Marquette Sports Law Review

Volume 33
Issue 1 *Fall*

Article 17

2022

Gendered Slurs on the Schoolyard: Unlawful Harassment or "Simple Teasing"?

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GENDERED SLURS ON THE SCHOOLYARD: UNLAWFUL HARASSMENT OR "SIMPLE TEASING"?

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I. INTRODUCTION

This Article seeks to grapple with one of the difficulties in sexual harassment law under Title IX: determining when bullying that uses words that are defined by reference to gender – such as "slut," "bitch," and "whore"

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– may nonetheless be viewed by courts as not truly harassment on the basis of sex.[1]

There is no question that these words target gender.[2] Specifically, they are insults designed to be used against women and girls.[3] Their dictionary definitions make this clear:

bitch (noun)

1. "the female of the dog or some other carnivorous mammals
    a. *informal + often offensive*: a malicious, spiteful, or overbearing woman
    b. *informal + offensive* – used as a generalized term of abuse and disparagement for a woman"[4]

slut (noun)

1. "*disparaging + offensive:* a promiscuous person: someone who has many sexual partners – usually used of a woman"[5]

whore (noun)

1. ". . . a person who engages in sexual intercourse for pay" (see prostitute)
2. "*offensive*: a promiscuous or immoral woman"[6]

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1. This Article does not focus on whether the use of slurs suggesting that the target is lesbian, gay, bisexual, transgender, or queer constitute harassment based on sex or on nonconformity with sex stereotypes under the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). That issue has been amply addressed elsewhere and was largely settled by the Supreme Court's 2020 ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731, 207 (2020). Articles relating to LGBT students and Title IX specifically include, for example, Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000); Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006 (2015); Kavan Vartak, *Title IX Protections Against Bullying in Schools for Sex, Gender, and Orientation*, 27 TUL. J.L. & SEXUALITY 91 (2018).

2. *See, e.g.*, Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810-13 (11th Cir. 2010) (en banc) (recognizing that terms like "bitch" and "whore" are "firmly rooted in gender" and "humiliating and degrading based on sex.").

3. *See* TANIA G. LEVEY, SEXUAL HARASSMENT ONLINE: SHAMING AND SILENCING WOMEN IN THE DIGITAL AGE (2011) (emphasis in the original). Levey categorizes these and other "misogynist slurs" as either focused on "sexual shaming" (words like "slut," "whore," "ho," and "dyke"), *id.* at 16, or on "demeaning women who fail to adhere to feminine norms of agreeableness and accommodation" (words like "bitch" and "cunt"), *id.* at 105. Note that when used against men or boys, these slurs convey an added insult because of their implication of femininity. *See Reeves*, 594 F.3d at 813 ("Calling a man a 'bitch' belittles him precisely because it belittles women . . . . Indeed, it insults the man by comparing him to a woman.").

4. *Bitch*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2022) (emphasis added).

5. *Slut*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2022) (emphasis added).

6. *Whore*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2022) (emphasis added).

The meaning of those terms is also plainly negative. Courts have even held that the use of such terms can even be defamatory *per se*.[7] Nonetheless, under both Title IX and other sex discrimination laws, courts sometimes hesitate to recognize the use of such gender-based slurs as a form of unlawful harassment on the basis of sex.[8] A significant reason for this reticence seems to be how common such terms are, particularly among young people.[9]

For example, in his dissent in the leading Supreme Court case on peer harassment under Title IX, *Davis v. Monroe County Board of Education*, Justice Kennedy cited to research showing that four out of five students reported having been the target of sexual harassment at school.[10] As a result, he warned, "[t]he number of potential lawsuits against our schools is staggering."[11] As discussed further below, much of the case law about peer harassment appears to be driven by that practical consideration and not necessarily by the faithful application of the statutory terms.

II. BACKGROUND

A. Development of Sexual Harassment Theory of Sex Discrimination Under Title VII

Understanding the development of sexual harassment doctrine under Title IX requires a look back at its forerunner, Title VII of the 1964 Civil Rights Act. That statute prohibits employers from firing, refusing to hire, or otherwise "discriminat[ing] against any individual with respect to his compensation,

7. Smith v. Atkins, 622 So.2d 795, 799 (La. Ct. App. 4th Cir. 1993) (holding that "calling a female law student a 'slut' is *defamatory per se*.").

8. *See infra* Part IV.A.

9. *See generally* ELIZABETH J. MEYER, GENDER, BULLYING, AND HARASSMENT: STRATEGIES TO END SEXISM AND HOMOPHOBIA IN SCHOOLS (2009). Relatedly, social scientists like Levey have tracked and analyzed the use of such slurs on social media. *See, e.g.*, LEVEY, *supra* note 3; Diane Felmlee et al., *Sexist Slurs: Reinforcing Feminine Stereotypes Online*, 83 SEX ROLES 16, 16-28 (2020).

10. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting) (citing AM. ASS'N OF UNIV. WOMEN EDUCATIONAL FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993)). A follow-up study from AAUW in 2011 focused on students' experiences in just the prior school year and found that forty-eight percent of students in middle and high school—including fifty-six percent of girls and forty percent of boys—had experienced some form of sexual harassment at school in the previous school year. Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

11. *Davis*, 526 U.S. at 680.

