regardless of its purpose — because its effect was to communicate to religious minorities that they were not "full members of the political community." Ultimately, the court was convinced that the procedure sought "to accommodate the preference of some at the expense of others" and therefore "cross[ed] the required line of neutrality."

In a dissenting opinion, Judge Mansmann argued that the majority had expanded the reach of the Establishment Clause to the detri-

10 See id. at 1476.
11 See id.
12 The Supreme Court in Lee primarily examined two issues: the extent to which the state had exerted control over the ceremony, see Lee v. Weisman, 505 U.S. 577, 590 (1992), and the degree to which the students had been coerced into participating, see id. at 593.
13 Under the Lemon test, a government practice must satisfy three requirements to avoid violating the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion.'" Id. at 612-13 (citation omitted) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).
14 Black Horse, 84 F.3d at 1479-80. In Lee, the school principal decided that prayer would be included in the ceremony, chose the religious speaker, and determined part of the prayer's content. See id. (citing Lee, 505 U.S. at 587).
15 See id.
16 See id. at 1480.
17 Id. at 1485.
19 Id. at 1488. The court declined to address the Lemon test's third prong — the question of "excessive entanglement," Lemon, 403 U.S. at 613 — because it found that the Board's policy violated the test's first two prongs. See Black Horse, 84 F.3d at 1488.
20 Judges Nygaard, Alito, and Roth joined Judge Mansmann's opinion.
ment of the students’ free exercise and free speech rights. The dissent noted that only a compelling state interest, such as avoiding a violation of the Establishment Clause, could justify an infringement of those First Amendment rights. It concluded that the Board’s policy did not violate the Establishment Clause because the “highly democratic” nature of the student vote satisfied both the Lee criteria and the Lemon test. In the dissent’s view, no other compelling state interest justified the extreme measure of issuing an injunction.

The dissent failed to recognize that using a political process to advance a religious majority’s goals flouts the very purpose of the Establishment Clause: to protect religious minorities. The First Amendment has never implied a right on the part of a majority—much less a plurality—to override the fundamental protections that the Constitution accords all Americans. One of the purposes of the Bill of Rights was “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities.” A vote by students—far from being the “exercise in responsible citizenship” described by the dissent—amplifies, rather than reduces, the danger that a majority will bring intimidating pressures to bear in favor of a particular religion. The peer pressures inherent in the public school setting may produce unsavory campaigning in the cafeteria and inappropriate lobbying between classes. Government-sponsored referenda concerning public prayer could further fragment the school community, as religious minorities would be forced to recognize the beliefs of the majority, but would not be given a public

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22 See Black Horse, 84 F.3d at 1489 (Mansmann, J., dissenting).
23 See id.
24 See id. at 1490. According to the dissent, the student vote allowed the Board to maintain a position of “strict neutrality” toward religion, id., and eliminated the “psychological coercion” objected to in Lee, id. at 1492. The dissent further reasoned that the vote permitted every graduate to “partake in the community,” thereby reducing any feelings of exclusion potentially caused by the prayer. Id. at 1494. Finally, the dissent argued that the student vote policy served an educational, secular purpose by teaching students to resolve the issue of graduation prayer independently. See id.
25 See id. at 1497.
26 See Engel v. Vitale, 370 U.S. 421, 429 (1962) (Our Founders were not willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box...); cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (“Fundamental rights may not be submitted to vote...”).
28 Barnette, 319 U.S. at 638, cited in Black Horse, 84 F.3d at 1478.
29 Black Horse, 84 F.3d at 1494 (Mansmann, J., dissenting).
30 The Supreme Court has consistently enforced a strict standard of religious neutrality in the public school setting because children are more susceptible to religious indoctrination than adults. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).
31 Cf. Engel, 370 U.S. at 429 (recognizing the “anguish, hardship and bitter strife” that results if “zealous religious groups struggle[ ] with one another to obtain the Government’s stamp of approval”).
outlet through which to express their own views. Such referenda devalue the majority’s religion as well; the voting process subjects a highly personal and individualized conviction to a public procedure that demeans and debases any prayer that it produces.

