

# SEXUAL HARASSMENT, SEXUAL ASSAULT, AND STUDENTS WITH SPECIAL NEEDS: CRAFTING AN EFFECTIVE RESPONSE FOR SCHOOLS

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## INTRODUCTION

The sexual harassment and sexual assault of children with physical and developmental disabilities is disturbingly common. Because most children spend the bulk of their time in school, much of this abuse, inevitably, occurs in school settings. Disabled children who have experienced sexual harassment and sexual assault at school have, through their caregivers, sought remedy in the courts. Unfortunately, disabled children's claims often fail due to heavy litigation burdens.

Existing regulatory guidance pertaining to sexual harassment and sexual assault in schools only obliquely references disability, especially as it pertains to the ability of an individual student to consent to sexual activity. The focus on consent is backward looking, not preventative, and offers little to schools in the way of actual action they can take to best serve students and fulfill their legal obligations. Moreover, this *ex post* focus leads courts and advocates to rely on the fraught concept of "mental age," which has been roundly criticized by disabilities rights advocates as not only inexact, but insulting and oppressive.

To develop a more successful method of preventing and responding to the harassment of and assaults against vulnerable students, there is a need to develop a holistic approach. Ideally, such an approach would consider the needs of the individual child and strike a balance between encouraging healthy sexual development and preventing harassment and assault. This piece explores these problems and suggests a framework for schools to better prevent and remedy the sexual harassment and assault of students with special needs, including: targeted education on sexuality and relationships; an emphasis on social mainstreaming and inclusion; training staff to identify students experiencing harassment and assault who may have difficulty reporting due to the nature of their disabilities; instructing staff to supervise vulnerable children, and punishing those who fail to do so; requiring teacher intervention; refraining from the punishment of complainants; and putting the burden of relief on the accused, not the complainant.

## I. ALICIA'S CASE

Alicia was eleven years old when she began attending LaPine Middle School in 2000.<sup>1</sup>

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<sup>1</sup> Morgan v. Bend-LaPine Sch. Dist., No. 07-173, 2009 U.S. Dist. LEXIS 9443, at \*6 (D. Or. Feb. 6, 2009).

She struggled academically and was diagnosed with a variety of disabilities that impaired her ability to succeed: attention deficit hyperactivity disorder (“ADHD”), emotional disturbance, a communication disorder, muscular dystrophy, and arthritis.<sup>2</sup> The public school she attended recommended that she be transferred to RiverBend, an alternative school, to continue her education.<sup>3</sup> It was at RiverBend where Alicia’s problems began.

When Alicia began attending RiverBend, she was the only female in a group of twenty-one students.<sup>4</sup> Some time later, two more female students began attending RiverBend: one was younger than Alicia and not in her class, and the other quickly became Alicia’s “best friend.”<sup>5</sup> Alicia’s 2003 Individualized Education Program (“IEP”) described her as “a delightful and likeable young lady,” but one who craved “‘any kind’ of positive attention.”<sup>6</sup> This caveat was particularly ominous when considered in conjunction with a comment in Alicia’s 2002 IEP that noted Alicia had difficulty reading social cues and could be easily targeted by more socially sophisticated peers, particularly due to her excessive eagerness to please.<sup>7</sup>

These predictions proved prescient. On a rafting trip with RiverBend, Alicia and her “best friend” were frequently left unsupervised with groups of boys, all of whom—Alicia, through her parents, would later contend—functioned at a higher cognitive level than her.<sup>8</sup> During one of these periods of isolation, Alicia was encouraged by one of the boys to “flash” them.<sup>9</sup> She clearly did not understand the sexual meaning of revealing her chest, and asked the boys why they would want to see her lift her shirt.<sup>10</sup> After being told “girls like it,” Alicia, hoping to please, complied.<sup>11</sup> She similarly complied when encouraged to manually stimulate one boy’s penis in the back of a van, and again during a further incident outside a tent.<sup>12</sup> On the way back from the trip, at least one of the teachers was alerted to the “flashing” incident.<sup>13</sup> However, the teacher did not inform parents or take any further action after being begged to stay silent by Alicia, who—fearing she had done something wrong and would get in trouble—became frantic upon being questioned.<sup>14</sup>

On a RiverBend trip to a state park shortly thereafter, Alicia—then fourteen and the only girl on the trip—was again left unsupervised with groups of boys, although she was given a tent to herself.<sup>15</sup> Two of the boys asked her to pull down her pants and show them her “pussy,” and as with the flashing incident, Alicia, confused by the proposition, complied.<sup>16</sup> On the way back from

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<sup>2</sup> *Id.* at \*6.