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[12]

In the 1970s, following advocacy by feminist legal scholars,[13] lower courts began to recognize that sexual harassment targeting women in the workplace could be a form of discrimination, as it subjected them to unequal "terms and conditions of employment" because of their sex.[14] In 1980, the Equal Employment Opportunity Commission (EEOC) promulgated regulations stating that "harassment on the basis of sex" constitutes unlawful sex discrimination under Title VII.[15] The regulations stated in part:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[16]

The first two items in that list are examples of what is termed *quid pro quo* sexual harassment, in which sexual favors are demanded in exchange for employment opportunity.[17] The third describes what became known as "hostile work environment" sexual harassment, where "sexual harassment simply makes the work environment unbearable."[18]

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12. 42 U.S.C. § 2000e-2(a)(1) (2022).

13. *E.g.*, CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

14. *E.g.*, Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); *see generally* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 40 STAN. L. REV. 661, 669 (1997).

15. 29 C.F.R. § 1064.11 (2022); *see* Lynn McClain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. REV. 275 (1981). The EEOC's positions are generally considered persuasive but not binding on courts. *See* Tessa M. Register, Comment, *The Case for Deferring to the EEOC's Interpretations in Macy and Foxx to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 IOWA L. REV. 1397, 1419 (2017).

16. 29 C.F.R. § 1604.11(a) (2022).

17. *See* MACKINNON, *supra* note 13, at 32.

18. *Id*. at 40.

Six years later, the U.S. Supreme Court recognized for the first time that sexual harassment could be a cognizable form of sex discrimination, in *Meritor Savings Bank v. Vinson*.[19] That case involved a female employee who said that her boss had repeatedly coerced her into having sex with him, fondled her in front of others, and forcibly raped her. The Court held that this harassment created a hostile environment for the employee because of her sex. The Court found that Title VII was not limited to denial of economic opportunities or tangible job benefits. Rather, the statute's reference to "'terms, conditions, or privileges of employment'" indicated the intent of Congress "'to strike at the entire spectrum of disparate treatment of men and women in employment.'"[20] The Court cautioned, however, that "'mere utterance of an . . . epithet which engenders offensive feelings in an employee'" would not sufficiently alter the employee's conditions of employment to violate the statute.[21]

In the following decades the Supreme Court went on to elaborate on the test for when "verbal or physical conduct of a sexual nature" crosses the line into discrimination.[22] In 1993, Justice Sandra Day O'Connor wrote for the unanimous Court in *Harris v. Forklift Systems* that the conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment[,]" from the perspective of a "reasonable person."[23] Determining that requires looking at the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[24]

In *Oncale v. Sundowner Offshore Services*, in 1998, Justice Antonin Scalia wrote for a unanimous Court that same-sex harassment could violate Title VII if the harassment took place "because of" the employee's sex.[25] In that case, the Court again cautioned that Title VII is not "a general civility code,"[26] and does not reach "simple teasing or roughhousing among members of the same sex."[27] And in *Faragher v. City of Boca Raton*, later that same year, the Court

19. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 57 (1986).

20. *Id.* at 63-64 (citations omitted).

21. *Id.* at 67 (quoting Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)).

22. *See* Wendy N. Hess, *Slut-Shaming in the Workplace: Sexual Rumors & Hostile Environment Claims*, 40 N.Y.U. REV. L. & SOC. CHANGE 581, 586-88 (2016).

23. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

24. *Id.* at 23.

25. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

26. *Id.* at 81.

27. *Id.* at 82.

noted further that the law does not protect against "'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[28]

B. Recognition of Sexual Harassment as a Basis for Title IX Claims Against School Districts

Title IX in many ways parallels Title VII's prohibition of sex discrimination, although the two statutes diverge in significant ways. Title IX was enacted as part of the Education Amendments of 1972.[29] It provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[30] Title IX was directly modeled on Title VI of the Civil Rights Act of 1964,[31] which prohibits discrimination on the basis of race, color, or national origin in all programs or activities that receive federal funding.[32] While Title VI applies to a wide range of publicly funded programs, Title IX specifically applies to public elementary and secondary schools and school districts, colleges, and universities.[33] It can also apply to private schools that receive federal funding, such as school lunch funds or Pell grants, although the statute includes a limited carve-out for certain religious institutions.[34]

Title IX was enacted pursuant to Congress's authority under the Spending Clause, which permits it to set conditions on state entities that receive federal funds.[35] The U.S. Department of Education's Office for Civil Rights (OCR) enforces both Title IX and Title VI (as it applies to schools), as well as other

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28. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)). *But see, e.g.*, Williams v. Gen. Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999) (recognizing that "harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women," such as referring to women as "sluts," constitutes harassment based on sex).

29. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified at 20 U.S.C. §§ 1681-1688).

30. 20 U.S.C. § 1681(a) (2022).

31. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 684-85, 694-96 (1979) (discussing legislative history of Title IX).

32. 42 U.S.C. § 2000d (2022) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

33. 20 U.S.C. § 1687(2) (2022).

34. 20 U.S.C. § 1687(3)-(4) (2022).

35. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1568 (2022).

nondiscrimination laws that apply to education programs.[36] OCR investigates complaints that schools are violating students' civil rights and often negotiates voluntary resolution with school districts.[37] It also has the power to withhold federal funding if the school fails to comply with its directives,[38] although this extreme step is rarely used. OCR's attorneys can also bring lawsuits against funding recipients, as can attorneys with the U.S. Department of Justice.[39]

It was not immediately clear after Title IX's enactment whether the statute also authorized private lawsuits to enforce its protections. In 1979, however, in *Cannon v. University of Chicago*, the Supreme Court held that the statute contained an implied private right of action.[40] In that case, the Court reversed a Court of Appeals' ruling dismissing a suit brought by a woman who alleged that she was denied admission to a medical school because of her sex.[41] However, the Court did not weigh in on the specific remedies that might be available to the plaintiff.