Creating these hazards cannot be justified by arguing that the student vote eliminates state responsibility and therefore does not implicate the Establishment Clause. As the majority noted, the state was intimately involved in the student vote: the Board deliberately created and enforced the mechanism by which religion could be incorporated into the graduation ceremony, and then placed its authority behind the vote’s results. Not only was the vote state action, but the graduation ceremony itself also served an overt state function. In short, the vote did not remove the state’s imprimatur; rather, it allowed a plurality of students to use the “machinery of the State” to further a religious agenda.

Black Horse addressed only voted-for prayer; other forms of public graduation prayer by students may still be acceptable if certain criteria are met. For example, the policy that chooses student speakers must presumably be religiously neutral — such as choosing the speaker based on grade-point average or random selection — and not easily dominated by a politically active religious majority. Under this as-

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32 See generally The Supreme Court, 1992 Term — Leading Cases, 106 HARV. L. REV. 163, 268 (1992) (“[G]overnmental preference of a religion also weakens the political community itself; exclusion weakens the disfavored individuals’ attachment to and participation in the community, and thereby produces divisiveness.”).
33 See Black Horse, 84 F.3d at 1485; cf. Engel, 370 U.S. at 431 (“[A] union of government and religion tends to . . . degrade religion.”). The vote produces a “theologically and liturgically thin” prayer that diminishes the important role private religion plays in many people’s lives. Douglas Laycock, The Benefits of the Establishment Clause, 42 DEPAUL L. REV. 373, 380 (1994).
34 See Black Horse, 84 F.3d at 1490–93 (Mansmann, J., dissenting). This line of reasoning has been developed by other courts. See Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 968 (5th Cir. 1992); Adler v. Duval County Sch. Bd., 85 F. Supp. 446, 455 (M.D. Fla. 1994).
35 See Black Horse, 84 F.3d at 1478–79.
36 By allowing the students to choose only among prayer, silence, or nothing, the school “invited” religion but did not “invite” other types of speakers. Cf. Capitol Square Review and Advisory Bd. v. Finette, 115 S. Ct. 2440, 2448–49 (1995) (“[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause . . . .”).
37 See Engel, 370 U.S. at 431 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”).
38 Moreover, attendance was compelled, even if it was not technically mandatory. See Lee v. Weisman, 505 U.S. 577, 592–93, 596 (1992).
40 Although the dissent claimed that the court implemented a per se rule against all prayer at graduation, see Black Horse, 84 F.3d at 1496 (Mansmann, J., dissenting), the decision is not that far-reaching, see Black Horse, 84 F.3d at 1488 (interpreting the district court’s permanent injunction to apply only to the Board’s policy of requiring a student vote).
41 See Swanson, supra note 3, at 1433 (arguing that the Court should consider graduation a “public forum” and allow graduation prayer if the school allows “equal access . . . by religious
sumption, a school valedictorian would be able to thank God (or Allah, or Nietzsche, or no one) during her address without violating the Establishment Clause, because the process by which the valedictorian is chosen — based on academic performance — is neutral, well known, and open to all. Therefore, the connection between the valedictorian’s speech and the religious preferences of school administrators is tenuous at best, and the possibility that state action has produced any religious coercion is minimal. Indeed, once the school gives a student access to the graduation forum, it arguably can no more prohibit her from delivering a prayer than mandate that prayer occur.

Deciding whether a school violates the Establishment Clause would be more difficult if the neutrally chosen student delivered an “invocation,” rather than a valedictory address. An invocation carries with it a historical connection to state-sponsored prayer and these connotations might cause some audience members distress. Nevertheless, the state has an interest in providing “solemnizing” moments in order to demonstrate the seriousness of the occasion. As long as the school chooses the speaker for these “solemnizing” moments through a neutral method and therefore a prayer is neither expected nor ensured — the government will not be excessively connected with the student’s speech. Additionally, each individual student, once given

and nonreligious speakers, and that access is determined on the basis of a religiously-neutral principle.

42 Cf. Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (allowing school property to be used for religious purposes, even though no public forum had been created, because the property was open for use by a wide variety of private organizations).


44 Similar difficulties would arise if the valedictorian led the audience in prayer — rather than merely recited her own personal prayer. Compare Goluha v. School Dist. of Ripon, 45 F.3d 1035, 1040 (7th Cir. 1995) (arguing that, although a school could not prevent an individual student from engaging in private prayer at graduation, the school would be in “constitutional compliance” if it “appropriately restrained an individual from temporarily converting graduation into a prayer meeting”) with Bauchman v. West High Sch., 906 F. Supp. 1483, 1494 (D. Utah 1995) (finding that a high school had no control over a graduation crowd that spontaneously sang religious songs and holding that the school therefore did not violate an injunction that prohibited the singing of those songs during the ceremony).