<sup>3</sup> *Id.* at \*7.

<sup>4</sup> *Id.* at \*9.

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

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

<sup>7</sup> *Id.*; see also *id.* at \*47 (“[T]he record supports the conclusion that [Alicia] was naïve and less socially aware than her peers . . .”).

<sup>8</sup> *Id.* at \*10, \*46.

<sup>9</sup> *Id.* at \*10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*10-11.

<sup>12</sup> *Id.* at \*12.

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

<sup>14</sup> *Id.* at \*13-14.

<sup>15</sup> *Id.* at \*18.

<sup>16</sup> *Id.* at \*18-19. As with the “flashing incident,” Alicia was told by the boys, “girls like it.” *Id.* at \*21.

the park, she asked a teacher what “pussy” was.<sup>17</sup> The teacher asked her why she wanted to know, and Alicia said, “because ‘they wanted to see it.’”<sup>18</sup> The teacher spoke to the two boys, who denied using the word “pussy” or engaging in any sexually-charged behavior.<sup>19</sup> Again, no parents were alerted, although an assembly about “appropriate” behavior was held.<sup>20</sup> After this assembly, Alicia disclosed to teachers what had happened at the river rafting trip, but after talking to one of the male students involved, the teachers accepted his version of events and urged him “not to brag or discuss the events with anyone.”<sup>21</sup>

The sexual harassment continued unabated. At a school trip to a pool, Alicia was groped under the water and complained to teachers that a boy (the same boy from the river rafting trip) had “touched [her] way too close” and “grabbed her crotch.”<sup>22</sup> She was convinced to play “strip poker” on the school bus by two boys, one of whom was a “repeat offender” from the incident at the state park.<sup>23</sup> The “game” Alicia thought she was playing, however, basically involved Alicia exposing her body parts and allowing the boys to expose their genitals and digitally penetrate her vagina.<sup>24</sup> There were several incidents on the bus before the bus driver reported the misbehavior.<sup>25</sup> The school’s only corrective action was to speak to the students involved and separate them on the bus.<sup>26</sup> Still, no one notified Alicia’s parents.

It was only in February 2004, nearly a year after the first incident, that Alicia’s parents were alerted to any incidents of harassment or assault involving their daughter.<sup>27</sup> They only learned of the mistreatment of Alicia when she herself finally disclosed what had happened; they removed her from RiverBend immediately.<sup>28</sup>

## II. MANY ALICIAS: THE ENHANCED VULNERABILITY OF STUDENTS WITH SPECIAL NEEDS

Children with physical and developmental disabilities face an increased risk of abuse, including sexual abuse.<sup>29</sup> Women and girls with disabilities of all kinds are more than twice as

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<sup>17</sup> *Id.* at \*21.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*22.

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

<sup>21</sup> *Id.* at \*22-23.

<sup>22</sup> *Id.* at \*25-26.

<sup>23</sup> *Id.* at \*27.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*28.

<sup>26</sup> *Id.* at \*29.

<sup>27</sup> *Id.* at \*30.

<sup>28</sup> *Id.* at \*30-31.

<sup>29</sup> Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 *SEXUALITY AND DISABILITY* 243, 243-44 (1991). Sobsey and Doe note that the prevalence of assault varies depending on the nature of the disability, with disabilities that render a child physically vulnerable (*e.g.*, cerebral palsy) or vulnerable by way of manipulation, coercion, or inability to report (*e.g.*, intellectual disabilities) obviously resulting in greater predation than other disabilities (*e.g.*, deafness). *See generally id.* Of course, some children present with multiple disabilities that are different in nature. This piece does not distinguish or categorize children with disabilities, but rather recognizes that a child’s individual disability and the resulting vulnerabilities are key components in contextualized, individualized analyses of each child’s case. *See id.*

likely to have been sexually abused as children than women without disabilities.<sup>30</sup> Although the numbers vary by specific disability, it is believed that a majority of disabled women and girls experience sexual abuse at some point in their lives.<sup>31</sup> The number of survivors at issue is significant—developmental disabilities present in approximately three to five percent of the general population—and the problem is pervasive.<sup>32</sup> It is, however, a largely silent problem, in part due to taboos against discussing sexual abuse, which results in a lack of reporting. It is estimated that reports are made for only one in thirty disabled survivors of sexual abuse, compared to an already-meager one in five for survivors without disabilities.<sup>33</sup> The United States Department of Justice (“DOJ”) estimates that “less than half [of disabled survivors of sexual abuse] will seek assistance” of any kind—be it legal remedy or private treatment—after an assault.<sup>34</sup>