In 1992, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that the remedies available in private lawsuits under Title IX included not just injunctive relief but also monetary damages.[42] That case was brought by a high-school student who had been sexually harassed and coerced into sex by a teacher. She alleged that administrators were aware of the teacher's conduct but took no action to stop it, and even attempted to dissuade the student from pressing charges against him.[43] Citing *Meritor Savings Bank*, the Court held that just as sexual harassment of a subordinate employee by a supervisor constitutes sex discrimination under Title VII, sexual harassment of

36. *See About OCR*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last visited Dec. 30, 2022).

37. *See Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties (Rescinded)*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., at iii-iv (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("[T]he process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.").

38. 20 U.S.C. § 1682 (2022) (setting forth mechanism for removing federal funding from programs found to violate Title IX).

39. *See Title IX Legal Manual*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/title-ix (Aug. 12, 2021).

40. Cannon v. Univ. of Chi., 441 U.S. 677, 688-89, 710-11 (1979). *See also* Barnes v. Gorman, 536 U.S. 181, 185 (2002).

41. *Cannon*, 441 U.S. at 680, 717.

42. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992).

43. *Id.* at 63-64.

a student by a teacher constitutes "intentional" sex discrimination under Title IX.[44]

The Court further refined its analysis of teacher-on-student harassment six years later in another case involving a student who was sexually abused by a teacher: *Gebser v. Lago Vista Independent School District*.[45] In that case, unlike in *Franklin*, there was no allegation that school administrators were aware of the sexual abuse. Justice O'Connor wrote for the majority in *Gebser* that when a teacher sexually harasses a student, the school will only be liable for money damages under Title IX where a school official with authority to take corrective action has actual notice of the harassment and is "deliberately indifferent" to the harassment.[46]

The following year, in 1999, Justice O'Connor wrote the majority opinion in another case that further clarified the liability of schools and districts in private lawsuits under Title IX. That case, *Davis v. Monroe County Board of Education*, was brought on behalf of an elementary-school student, LaShonda D., who was repeatedly sexually harassed by a male student, G.F., in her fifth-grade class.[47]

According to the complaint, the harassment took place over a period of five months. G.F. tried to touch LaShonda's breasts and genitals and made comments like "I want to get in bed with you" and "I want to feel your boobs."[48] He put a doorstop in his pants and acted "in a sexually suggestive manner" toward LaShonda during gym class.[49] LaShonda reported each incident to her mother and to teachers, and her mother also spoke with her teacher, who assured her the school's principal was aware of the incidents. G.F. also treated other girls similarly, but when a group of girls including LaShonda tried to speak with the principal about this, they were rebuffed. Nonetheless, the school took no disciplinary action and made little effort to separate G.F. and LaShonda. The harassment only stopped when G.F. was charged with and pled guilty to sexual battery for his conduct.[50]

The complaint alleged that the harassment took a serious toll on LaShonda. She became unable to concentrate on her schoolwork and her

44. *Id.* at 75 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

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

46. *Id.* at 277.

47. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633-35 (1999).

48. *Id.* at 633.

49. *Id.* at 634.

50. *Id.* at 634.

previously high grades dropped. Her father even discovered she had written a suicide note.[51]

After LaShonda's family filed suit in federal court, the lower courts dismissed the Title IX claim on the grounds that the statute did not provide liability for a failure to prevent student-on-student harassment.[52] The Supreme Court reversed, holding that, as with teacher-on-student harassment, a school district could be liable where a responsible official was actually aware of the harassing conduct and was deliberately indifferent to it.[53] The Court cited to guidelines recently adopted by OCR which stated that student-on-student harassment fell within the scope of Title IX.[54]

Justice Kennedy penned a lengthy and vigorous dissent on behalf of four justices, predicting a flood of cases from bullied students swamping the courts.[55] In answer to the dissent's dire warnings, Justice O'Connor spent many pages articulating limitations on the new right the Court was recognizing.[56] She wrote that schools can only be liable for the conduct of students where they actually have the ability to take remedial action, such as when the conduct takes place at school as opposed to off-campus.[57] She stated that schools have wide latitude to determine the appropriate remedial action, and cautioned that "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[58]

The majority opinion also cabined the type of harassment that could qualify for liability, stating that liability only attaches for peer harassment "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."[59]

The majority took for granted that some conduct that would violate Title VII among adults at work would not violate Title IX among children at school, and sought to explain why courts should treat the same conduct differently in

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51. *Id.* at 634.

52. *Id.* at 636-37.

53. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646-47 (1999).

54. *Id.* at 647-48 (citing Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-40 (1997)).

55. *Id.* at 654, 680 (Kennedy, J., dissenting).

56. *Id.* at 632-54. Note that the limitations the majority opinion set forth about where the line might be drawn in other future, hypothetical cases were arguably *dicta*, because those facts were not before the Court and thus not essential to its holding on the case before it.

57. *Id.* at 644-45.

58. *Id.* at 648.

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

those different contexts. Justice O'Connor's reasoning focused on the frequency of this type of bullying among schoolchildren. She noted that teasing is common among children, including teasing with offensive words. In a passage frequently cited by lower courts in subsequent cases involving peer harassment, she wrote:

> [c]ourts . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults . . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.[60]

Quoting the previous year's decision in *Oncale*, Justice O'Connor wrote that making such a determination will depend on "a constellation of surrounding circumstances, expectations, and relationships"—such as the ages and the number of the individuals involved.[61] The majority concluded that the facts set forth by the plaintiff in *Davis* were sufficient to meet that high standard, and that the lower courts had erred in dismissing the complaint.