45 Cf. Marsh v. Chambers, 463 U.S. 783, 786-88, 792 (1983) (upholding the use of prayer to open a state’s legislative assembly by recognizing the invocation’s long history and distinguishing the setting from that of a school by noting that the possibility of coercion is reduced if the prayer involves adults).

46 See Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring). Importantly, these ceremonies can have “solemnizing” moments without referring to religion at all. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring) (arguing that readings from the works of great Americans, or from the “documents of our heritage of liberty” could serve “solely secular purposes” without jeopardizing religious liberties).

47 Cf. Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2526 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”).
the opportunity to speak, should have sole control over the religious—or nonreligious—message of her speech. Moreover, unlike a student referendum, a "neutral process" would produce many different solemnizing methods over time and give various members of the student community access to the podium. This variety would further reduce the connection between any particular message and the school. Admittedly, such a process might frequently produce a majority prayer if conducted in a homogeneous community, or in a community with a staunch tradition of state-sponsored invocational prayer. However, requiring that all solemnizing speeches be secular would run afoul of the "viewpoint-neutrality" that the Supreme Court has required in regulating speech, and would force school officials into the unenviable position of censoring a student’s speech based solely on her religious views.

The Third Circuit vigorously protected the rights of religious minorities and was not fooled by the "democratic" rationalizations that the dissent offered in defense of the student vote. The court recognized that the student-vote policy could not be religiously neutral: democratic decisionmaking necessarily favors the majority religion. Yet the court properly did not forbid all prayer. Graduation prayer that is the individual expression of a neutrally-selected speaker—rather than the state-authorized litany of a political majority—should still be constitutional.

48 See Johanna J. Raimond, Note, The Constitutionality of Student-Led Prayer at Public School Graduation Ceremonies, 48 Vand. L. Rev. 257, 289-90 (1995) (arguing that spontaneous student prayer at graduation is constitutional, but recommending continued judicial vigilance to ensure against informal school coercion). This freedom is of course limited by the school’s power to forbid speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

49 See Jager v. Douglas County Sch. Dist., 862 F.2d 824, 827, 831 (10th Cir. 1989) (holding that presenting a prayer before high school football games violates the Establishment Clause, even if the speaker is chosen randomly).

50 See Rosenberger, 115 S. Ct. at 2518 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."). Rosenberger, which involved speech in religious publications, may be distinguishable from religious speech at graduation because the school ceremony involves a captive audience; the presence of captive listeners may lead the Court to balance the constitutional rights involved differently. Cf. id. at 2524-25 (holding that a state university would not violate the Establishment Clause by funding a religious publication if the university’s funding policy for student publications was neutral towards religion, because denying funding based on religion would amount to "viewpoint discrimination").

51 Cf. Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (arguing that a university "would risk greater entanglement [with religion] by attempting to enforce [an] exclusion of religious worship and religious speech" than by striving for viewpoint neutrality, because determining "which words and activities" fall within the religious category "could prove ‘an impossible task in an age where many and various beliefs meet the constitutional definition of religion’" (internal quotation marks omitted) (quoting O’Hair v. Andrus, 613 F.2d 931, 936 (D.C. Cir. 1979))).

As Title IX¹ claims for hostile learning environments created by peer sexual harassment have begun to proliferate,² this issue has leapt into the public eye.³ Last April, in Rowinsky v. Bryan Independent School District,⁴ the United States Court of Appeals for the Fifth Circuit foreclosed one avenue of relief for victims of such harassment, holding that Title IX does not impose liability on school districts for third-party sexual harassment.⁵ However, the court’s restrictive approach to statutory interpretation failed to provide a persuasive justification for excluding peer sexual harassment from the scope of Title IX.