Children and youth with special needs are more vulnerable to sexual harassment and assault than other children for a number of reasons. People with disabilities, especially women and children, are typically perceived—however accurately or inaccurately—as “weak and passive,” and many have been trained by well-meaning caregivers to be compliant, making them easy targets for exploitation.<sup>35</sup> Another source of vulnerability is the result of stigma against the disabled. Because of stigmatization, people with disabilities frequently exhibit poor self-image and, perceiving themselves to be inferior, may assume they are deserving of harassment or abuse.<sup>36</sup> Children and youth with disabilities are also at increased risk of victimization because they, like all children, exhibit an intense desire to fit in and befriend other children, including those without disabilities. Eagerness to be accepted can leave these children “vulnerable to coercion” to perform sexual or other acts that they believe, or are told to believe, will lead to acceptance and friendship.<sup>37</sup>

In addition to exploitation by peers, children and youth with special needs are at heightened risk of abuse at the hands of caregivers, including teachers, non-teaching aides, and other school personnel, particularly if the child’s disability is one that makes them dependent on

<sup>30</sup> Nancy A. Murphy & Ellen R. Elias, *Sexuality of Children and Adolescents With Developmental Disabilities*, 118 PEDIATRICS 398, 400 (2006).

<sup>31</sup> Sobsey & Doe, *supra* note 29, at 244; Murphy & Elias, *supra* note 30 at 400 (“The US Department of Justice reports that 68% to 83% of women with developmental disabilities will be sexually assaulted in their lifetimes . . .”); *see also* Nora J. Baladerian, *Sexual Abuse of People with Developmental Disabilities*, 9 SEXUALITY AND DISABILITY 323, 328 (1991) (“By combining national statistics with specific studies, estimate ranges are as follows: between 39% and 83% of girls with developmental disabilities, and between 16% and 32% of boys with developmental disabilities will be subjected to sexual abuse before the age of 18 years.”) (internal citations omitted).

It should be noted that although much research and scholarly literature, including much of that which is cited herein, focuses disproportionately on female survivors, there are many male survivors, and men and boys with disabilities are also more likely than men and boys without disabilities to experience sexual exploitation. *See generally id.* For myriad reasons, male victims are understudied and underreport their assaults. *See generally* Clayton M. Bullock & Mace Beckson, *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, 39 J. AM. ACAD. PSYCHIATRY LAW 197 (2011).

<sup>32</sup> Baladerian, *supra* note 31, at 325.

<sup>33</sup> Deborah Tharinger et al., *Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps*, 14 CHILD ABUSE & NEGLECT 301, 304 (1990).

<sup>34</sup> Murphy & Elias, *supra* note 30, at 400.

<sup>35</sup> Sobsey & Doe, *supra* note 29, at 252.

<sup>36</sup> *Id.* at 253.

<sup>37</sup> Tharinger et al., *supra* note 33, at 305.

adults for intimate care.<sup>38</sup> These children may have normalized intimate touch, making it difficult for them to distinguish abuse from other physical contact.<sup>39</sup> Finally, and perhaps most egregious in the context of educational institutions, children and adults with intellectual disabilities, for a variety of reasons discussed *infra*, do not typically receive information about human sexuality. Even children with purely physical disabilities, if they are not “mainstreamed” into general education classrooms, are often excluded from sex education and sexual abuse prevention programs other children attend.<sup>40</sup> To add a further layer of complexity, when these children *do* receive sex education, the educational materials used are typically not created for or targeted to children functioning at lower than average cognitive levels.<sup>41</sup> Without effective education, many children lack the vocabulary to describe what has happened to them and the social skills to interact safely with others, including strategies to defend themselves against abuse.<sup>42</sup>

### III. CLOSED DOORS IN THE COURTS

Litigation has proven an unreliable vehicle for relief for affected students and their families. Alicia, for example, faced barriers in the courts that are representative of the barriers that litigants in her position typically encounter. After Alicia’s parents were finally alerted to the fact that she had experienced sexual abuse on school outings and school transportation, they filed a variety of claims against the school district and against three individual teachers, all of which were rejected.<sup>43</sup> Her case is again a useful place to begin identifying and analyzing these obstacles.