III. PATTERNS IN COURTS' TREATMENT OF GENDERED SLURS UNDER TITLE IX

In the years after *Davis*, lower courts have sometimes struggled to follow its logic regarding where the line should be drawn between permissible teasing among schoolchildren and impermissible harassment based on sex.[62] The same

60. *Id.* at 651-52.

61. *Id.* at 651 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

62. While *Davis* involved a claim of sexual harassment under Title IX, it is generally recognized that its ruling applies in equal measure to harassment based on race, color, or national origin under Title VI and

difficulty followed the Supreme Court's ruling from the previous year in *Oncale*, which offered equally vague guidance about when same-sex bullying and sexual abuse at work crosses the line from "simple teasing or roughhousing" to unlawful sexual harassment under Title VII.[63] There, Justice Scalia wrote for the unanimous Court, somewhat unhelpfully, that "common sense" would guide courts and juries in that endeavor.[64]

The few published decisions of the federal Courts of Appeal in this area have provided limited guidance to district courts, because these cases are so fact-specific and require consideration of a broad "constellation" of factors.[65] The lower courts are therefore left to determine based on the facts before them when harassment that targets a student's sex may nonetheless not be actionable harassment based on sex under Title IX.[66]

Some courts have suggested that verbal harassment alone is insufficient to constitute harassment under Title IX.[67] In other cases, courts have concluded that where the bulk of the harassment does not seem connected to the target's gender, the use of one or even a small handful of gender-related or sexual epithets are insufficient to constitute sex discrimination.[68]

Others have held that harassment that seems to be primarily attributable to "personal animus," rather than animus related to the target's gender, does not constitute gender-based harassment.[69] In cases involving mixed motives – for

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harassment based on disability under the Americans with Disabilities Act and/or the Rehabilitation Act. *See, e.g.*, Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 664-65 (2d Cir. 2012) (discussing peer racial harassment); S.S. v. E. Ky. Univ., 532 F.3d 445, 453-54 (6th Cir. 2008) (discussing peer disability harassment).

63. *Oncale*, 523 U.S. at 82.

64. *Id.*

65. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting *Oncale*, 523 U.S. at 82).

66. For an insightful analysis covering many factors that distinguish successful Title IX harassment claims from unsuccessful ones, see Susan P. Stuart, *Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TR. ADVOC. 243 (2005).

67. *E.g.*, Burwell v. Pekin Cmty. High Sch. Dist., 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002); Higgins v. Saavedra, No. CIV 17-0234, 2018 WL 327241, at *7 (D.N.M. Jan. 8, 2018) ("'name-calling, standing alone, probably would not be sufficient to' demonstrate gender-based harassment") (quoting Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 965 (D. Kan. 2005)).

68. *E.g.*, Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165 (5th Cir. 2011) (discussing single use of the word "ho").

69. *Id.* at 165-66 (5th Cir. 2011) (concluding that the harasser was motivated by the target dating the harasser's former boyfriend, not by the target's gender); Burwell v. Pekin Cmty. High Sch. Dist., 213 F. Supp. 2d 917, 918-28 (C.D. Ill. 2002) (discussing alleged harassment by a group of male students in an alleged gang who targeted a brother and sister, calling them epithets and threatening to fight them, for unclear reasons that might have included a belief that the brother had stolen lunch money from one of the gang members); Benjamin v. Lawrence Twp. Metro. Sch. Dist., No. IP00-0891, 2002 WL 977661, at *3

example, bullying based on multiple features of the target's identity – some courts have concluded that the presence of gender-specific epithets is insufficient to constitute gender-based harassment under Title IX.[70]

Finally, some courts have rejected Title IX claims of peer harassment even in the face of allegations that the plaintiff experienced pervasive verbal harassment with words like "whore" and "slut," where the court concluded that such "name-calling" alone can never constitute unlawful harassment, rejecting arguments that those epithets are connected to sexual stereotypes about women.[71]

On the other side of the ledger, courts appear more likely to find a valid claim for peer harassment that takes the form of verbal epithets when the bullying has some nexus to an underlying sexual assault[72] or to the target's choices about engaging in or not engaging in sexual activity.[73] Courts have also found an adequate connection to sex where the verbal harassment specifically relates to features of the target's genitals.[74] Finally, courts have upheld claims involving harassment by gender-based slurs like "bitch" and "whore" in the context of other allegations suggesting that the student was targeted for perceived nonconformity with gender stereotypes, including stereotypes relating to sexual orientation.[75]

(S.D. Ind. Mar. 27, 2002) (discussing that harassment stemmed from the breakup between the female target and a friend of the harassers).

70. *E.g.*, Doe v. Galster, 768 F.3d 611, 614, 618 (7th Cir. 2014) (discussing female student targeted by multiple students with epithets including "bitch" and "stupid Russian"); H.B. v. Monroe Woodbury Cent. Sch. Dist., No. 11-CV-5881, 2012 WL 4477552, at *17 (S.D.N.Y. Sept. 27, 2012) (discussing that epithets included "whore," "bitch," "fucking rat," "dirty spic," and "gorilla").

71. *E.g.*, Whitley v. Indep. Sch. Dist. No. 10 of Dewey Cnty., Okla., No. CIV-18-331, 2019 WL 7667329, at *2, 5, 9 (W.D. Okla. Apr. 22, 2019).

72. *E.g.*, Doe *ex rel.* Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., 35 F.4th 459 (6th Cir. 2022); Doe v. Sch. Dist. No. 1, Denver, Colo., 970 F.3d 1300 (10th Cir. 2020); I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360 (5th Cir. 2019); Doe v. E. Haven Bd. of Educ., 200 F. App'x 46 (2d Cir. 2006); Goodwin v. Pennridge Sch. Dist., 389 F. Supp. 3d 304, 314 (E.D. Pa. 2019) ("When a sexual assault triggers a course of harassment, the total course of events can be considered sexual harassment.").