Sisters Jane and Janet Doe, both eighth grade students at Sam Rayburn Middle School in the Bryan Independent School District in Texas, allegedly experienced numerous episodes of physical and verbal sexual harassment that occurred primarily on the school bus.⁶ At different times during the school year, Jane and Janet’s parents spoke with various school officials.⁷ The school suspended one male student for three days, but the incidents continued until the girls’ mother, Debra Rowinsky, removed her daughters from the bus.⁸ Rowinsky sued the school district under Title IX on her daughters’ behalf.⁹

The United States District Court for the Southern District of Texas granted summary judgment to the school district.¹⁰ The court held

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¹ Title IX provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....” 20 U.S.C. § 1681(a) (1994).
³ Within the past few years, both California and Minnesota have enacted laws requiring schools to distribute sexual harassment policies to students. See CAL. EDUC. CODE § 212.6 (West 1994); MINN. STAT. § 127.46 (1994). In addition, a public uproar erupted last fall over the suspension of a six-year-old boy from elementary school for kissing a female classmate. See Katy Kelly & David J. Lynch, Smooch Lands 1st-Grader in Hot Water, Headlines, USA TODAY, Sept. 26, 1996, at 1A.
⁵ See id. at 1008.
⁶ For instance, one male student identified as “G.S.” regularly swatted Jane and Janet on the buttocks as they walked down the bus aisle and, on several occasions, groped their genital areas and breasts. See id. G.S. once called Janet a “whore” and frequently made remarks such as: “When are you going to let me fuck you?”, “What bra size are you wearing?”, and “What size panties are you wearing?” Id. (internal quotation marks omitted).
⁷ See id. at 1008–09.
⁸ See id.
⁹ See id. at 1009–10.
¹⁰ See id. at 1010.
that Rowinsky had failed to state a claim under Title IX because she had not provided evidence that the school district had discriminated against students on the basis of sex.\footnote{11}

The Fifth Circuit affirmed the judgment by a 2–1 vote.\footnote{12} Writing for the majority, Judge Smith\footnote{13} held that Title IX does not impose liability on a school district for its knowing failure to halt peer hostile environment sexual harassment, absent proof that the school district itself directly discriminated based on sex.\footnote{14} Finding the statutory text ambiguous, Judge Smith relied on three contextual factors in interpreting Title IX to impose liability only for the acts of grant recipients.\footnote{15}

First, the majority analyzed the scope of Title IX as a whole. Judge Smith reasoned that “[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of title IX.”\footnote{16} Thus, he concluded that the “more probable inference is that [Title IX’s spending] condition prohibits certain behavior by the grant recipients themselves”;\footnote{17} otherwise, grant recipients would be induced to refuse the grants rather than risk third-party liability. Furthermore, the majority emphasized that, with the exception of one phrase, the statute discusses discrimination only by grant recipients.\footnote{18}

The majority then examined Title IX’s legislative history. Judge Smith noted that, in the congressional debates surrounding Title IX’s passage, both supporters and opponents of the bill had discussed only acts by grant recipients.\footnote{19} He also emphasized that Congress had explicitly acknowledged the limited scope of Title IX.\footnote{20} For example, Title IX’s sponsor admitted that Title IX “is not a panacea” for all forms of discrimination.\footnote{21} Judge Smith buttressed this view by noting that the “Supreme Court has repeatedly stated that the purpose of title IX is to prevent discrimination by grant recipients.”\footnote{22}

Lastly, the majority found that refusing to impose liability would be consistent with the interpretation of Title IX adopted by the Office of Civil Rights (OCR).\footnote{23} After characterizing the implementing regula-
as OCR’s “primary interpretation” of Title IX, Judge Smith concluded that the regulations could not be read to include the actions of third parties. Moreover, he found that OCR’s most definitive statement on sexual harassment was a 1981 policy memorandum that defined sexual harassment as conduct “by an employee or agent of the recipient.” Judge Smith declined to accord much weight to other OCR documents that implied a different interpretation of Title IX, because these Letters of Finding were merely ad hoc attempts to induce compliance in unique factual settings. Likewise, even though OCR’s interpretation of Title VI would impose liability on grant recipients for hostile environments caused by peer racial harassment, Judge Smith resisted Rowinsky’s analogy to that statute because OCR’s Title VI interpretation lacked a “reasoned explanation.”

Judge Dennis dissented, challenging the majority’s conclusion that the school district had no duty to protect students from hostile environments created by peer sexual harassment. He relied on Franklin v. Gwinnett County Public Schools, which held that Title IX contains an implied right of action for damages by a female student for hostile environment sexual harassment perpetrated by a school district employee. Because the Franklin Court cited an employment discrimination case under Title VII, Meritor Savings Bank, FSB v. Vinson, as precedent for its interpretation of Title IX, Judge Dennis maintained that the Court had intended to import the Title VII hostile environment standards “applied or adverted to” in Meritor into Title

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24 See 34 C.F.R. § 106.31 (1995). Section 106.31(a) provides that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic . . . program or activity operated by a recipient.” Id. § 106.31(a). Section 106.31(b)(7) states that a recipient shall not, on the basis of sex, “[o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.” Id. § 106.31(b)(7).