First, Alicia raised a constitutional due process claim under 42 U.S.C. § 1983 (“Section 1983”), alleging that the defendants had deprived Alicia of her liberty interest in being protected from harm.<sup>44</sup> The Court rejected her claim, citing the long-established principle that “members of

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<sup>38</sup> Murphy & Elias, *supra* note 30, at 400.

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

<sup>40</sup> Tharinger et al., *supra* note 33, at 305.

<sup>41</sup> *Id.*

<sup>42</sup> Murphy & Elias, *supra* note 30, at 400. The same concerns undergird popular wisdom about teaching children the proper names for their genitals. The tale of the child who reports to an unknowing parent that another child touched their “cubby” (or “cookie,” or “dolly,” etc.) when the child is referring to an intimate body part they lack the vocabulary to describe, thus permitting the abuse to continue, is a standard training exercise in the area of sexual assault prevention and treatment. For example, Pandora’s Project, a non-profit organization providing support to survivors of sexual assault, observes:

By teaching a child the proper names for their body parts, they will be in a position to name what’s happening to them should someone touch them in an abusive way. By using the proper terms, everybody will be in a position to know exactly what they are referring to, and minimizing the chance of misinterpretation. For example, it is far less confusing if a child is able to say “He touched my vagina with his penis” than it is if she said, “He touched my Merry Christmas with his didler!”

*Some Tips on How to Protect Your Child From Sexual Abuse*, PANDORA’S PROJECT (2009), <http://www.pandys.org/articles/protectyourchild.html> (last visited Oct. 1, 2013).

<sup>43</sup> *See generally* Morgan, 2009 U.S. Dist. LEXIS 9443.

<sup>44</sup> Specifically, Alicia claimed that “the individual defendants failed to adequately respond to their knowledge of inappropriate sexual conduct between RiverBend students by failing to discover, investigate, report (to both legal authorities and [Alicia’s] parents), and intervene to prevent harm to her.” *See id.* at \*36-37.

the public have no constitutional right to sue state actors who fail to protect them from harm inflicted by third parties” unless there is a special relationship at issue between the state actor and the victim, or the state actor was responsible for creating the danger.<sup>45</sup> The court acknowledged that RiverBend’s teachers did fail to supervise Alicia’s classmates while on field trips and bus rides, and that they had noticed as early as May 2003 that Alicia’s classmates had subjected her to sexual harassment and abuse, and that they had discouraged reports of the harassment and abuse to parents and persons outside of RiverBend.<sup>46</sup> However, the Court found that the failure to “take[] a more active role in bringing the information they had concerning sexually charged conduct between [Alicia] and her classmates to the attention of authorities or her parents” was insufficient to “support a finding of the level of deliberate disregard required to sustain a violation of [Alicia’s] constitutional right to due process.”<sup>47</sup>

Alicia also brought an equal protection claim, arguing that she was the victim of discrimination on the basis of gender and disability.<sup>48</sup> Alicia alleged that the defendant teachers had “treated male students preferentially by failing to punish” them after the teachers became aware of the sexual misconduct, while simultaneously threatening to punish her, and by believing the male students’ false accounts of what transpired in the tent, the van, the pool, etc. while discounting Alicia’s alarm.<sup>49</sup> The court rejected the gender discrimination claim, finding that the teachers had not acted with any discriminatory animus towards Alicia as a female.<sup>50</sup>

As for the disability discrimination claim, Alicia proposed an argument that will form the crux of major analysis, *infra*, but will be discussed here only briefly. Alicia asserted that “she should have been treated the same as a young child due to her level of emotional maturity,” which was low in light of her disability, and that RiverBend should not have “relied on her chronological age in assessing their duty to report.”<sup>51</sup> Yet again, the Court rejected Alicia’s claim, determining that she had failed to prove that the defendants acted with discriminatory animus towards Alicia as a result of her disability solely because they maintained “a facially-neutral policy (of reporting cases of abuse where the victim is a chronologically younger child) [but not ‘mentally younger,’] result[ing] in discrimination against older emotionally disabled students.”<sup>52</sup>

Finally, Alicia attempted to access relief under Title IX of the Education Amendments Act of 1972 (“Title IX”), which prohibits sex discrimination in federally funded educational programs and has been interpreted by courts to hold schools liable for the sexual harassment and

Section 1983 makes relief in the form of money damages available to persons subjected to a “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” by a state actor. *See* 42 U.S.C. § 1983.