73. Krebs v. New Kensington-Arnold Sch. Dist., No. 16-610, 2016 WL 6820402, at *3 (W.D. Pa. Nov. 17, 2016) (discussing a high-school student harassed by her ex-boyfriend and his friends after she refused to have sex with him); John T.D. v. River Delta Jt. Unified Sch. Dist., No. C092655, 2021 WL 5176356, at *1 (Cal. Ct. App., 3d Dist., Nov. 8, 2021) (discussing a male high-school student harassed after admitting he was a virgin).

74. *E.g.*, T.B. v. New Kensington-Arnold Sch. Dist., No. CV 15-606, 2016 WL 6879569, at *3 (W.D. Pa. Nov. 22, 2016) (discussing seventh-grade student harassed with, among other things, comments about the odor of her vagina); Price *ex rel.* O.P. v. Scranton Sch. Dist., No. 11-0095, 2012 WL 37090, at *2 (M.D. Pa. Jan. 6, 2012) (discussing seventh-grade student harassed after getting a yeast infection).

75. *E.g.*, Harrington v. City of Attleboro, 172 F. Supp. 3d 337, 341 (D. Mass. 2016) (discussing plaintiff who was openly queer, tall, and heavy-set and was called names including "bitch," "whore," "fat ass,"

IV. SPECIFIC EXAMPLES

A. Cases Finding Gendered Slurs "Simple Teasing"

This section examines two examples of cases in which lower courts have held that harassment using sexual or gender-based epithets is not actionable harassment under Title IX.

1. "Personal Animosity Unrelated to Gender"

Burwell v. Pekin Community High School District[76] was one of the earliest published decisions after *Davis* where the facts of the harassment claim centered on sexual and gender-based name-calling. In *Burwell*, a group of male high-school students in a purported gang targeted a brother and sister—Patricia and Mark—who were both seniors, and Patricia's friend Amy, over the course of the second semester of their senior year. The group of boys called them epithets like "bitch" and "pussy" on a daily basis, and threatened to fight them.[77] Patricia filed suit against the school district after she graduated, asserting that school administrators had failed to protect her from sexual harassment.

According to the plaintiff, the male students were members of a gang called "M.O.B.," which stood for either "Money Over Bitches" or "Men Over Bitches."[78] The origin of the conflict between the M.O.B. members and Patricia, Mark, and Amy was somewhat obscure, but it may have involved a belief that Mark had stolen lunch money from one of the gang members. The plaintiff testified that the male students frequently yelled epithets like "slut," "bitch," and "pussies" at Patricia and Amy, and threatened to fight them.[79] On one occasion a group of the male students attempted to goad the plaintiff into fighting, calling her a "pussy" and a "tough girl."[80] When the campus police officer arrested them a short time later, two male students shouted at Patricia, "You're a fucking bitch."[81] Graffiti at the school included "Men Over Bitches,

"dyke," and "fag"); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 222, 226 (D. Conn. 2006) (discussing eighth-grade girl subjected to frequent harassment by other girls including the epithets "bitch," "dyke," "freak," "lesbian," and "gothic").

76. Burwell v. Pekin Cmty. High Sch. Dist., 213 F. Supp. 2d 917 (C.D. Ill. 2002).

77. *Id.* at 919.

78. *Id.*

79. *Id.*

80. *Id.* at 920.

81. *Id.*

Fuck Them" and "Fuck the Burwells, MOB."[82] A male friend of Patricia's said one of the M.O.B. members made comments outside of Patricia's presence threatening to rape Patricia.[83]

There was some testimony that Patricia and Mark returned the threats and profanity, and that Patricia in particular called one of the boys a "fucking pussy."[84] The school eventually imposed restrictions on Patricia and Mark as well as the M.O.B. members, ensuring that the two groups would be separated.[85]

The court noted that the harassment did not appear to have a significant impact on the plaintiff. She received the highest grades of her high-school career in the semester in which the conflict took place, and there was no evidence that she sought counseling before she graduated.[86]

The district court, in the Central District of Illinois, granted the school district's motion for summary judgment. The court rejected as speculative and conclusory Patricia's argument that the harassment was based on her gender or failure to conform to sex stereotypes. The court pointed to the fact that her brother Mark was also targeted by the same group, and that he in fact seemed to have been the initial target. Thus, this seemed to be a case of harassment motivated by "personal animus," not gender.[87] The court cited to *Davis* for the proposition that "it is not enough to show that a student has been teased or called offensive names."[88] The court concluded, as a result, that the mere fact that the harassment included gender-specific epithets like "bitch," "pussy," and "slut" did not necessarily indicate gender bias where the evidence indicated that the harassment was based on "personal animosity unrelated to gender."[89]

The court also noted that all the conduct the plaintiff reported was verbal, not physical. It noted that (at the time, at least), all the cases in which a Title IX violation was found based on peer harassment involved much more serious misconduct, such as sexual assault or at least groping, as in *Davis*.[90]

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82. Burwell v. Pekin Cmty. High Sch. Dist., 213 F. Supp. 2d 917, 924, 927 (C.D. Ill. 2002).

83. *Id.* at 927.

84. *Id.* at 923.

85. *Id.* at 924-25.

86. *Id.* at 928.

87. *Id.* at 930.

88. Burwell v. Pekin Cmty. High Sch. Dist., 213 F. Supp. 2d 917, 931 (C.D. Ill. 2002).

89. *Id.*

90. *Id.* at 930.