27 See id. at 71–73.


30 Rowinsky, 80 F.3d at 1016.

31 See id. at 1016 (Dennis, J., dissenting).


33 See Franklin, 503 U.S. at 75.
IX claims.\textsuperscript{37} Reasoning that the case of non-employee harassment was implicit in the \textit{Franklin} Court's holding,\textsuperscript{38} Judge Dennis concluded that the school district could be held liable for allowing hostile environments created by peer sexual harassment if it had knowledge of the harassment and failed to take corrective action.\textsuperscript{39}

By affirming the district court's decision in \textit{Rowinsky}, the Fifth Circuit not only split with the Eleventh Circuit,\textsuperscript{40} but also failed to explain persuasively its refusal to apply Title IX to cases of third-party sexual harassment. The majority's interpretation of Title IX's scope rests on two false premises. First, the majority's conclusion that imposing liability for the acts of students would deter schools from accepting grants assumes that, despite the best efforts of school districts, peer sexual harassment is inevitable.\textsuperscript{41} Although school districts do have substantial control over their students,\textsuperscript{42} most school districts have not attempted to address the problem of peer harassment because — absent the threat of Title IX liability — they have little incentive to do so. The majority's second flawed assumption is that, if Title IX did impose liability on school districts for peer sexual harassment, the standard would automatically be strict liability.\textsuperscript{44} Although it is unclear whether a negligence standard or an intent standard would apply under Title IX,\textsuperscript{45} no case has suggested that strict liabil-

\textsuperscript{37} \textit{Rowinsky}, 80 F.3d at 1020 (Dennis, J., dissenting). Title VII liability for hostile environment harassment will apply when the victim is a member in a protected group, there is an abusive environment, and the employer has actual or constructive notice of the hostile environment yet fails to take corrective action. \textit{See Doe v. Petaluma City Sch. Dist., No. C93-00123CW, 1996 WL 432298, at *11 (N.D. Cal. July 22, 1996).}

\textsuperscript{38} \textit{See id.} at 1021-22 (citing \textit{Meritor}, 477 U.S. at 65-67).

\textsuperscript{39} \textit{See id.} at 1023.

\textsuperscript{40} \textit{See Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996) (holding that “Title IX encompasses claims for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate harassment” (footnote omitted)).}

\textsuperscript{41} \textit{See Rowinsky}, 80 F.3d at 1013 (“[G]rant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of title IX.”).

\textsuperscript{42} \textit{See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2391-92 (1995) (justifying a urinalysis drug test requirement for high school athletes in part because the state, acting \textit{in loco parentis}, has a tutelary duty to promote and inculcate good morals, health, and self-discipline among its students). As Judge Dennis recognized, this degree of control is “sufficient to apply tort liability for the knowing failure of a school receiving federal funds to act in accordance with its statutory duty to prevent sex discrimination in the school.” \textit{Rowinsky}, 80 F.3d at 1024 n.9 (Dennis, J., dissenting).}

\textsuperscript{43} \textit{See Nan Stein, Nancy L. Marshall & Linda R. Trupp, Secrets in Public: Sexual Harassment in Our Schools II (1993) (estimating that 85% of schools fail to deal with sexual harassment).}

\textsuperscript{44} \textit{Cf. Rowinsky}, 80 F.3d at 1011 n.11 (“In the context of two students, . . . there is no power relationship, and a theory of respondent superior has no precedential or logical support.”).

\textsuperscript{45} \textit{See Gail Sorenson, Commentary, Peer Sexual Harassment: Remedies and Guidelines Under Federal Law, 92 Educ. L. Rep. (West) 1, 5-6 (1994); see also Rowinsky, 80 F.3d at 1023-24 (Dennis, J., dissenting) (stating that the \textit{Franklin} Court may have intended to limit Title IX's implied right of action to situations in which the recipient has actual or constructive knowledge of a violation, rather than to apply a negligence standard).}
ity would be imposed for third-party acts. The majority’s mistaken assumptions led to the wrong conclusion: instead of being inconsistent with Title IX’s spending condition, imposing liability for student acts would induce recipients to take reasonable steps to eliminate this harassment.