<sup>45</sup> Morgan, 2009 U.S. Dist. LEXIS 9443, at \*38-40 (internal citation omitted). “Poor Alicia!” one might exclaim, echoing Justice Blackmun’s famed lament for a vulnerable child. *See* *DeShaney v. Winnebago County*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (referring to this principle as “a sad commentary upon American life, and constitutional principles . . .”).

<sup>46</sup> *Id.* at \*60, \*65.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*65.

<sup>49</sup> *Id.* at \*67.

<sup>50</sup> *Id.* at \*68-70.

<sup>51</sup> *Id.* at \*71-73. Put another way, “[t]he alleged discrimination is based on a presumption that coercion does not exist between students of the same age,” even when the situation involves a “more emotionally mature student [targeting] disabled students who, although the same age, are vulnerable to victimization due to their relative emotional immaturity.” *Id.* at \*72.

<sup>52</sup> *Id.* at \*75.

assault of students where found to deprive the targeted student of educational benefits.<sup>53</sup> In this case, the Court held that the abuse Alicia suffered was in fact “severe [and] pervasive,” but also held that the school district had no “actual knowledge” of the abuse and exhibited no “deliberate indifference” to it, and therefore, her final claim must also fail.<sup>54</sup>

It is difficult to imagine factual scenarios with respect to which these heavy burdens could be met. If failure to investigate and correct sexual harassment and abuse of a child with known vulnerabilities does not constitute creation of a dangerous situation under Section 1983, what could?<sup>55</sup> Direct evidence of discriminatory animus will obviously be rare,<sup>56</sup> and courts hearing Title IX cases are inclined to classify awareness as constructive, not “actual,” or to hold that while some officials had actual notice, the “appropriate” officials did not, shutting plaintiffs

<sup>53</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2006).

<sup>54</sup> *Id.* at \*80. Put another way, Alicia failed to establish two of the three *Gebser/Davis* prongs for establishing liability under Title IX. The prevailing standard of Title IX liability for sexual harassment suits comes from two cases, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). These cases, considered together, establish that in order to hold a school district, official, or employee liable for the sexual harassment of a student by another student, teacher or employee, the plaintiff student must show that he or she endured harassment “so severe, pervasive, and objectively offensive that it denie[d] its victims the equal access to education that Title IX is designed to protect,” that the school or school district had actual knowledge of the abuse, and that the school or school district responded to such actual knowledge of harassment or abuse with deliberate indifference. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. at 652.

<sup>55</sup> Reference to *DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv.*, 489 U.S. 189 (1989) is again pertinent. In that seminal case, Wisconsin child welfare officials were first alerted to the potential abuse of toddler Joshua DeShaney at the hands of his father in January 1982. *Id.* at 192. Although they repeatedly investigated, and even temporarily removed Joshua from his father’s care, he was ultimately permitted to remain in the custody of his father, who in March 1984 beat Joshua so severely that he suffered a series of hemorrhages due to traumatic brain injury and was permanently rendered profoundly retarded. *Id.* at 192-93. Although the record revealed stunning failures on the part of child welfare, including ignoring emergency room reports that Joshua was being abused and making two home visits without even seeing Joshua to assess his welfare shortly before the final, catastrophic incident of abuse, the Supreme Court denied relief under Section 1983, as “the harms Joshua suffered occurred not while he was in the State’s custody, but while he was in the custody of his natural father, who was in no sense a state actor.” *Id.* at 201. The Court further reasoned:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

*Id.* The bar has thus been set exceptionally high, and injured children face a herculean task when bringing failure to protect claims.

<sup>56</sup> Courts have repeatedly described direct evidence of discriminatory animus as “rare.” *See, e.g.*, *Braithwaite v. Dep’t of Homeland Sec.*, 473 F. App’x 405, 410 (6th Cir. 2012) (in the context of age discrimination claims); *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 587 (7th Cir. 2011); *Sardina v. United Parcel Serv., Inc.*, 254 F. App’x 108, 109 (2d Cir. 2007) (in the context of employment discrimination claims brought under Title VII of the Civil Rights Act of 1964 (“Title VII”)); *see also Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (indicating that Title VII analysis should inform Title IX analysis).