The court also found that the limited harassment that it did consider to be based on sex – the rape threats – were not severe or pervasive, because they were made to another student outside of the plaintiff's hearing.[91] Finally, even if Patricia had met the requirements of showing that the harassment was severe, pervasive, and objectively offensive, the harassment did not effectively deny her the benefits of the school's educational program, because she had been on the honor roll and graduated on time.[92]

Finally, another factor – though unacknowledged in the analysis – may have been that the court simply did not find the plaintiff credible. There was some evidence that Patricia encouraged witnesses to exaggerate or lie in support of her claims.[93] It stands to reason that if the court was already skeptical of Patricia's claims, it would be inclined to view close questions against her.

2. Offensive Comments Outside of Plaintiff's Presence

In a 2022 decision, *Doe v. Plymouth-Canton Community School*,[94] the District Court for the Eastern District of Michigan granted summary judgment to the school district. It held that the plaintiff who was verbally harassed by an ex-boyfriend and his friends did not assert a valid claim of harassment under Title IX.[95]

This case stemmed from the breakup between the plaintiff, Jane Doe, and a boy she dated for several weeks, H.B.[96] At the time, she was going into ninth grade and he was going into eleventh grade. During their short relationship, Doe told H.B. that she had been sexually assaulted when she was two years old by a babysitter's husband.[97] After their breakup, H.B. began harassing her at school. Doe complained to the school at least ten times over the course of the next two years about H.B.'s harassment. Doe said H.B. called her names like "bitch," "whore," and "slut," in the hallway and at lunch, at least once a

91. *Id.* at 931.

92. *Id.* at 932.

93. *Id.* at 925.

94. Doe v. Plymouth-Canton Cmty. Schs., No. 19-10166, 2022 WL 1913074, at *1, 14 (E.D. Mich. June 3, 2022), *appeal filed*, (June 24, 2022) (No. 22-1555).

95. *Id.* at *6-9.

96. *Id.* at *1.

97. *Id.*

week.[98] Twice, other students reported to Doe that H.B. had said he hoped she "would be raped again."[99]

Doe attempted suicide in the spring of her ninth-grade year.[100] She asserted in the lawsuit that she did so due to the unending harassment. However, the defendants pointed to her medical records which indicated the precipitating incident was a falling-out that afternoon with a male friend who attended a different school, whose friends got on the phone with her, called her a "whore," and said, "she deserved to be raped."[101]

In this case, as in *Burwell*, there was some evidence suggesting that the plaintiff had fabricated some of the allegations. For example, she complained to school officials several times that H.B. approached her in a threatening manner or grabbed her arm at school, but when administrators reviewed surveillance video, they could not corroborate her account.[102] That may have contributed to the court's skepticism toward her claim overall.

The court concluded that the evidence did not support an actionable claim of sexual harassment under *Davis*. Citing Sixth Circuit precedent, the court wrote that "'[s]evere' means something more than just juvenile behavior that is antagonistic, non-consensual, and crass."[103] Moreover, as the Supreme Court recognized in *Davis*, "'simple acts of teasing and namecalling' are not enough, 'even where these comments target differences in gender.'"[104] The court emphasized that the harassment Doe alleged that explicitly related to sex was only verbal.

Importantly, the court emphasized that the most offensive comments – the comments by H.B. that he hoped she would be raped again – were not even directed at Doe herself, but rather reported to her by others.[105] The court noted that it had been unable to find any decisions in which a Title IX claim for harassment had been based on "hearsay" comments.[106] On the other hand, at least two cases involving such indirect comments had been found *not* to

98. *Id.*

99. *Id.* at *2.

100. Doe v. Plymouth-Canton Cmty. Schs., No. 19-10166, 2022 WL 1913074, at *3 (E.D. Mich. June 3, 2022), *appeal filed*, (June 24, 2022) (No. 22-1555).

101. *Id.*

102. *Id.* at *3-5.

103. *Id.* at *7 (quoting Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 620-21 (6th Cir. 2019)).

104. *Id.*

105. *Id.* at *9.

106. Doe v. Plymouth-Canton Cmty. Schs., No. 19-10166, 2022 WL 1913074, at *8 n.16 (E.D. Mich. June 3, 2022), *appeal filed*, (June 24, 2022) (No. 22-1555).

constitute actionable harassment under Title IX. For example, in a 2011 case, *Sanches v. Carrollton-Farmers Branch Independent School District*, the Fifth Circuit had rejected a claim based on allegations of bullying by a female classmate where the action most explicitly related to sex was overhearing that classmate calling the plaintiff a "ho" on one occasion while speaking to another student.[107] The Fifth Circuit questioned whether this single instance "qualifies as harassment at all."[108]

As a result, the district court in Doe's case concluded that H.B.'s conduct did not constitute severe and pervasive harassment based on sex, especially in comparison with cases involving more severe harassment, including physical touching, that was found not to violate Title IX.[109] Those included a case from an Ohio district court in which an elementary-school student eventually died by suicide after years of pervasive harassment including a threat by another student to tie her up and rape her.[110] As in that case, the court concluded, the harassment Doe experienced was "vile, but it is not actionable."[111]

B. Cases Finding Gendered Slurs Unlawful Harassment

1. Nexus to Sexual Assault

By far the most common context in which courts recognize claims under Title IX for verbal harassment and epithets alone is where there is a nexus to an underlying sexual assault. For example, in a 2019 decision, *I.F. v. Lewisville Independent School District*, the Fifth Circuit recognized that a student had raised a plausible claim based on verbal harassment with gendered slurs.[112] The harassment in that case began after a female ninth-grade student alleged that she was raped at a party by two male classmates.[113] Afterwards, numerous other students began to harass her, calling her a "whore" and a "slut."[114] One of the boys who had raped her wore to school a pair of pants

107. Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165 (5th Cir. 2011).