Furthermore, the majority’s reliance on the congressional debates surrounding Title IX to restrict the statute’s scope ignores the Supreme Court’s instruction that Title IX should be read broadly to give effect to its remedial purposes. Several Supreme Court decisions have indicated that courts interpreting Title IX should not be constrained by congressional debates; instead, courts should accord Title IX “a sweep as broad as its language.” For example, even though Congress did not expressly authorize a private right of action under Title IX, the Supreme Court found an implied right of action for injunctive relief in the statutory text. Years later, the Court held that Title IX even authorizes an award of monetary damages. These decisions reflect an expansive vision of Title IX.

Ultimately, the majority’s effort to preempt — rather than defer to — OCR’s interpretation of Title IX betrays itself. The court properly tried to ascertain whether OCR had formulated a policy regarding school district liability for peer sexual harassment. However, the majority’s suggestion that OCR’s implementing regulations clarify this ambiguity is disingenuous: the language of the regulations is nearly as broad as Title IX’s statutory language. In his search for a definitive interpretation, Judge Smith accorded little deference to OCR’s Letters of Finding because, he argued, none of the traditional factors supporting deference was present. Yet these letters clearly evince OCR’s interpretation that Title IX imposes liability on school districts for peer

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46 See Rowinsky, 80 F.3d at 1020 n.7 (Dennis, J., dissenting).
47 See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 694 (1979) (noting that the “legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question”).
49 See Cannon, 441 U.S. at 717.
51 According to the rule laid down in Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), if a statute is silent or ambiguous with respect to a specific issue, a court must defer to an agency’s interpretation if such interpretation is based on a “permissible construction of the statute.” Id. at 842–44.
52 Compare 34 C.F.R. § 106.31 (1995) (“[N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic . . . program or activity operated by a recipient . . . .”), with 20 U.S.C. § 1681(a) (1994) (“[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 . . . .”).
53 See Rowinsky, 80 F.3d at 1015. Judge Smith’s opinion implies that these factors include proper deliberation by the agency, universal applicability, and finality. See id.
sexual harassment. The consistency of the position adopted in OCR's letters over time and changing circumstances strongly suggests that the letters embody OCR's interpretation of Title IX regarding student-to-student sexual harassment. Consequently, the Rowinsky court should have deferred to OCR's conclusion that school districts can be liable under Title IX for third-party harassment.

Moreover, OCR's interpretation of Title VI complements this view. Judge Smith's rationale for dismissing OCR's position that Title VI prohibits peer hostile environment racial harassment — that the position lacked a reasoned explanation — is disingenuous. OCR justified its position that "[a] recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice" by reasoning that "an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment." Given OCR's reasoned explanation for its interpretation of Title VI and the Title IX Letters of Finding, the reasonable conclusion is that OCR interpreted Title IX to extend liability to school districts for hostile environments created by peer sexual harassment.

The Fifth Circuit's three justifications for limiting the scope of Title IX to the discriminatory acts of school districts — the statute's scope, legislative history, and regulatory treatment — actually lead to the conclusion that Title IX liability should extend to the acts of third parties. First, the scope of Title IX ought to be broad, thus recommending the imposition of liability on school districts for third-party actions to induce them to take the necessary steps to decrease occurrences of peer sexual harassment. Second, the Supreme Court's pronouncements on Title IX's applicability clearly specify a broader scope than that discussed in the statute's legislative history. Finally, OCR's interpretation of Title IX supports Title IX liability for the acts of third parties. Thus, the Fifth Circuit considered the correct factors in interpreting Title IX, but it reached the wrong conclusion.

54 See, e.g., Letter from Kenneth A. Mines, Regional Director, OCR, to Judyth Dobbert, Superintendent, Albion Public Schools (Apr. 7, 1994) (on file with the Harvard Law School Library) ("[A] recipient violates Title IX when it knew or should have known that a sexually hostile environment exists due to student-to-student harassment and fails to take effective corrective action."). In Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990), the Supreme Court held that three agency opinion letters were sufficient to demonstrate that the agency had a clear statutory interpretation that was entitled to deference. See id. at 642, 648.


56 Id.