Moreover, the small sample sizes that arise in the school context make comparator evidence difficult to obtain; comparator evidence drawn from small sample sizes has been recognized as inherently unreliable. *See generally Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605 (1974).

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#### IV. AN OPEN REGULATORY WINDOW

As in Alicia's case, the doors to the courts will be closed to many potential plaintiffs who have experienced sexual harassment and sexual assault in schools. However, there is an open regulatory window.

In 2001, the United States Department of Education's Office for Civil Rights ("OCR") published a sexual harassment and Title IX compliance guidance that proved to be an enormously helpful tool for schools receiving federal funds.<sup>58</sup> When schools are given clear, reliable guidelines for how they should behave—and clear, reliable guidelines for how they will be punished if they do not—they comply, to the benefit of students. Thus, guidance upon which schools can rely regarding sexual harassment and sexual assault is imperative.

The 2001 Guidance did not, however, include targeted instructions applicable to students with special needs. The only meaningful sign that disability was on the radar was a passing reference to disability and consent: in a section about how to assess the "welcomeness" of allegedly consensual sexual relationships between an adult school employee and a student, the 2001 Guidance states that "certain types of disabilities could affect a student's abilities to [consent]."<sup>59</sup>

Ten years later, on April 04, 2011, OCR released a "Dear Colleague" letter mandating policy changes in the way schools address sexual harassment and sexual assault.<sup>60</sup> The Dear Colleague letter emphasized important steps schools must take to address these offenses, including taking immediate action upon being informed of an offense having taken place; ensuring that a grievance procedure is in place through which students can file complaints of

<sup>57</sup> See, e.g., *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (holding the "actual knowledge" requirement had not been met because evidence showed only that the principal was aware of the *potential* for abuse by a teacher with a known history of abuse and a known predilection towards excessive physical contact with a student, but was not *in fact* aware that abuse had actually occurred—this decision was attacked for encouraging officials to "bury their heads in the sand").

Similarly, courts frequently hold that even an ineffective or minimal response to harassment excuses an actor from accusations of deliberate indifference. See, e.g., *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (holding that a school board's response to reported harassment was not "clearly unreasonable" even though "proven ineffective"). See generally FATIMA GOSS GRAVES, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, RESTORING EFFECTIVE PROTECTIONS FOR STUDENTS AGAINST SEXUAL HARASSMENT IN SCHOOLS: MOVING BEYOND THE *GEBSER* AND *DAVIS* STANDARDS (2008), available at <http://www.acslaw.org/files/Goss%20Graves%20-%20Moving%20Beyond%20Gebser%20and%20Davis%20Final.pdf> (advocating that alternatives to rigid standards would provide students with a broad range of legal protections more consistent with the purposes of Title IX).

<sup>58</sup> See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter 2001 GUIDANCE], available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>59</sup> *Id.* at 8. Thankfully, the 2001 Guidance noted that there is a strong presumption against consent between adult school employees and secondary or post-secondary students, with or without disabilities, and that "OCR will *never* view sexual conduct between an adult school employee and an elementary school student as consensual." *Id.* (emphasis added).

<sup>60</sup> RUSSLYNN ALI, ASSISTANT SEC'Y FOR CIVIL RIGHTS, DEP'T OF EDUCATION, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (last visited Sept. 27, 2013) (hereinafter DEAR COLLEAGUE LETTER).

sexual harassment and assault; and use of a “preponderance of the evidence” standard in resolving such complaints (rather than a more stringent standard such as “clear and convincing evidence” or “beyond a reasonable doubt”).<sup>61</sup> In spite of the many other excellent proposals contained therein, like the 2001 Guidance, the Dear Colleague letter addressed disability in the most cursory of ways. The Dear Colleague letter again noted that “[a]n individual . . . may be unable to give consent due to an intellectual or other disability.”<sup>62</sup>

## V. RELIANCE ON A “MENTAL AGE” FRAMEWORK

Existing guidance on the federal level only tangentially addresses disability as it pertains to the matter of consent to sexual activity. Here, regulation treads on thorny ground.