108. *Id.*

109. *Id.*

110. Feucht v. Triad Loc. Schs. Bd. of Educ., 425 F. Supp. 3d 914, 918, 931 (S.D. Ohio 2019).

111. *Doe*, 2022 WL 1913074, at *9.

112. I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360, 373-74 (5th Cir. 2019) (holding that the plaintiff had stated a valid claim of sexual harassment but upholding the district court's grant of summary judgment to the school district on the grounds that it had not been deliberately indifferent to the plaintiff's complaints).

113. *Id.* at 364.

114. *Id.* at 373.

that had her blood on them, stood on a lunch table, and proclaimed, "these are the pants that I took [I.F.'s] virginity in."[115]

The Fifth Circuit agreed with the district court that I.F. had presented a valid claim of sexual harassment under Title IX, because the harassment she described was "severe, pervasive, and objectively offensive."[116] In addition to the offensive name-calling, students spread rumors about her, called her a liar, and asked her questions such as what it felt like "to be fucked in every single hole of your body?"[117] The verbal harassment in school continued for approximately two weeks until I.F. stopped attending classes in person.[118] The harassment also carried over to online forums, with students posting comments about I.F.'s assault on Instagram and Twitter.[119]

The harassment also had a profound effect on I.F. The evidence indicated that she began feeling depressed and having nightmares and panic attacks.[120] She felt suicidal and started cutting herself.[121] She ultimately completed her ninth-grade year at home and her parents withdrew her from the school district at the end of that school year.[122] The impact on her contributed to the court's conclusion that the harassment was severe and pervasive and that it effectively denied her access to the benefits of the school's educational programs.[123]

Nonetheless, the Fifth Circuit upheld the lower court's grant of summary judgment to the school district, because its response to I.F.'s complaints had not been deliberately indifferent.[124] The district conducted thorough investigations of I.F.'s claims of sexual assault, harassment, and cyberbullying and disciplined the students involved for the incidents it was able to substantiate.[125] The Fifth Circuit concluded that because the school district's actions were "not clearly unreasonable," summary judgment was appropriate.[126]

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115. *Id.* at 364.

116. *Id.* at 374.

117. *Id.* at 373.

118. I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360, 364 (5th Cir. 2019). I.F. completed the school year through the school district's "homebound" program for students unable to attend school for medical reasons. After that year, her parents withdrew her from the district. *Id.* at 365.

119. *Id.* at 367.

120. *Id.* at 373.

121. *Id.*

122. *Id.* at 367.

123. *Id.* at 373-74.

124. I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360, 374-75 (5th Cir. 2019).

125. *Id.* at 366-67, 377.

126. *Id.* at 378.

2. Serious Verbal Harassment from Multiple Classmates

An unpublished 2016 case from the Western District of Pennsylvania, *Krebs v. New Kensington-Arnold School District*, was filed by the parents of a fourteen-year-old girl named Destinee who died by suicide after three years of persistent harassment by classmates.[127] The harassment in that case began in the seventh grade, when students called her "fat" and "ugly."[128] As a result, her grades dropped, and she lost thirty pounds.[129]

In eighth grade the harassment worsened and became more explicitly related to sex. Classmates called her names including "slut," "whore," and "bitch," as well as non-sex-related insults like "stupid."[130] That year she began cutting herself and started seeing a therapist, who diagnosed her with anxiety and depression.[131] Teachers noticed that her schoolwork was affected and reported those concerns to the school district.[132]

The harassment continued escalating as Destinee entered ninth grade. Other students threatened and physically assaulted her at school.[133] However, the school refused to allow her to withdraw from in-person classes because of her failing grades and lack of "motivation."[134] After Destinee refused to have sex with her boyfriend, he and other classmates began harassing her further.[135] She "'begged' her parents to withdraw her from school," but they did not, relying on the school district's assurances that it would stop the bullying.[136] Ultimately Destinee took her own life, leaving a note that said, "the pain needs to end."[137]

The district court concluded that the sex-based harassment Destinee experienced was sufficiently pervasive to constitute actionable sexual harassment under Title IX.[138] (While *Davis* used the phrasing "severe and

127. Krebs v. New Kensington-Arnold Sch. Dist., No. 16-610, 2016 WL 6820402, at *1 (W.D. Pa. Nov. 17, 2016).

128. *Id.*

129. *Id.* at *1.

130. *Id.* at *2.

131. *Id.*

132. *Id.* at *1.

133. Krebs v. New Kensington-Arnold Sch. Dist., No. 16-610, 2016 WL 6820402, at *1 (W.D. Pa. Nov. 17, 2016).

134. *Id.*

135. *Id.* at *3.

136. *Id.*

137. *Id.* at *1.