A common default for feminist advocates in the courts has been to point to the framework of a “mental age” in assessing consent: not a person’s actual chronological age, but the chronological age at which their individual level of intellectual and emotional development is typically attained (illustrated in statements such as, “she was thirty, but with the mental age of a six year old”). A prototypical example of the use of a mental age framework would be a presumption that when an alleged perpetrator functions at a higher cognitive level than an alleged victim, any sexual contact between the two is to be considered harassing and unwelcome. The concept is pervasive in discourse—and screaming headlines in the media—about sexual abuse and disability, and is clearly one that has been endorsed by existing OCR guidance.

Yet, mental age is a concept that has been fraught with controversy since it first originated in the early twentieth century, contemporaneously with the advent of the intelligence quotient (“IQ”) test.<sup>63</sup> Many disabilities rights advocates suggest a middle of the road approach, in which an individualized inquiry is conducted into the matter of consent in the context of disability.<sup>64</sup> Such an inquiry should be based in modern knowledge about cognitive disabilities and include individual attributes beyond IQ and “mental age,” including specific details about the circumstances of the sexual encounter.<sup>65</sup> Advocates concerned with disabilities rights typically downplay the rhetorically powerful concept of mental age because such concepts perpetuate the belief that cognitively disabled people of all ages are childlike and incapable of personal agency.<sup>66</sup>

In assessing a cognitively disabled person’s grant of consent to sexual activity, or lack thereof, criminal courts generally look for three elements to establish competency to provide legal

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<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Id.* at 1. It should be noted that the Dear Colleague letter also observed that women with intellectual disabilities are “significantly” more likely to be sexually assaulted than the general population, *id.* at 2, and stated that “if an alleged *perpetrator* is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the [Individuals with Disabilities in Education Act (“IDEA”)] as well as the requirements of Section 504 of the Rehabilitation Act of 1973 . . . when conducting the investigation and hearing.” *Id.* at 8 n.22 (emphasis added). To be fair, the Dear Colleague letter was primarily targeted at post-secondary institutions (colleges and universities), where students with intellectual disabilities comprise a smaller proportion of the student population.

<sup>63</sup> *See, e.g.,* L.L. Thurstone, *The Mental Age Concept*, 33 PSYCHOL. REV. 268 (1926) (using correlation data to argue that the mental age concept leads to ambiguities and inconsistencies).

<sup>64</sup> *See, e.g.,* Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1354 (2009); *see also* Deborah W. Denno, *Sexuality, Rape and Mental Retardation*, 1997 U. ILL. L. REV. 315 (1997).

<sup>65</sup> Denno, *supra* note 64, at 321.

<sup>66</sup> *Id.* at 330-31.

consent: (1) knowledge of the important aspects of the decision and its risks and attendant benefits; (2) evidence the knowledge is comprehended and is applied in a manner consistent with the person's values or beliefs; and (3) voluntariness.<sup>67</sup> The specific contours of these three elements vary by state; the majority requires a showing that the person understands the nature of the sexual conduct and consequences such as pregnancy and/or disease, but some also require an appreciation that there are moral dimensions to the decision to engage in sexual conduct.<sup>68</sup> In both criminal and civil cases in which ability to consent to sexual activity is involved, a variety of indicators of competence are examined: functional abilities like reading, writing, counting, operating household machinery, performing household chores and errands, holding a job, functioning successfully without supervision, and managing money; whether the person is mainstreamed or attending a special school, living independently, or institutionalized; knowledge of the sex act, diseases, pregnancy, etc.; ability to resist coercion of authority figures; and, inevitably, the old specters of mental age and IQ.<sup>69</sup>

Alicia appealed to these principles in her claim of discrimination on the basis of disability.<sup>70</sup> As discussed, she claimed she was a member of an identifiable sub-class of disabled students with disabilities affecting their emotional age or maturity level, and that the school district had maintained "a policy, custom, or practice" of presuming that coercion does not exist when the alleged perpetrator is chronologically younger or the same age as the alleged victim.<sup>71</sup> Alicia was, as noted, of a comparable chronological age to her classmates, but was lower-functioning and less emotionally mature. She argued, essentially, that she should have been treated the same as a young child by school personnel aware of the fact that some sexual activity had occurred, and that RiverBend's failure to do so constituted discrimination on the basis of disability.<sup>72</sup>

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<sup>67</sup> Clarence J. Sundram, *Sexual Behavior and Mental Retardation*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 448, 450 (1993). Courts must also, of course, perform a similar assessment with respect to the requisite *mens rea* of *defendants* with cognitive impairments. Denno, *supra* note 64, at 367. The two are, conceptually, largely inseparable. Although the focus of this article is on survivors of sexual abuse and sexual harassment, not perpetrators, and discussion is consequently so limited, this does necessitate the construction of a fictional barrier when conceptualizing the two sides of what can, crudely, be considered a single "transaction."