138. *Id.*

pervasive" in describing actionable peer harassment,[139] the Third Circuit Court of Appeals has held that harassment that was sufficiently severe *or* pervasive could qualify, so long as "a reasonable person would agree that it is harassment."[140]) The district court noted that Destinee herself viewed the conduct as sexual harassment. The court pointed to the names classmates called her—like "bitch," "slut," and "whore"—that were tied to her gender.[141] It also pointed to the fact that some of the harassment began after she refused to have sex with her boyfriend.[142]

The court acknowledged that "infrequent name calling and bullying among adolescent peers at school may not always rise to the level of harassment required under Title IX."[143] However, in this case, it concluded that the "constant and pervasive harassment with sex based terms" that Destinee experienced did rise to that level.[144] In this case, "a reasonable person could find this conduct to be severe or pervasive enough to rise to the level of actionable harassment."[145]

V. CONCLUSION

It is difficult to deny that when a student's peers target her with epithets relating to her gender, such as "slut" or "bitch," that is a form of harassment based on sex. Whether courts will recognize such harassment as actionable under Title IX is less certain. As shown in those examples, courts appear more likely to find sex-based slurs actionable sexual harassment under Title IX

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

140. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 205 (3d Cir. 2001) (citing to Title VII hostile environment cases). In subsequent cases, the Third Circuit confirmed that it uses the disjunctive standard (severe *or* pervasive) in Title IX cases. *See, e.g.*, Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 533-34 n.99 (3d Cir. 2018). Note that this is also the standard used by the Department of Education's Office for Civil Rights in its guidance between 1997 and 2020, which OCR looks likely to return to based on the amendments to the regulations it proposed in July 2022. *See* Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,410 (proposed July 12, 2022). Other Courts of Appeal have also used the disjunctive standard at times. *See, e.g.*, Feminist Majority Found. v. Hurley, 911 F.3d 674, 686 (4th Cir. 2018) ("Consistent with the Supreme Court's *Davis* decision, we have recognized that, to succeed on a Title IX claim premised on sexual harassment, a plaintiff must [show that] . . . 'the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity . . . .'") (quoting Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (en banc)).

141. Krebs v. New Kensington-Arnold Sch. Dist., No. CV 16-610, 2016 WL 6820402, at *3 (W.D. Pa. Nov. 17, 2016).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at *3.

where the name-calling follows an underlying sexual assault, as in *I.F.*, or where the verbal harassment is pervasive and has an undeniable impact on the target's educational experience, as in *Krebs*. Courts are less likely to find such name-calling actionable where they believe the harassment is "really" motivated by personal animus, rather than gender, or where the evidence throws doubt on the truthfulness of the plaintiff's allegations.

The court's wording of the standard likely makes a difference as well: the *Krebs* court used the "severe *or* pervasive" standard used by the Third Circuit, but most Courts of Appeal follow the literal wording of the standard from *Davis*, which requires a showing that peer harassment is both severe *and* pervasive.[146] In 2020, under the Trump Administration, the Department of Education adopted regulations codifying the definition of sexual harassment under Title IX as "unwelcome conduct . . . on the basis of sex" that is "determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[147] That was a shift away from the Department's longstanding guidance, dating back to 1997, which had used a lower standard that swept in significantly more conduct.

However, under the Biden Administration, the Department of Education has proposed amendments to the Title IX regulations that, among other things, would revert back to the "severe or pervasive" standard.[148] The Department's regulations and policy guidance are not generally viewed as binding on courts, but its longstanding views typically receive some deference from the Supreme Court. Indeed, the Court has regularly relied on OCR's policy guidance to schools in its Title IX decisions, including *Davis*.[149]

Justice Kennedy's dissent in *Davis* pointed out that at the time Title IX was enacted, in 1972, sexual harassment had not been recognized by any federal courts as a form of gender discrimination.[150] Thus, it is not likely that the authors of that measure envisioned that sexual or gender-based harassment

146. *See* Misa Scharfen, Note, *Peer Sexual Harassment in School: Why Title IX Doctrine Leaves Children Unprotected*, 24 S. CAL. REV. L. & SOC. J. 81, 93 (2014).

147. 34 C.F.R. § 106.30 (2020) (emphasis added).

148. Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,410 (proposed July 12, 2022) (proposing to define sexual harassment, in relevant part, as "Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).").

149. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 647-48 (1999).

150. *Id.* at 663-64 (Kennedy, J., dissenting).

among schoolchildren would violate the law. Nevertheless, the mere fact that certain types of mistreatment are common or that Congress might not have clearly understood that they would be covered by the terms of the statute does not prevent a finding that they are unlawful. As the Supreme Court noted in its landmark 2020 decision holding that discrimination based on sexual orientation or gender identity is *per se* sex discrimination, *Bostock v. Clayton County, Georgia*, "it is 'the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'"[151]

Bostock held that discrimination against a gay or transgender employee is always in part a form of sex discrimination, even if another factor—anti-gay or anti-transgender animus—is also involved because traits like "gay" and "transgender" are defined in relation to the employee's sex.[152] The employee's sex is therefore a "but-for" cause of the discrimination.[153] The same logic would counsel that where harassment takes the form of epithets aimed directly at the target's sex, including the target's perceived nonconformity with gender stereotypes[154]—even if that harassment is also motivated by other factors, such as personal animus—that conduct is *per se* gender-based harassment, because it would not have occurred but for the target's gender.[155]

It remains to be seen how the current Supreme Court will weigh the practical considerations of increased liability for school districts against fidelity to the statutory language in the context of Title IX. However, based on the combination of the proposed amendments to the Title IX regulations, the *Bostock* decision, and the slight trend in the lower courts toward recognizing gendered slurs as actionable harassment, it appears somewhat more likely today that the Supreme Court could conclude that the use of gender-based epithets is, in fact, a form of sexual harassment and not just "simple teasing" that schools, and courts, can look past.

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151. Bostock v. Clayton Cnty, 140 S. Ct. 1731, 1744 (2020) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

152. *Id.* at 1742 ("When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.").

153. *Id.*

154. As scholars including Tania Levey have observed, "misogynist slurs" like "bitch," "slut," and "whore" carry an implication that the target has failed to conform to stereotypes of "agreeableness" or sexual chastity. See Levey, *supra* note 3.

155. *See id.*