<sup>68</sup> Sundram, *supra* note 67, at 451.

<sup>69</sup> *Id.* at 452. Indeed, courts "nearly always refer to a victim's IQ when the crime charged is rape or an assault against a mentally retarded person," despite the fact that "mental age . . . is considered misleading and controversial," and that IQ "has limited predictive value and may mischaracterize an individual's adaptive abilities, particularly when it is used by inexperienced evaluators." Denno, *supra* note 64, at 366 (internal citations omitted).

For example, in the Title IX sexual harassment case *Watkins v. La Marque Indep. Sch. Dist.*, the Fifth Circuit held that "it is appropriate to consider the factual scenario here as if it had happened to an eight-year old rather than a sixteen-year-old victim," as the plaintiff, A.M.W., was a cognitively disabled girl with a speech impediment. 308 F.App'x 781, 783 (5th Cir. 2009). Although she was sixteen, she was only in the seventh grade, and functioned more akin to a second grader. *Id.* The harassing conduct at issue occurred when A.M.W. was left alone with another special education student, J.S., for approximately 15-20 minutes, during which time he exposed himself to her, kissed her and lifted up her dress. *Id.* The *Watkins* Court ultimately held that "even assuming that this incident happened to an unimpaired second-grade student, the alleged facts would still not reach the level of severity required" for liability to attach. *Id.*

<sup>70</sup> *Morgan*, 2009 U.S. Dist. LEXIS 9443, at \*71-72.

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

<sup>72</sup> *Id.* It should be noted that the major disabilities statute affecting students, the IDEA, is silent on matters of sexual harassment and sexual assault, with the exception of an active stance taken on behalf of disabled *perpetrators* of sexual assault and other offenses. For example, sex offenses are not excluded from the "stay put" rule of the IDEA, so

This claim, of course, failed because the court found no identifiable discriminatory animus toward cognitively disabled students as a protected class.<sup>73</sup> However, reflection on Alicia's claim presents two fruitful avenues for exploration. First, is our current reliance on parsing the matters of mental age and consent, as suggested by the 2001 Guidance and the Dear Colleague letter, a useful framework for schools in preventing and addressing sexual harassment and assault against vulnerable students like Alicia? Second, in light of the barriers students like Alicia face in the courts, what alternative regulatory and/or administrative remedies should be made available to provide relief?

## VI. DIVERGENT PERSPECTIVES ON THE USE OF A "MENTAL AGE" FRAMEWORK

The use of a mental age framework with respect to cases involving sexual harassment or sexual assault and people with disabilities has prompted a clash of advocates between traditional feminists and disabilities rights feminists.

In light of the enhanced vulnerability of children with special needs to sexual harassment and assault, feminist advocates have made the exploitation of this population a pillar in their efforts to combat sexual violence. The alliance is an old one, dating back to the women's movement's first efforts to reform sexual assault law and legal practice. As Sherene Razack has noted, "[t]he idea that women with developmental disabilities (and other groups of women) are specially at risk has been a part of reform efforts to legally restrict the introduction of evidence of past sexual history (rape shield laws) and to clarify the meaning of consent and nonconsent," as well as other reforms, including the institution of legal presumptions that intellectually disabled people are incapable of consenting to sexual intercourse.<sup>74</sup>

It is impossible to overstate the importance these feminist legal reforms have had on both public understanding of sexual violence and the likelihood of relief for individual victims. Although much work remains to be done, some of the great successes of the women's movement have been in the areas of sexual harassment and sexual assault, including such reforms as the criminalization of marital rape, heightened awareness of and improved police and prosecutorial response to acquaintance rape, and the recognition of sexual harassment at school and at work as actionable under Title IX and Title VII. However, these efforts have had, as all things do, some unintended consequences.

Feminist advocates working on behalf of survivors of sexual harassment and assault have heavily emphasized "protecting." As Razack observed of vanguard Catharine MacKinnon and those who followed,

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there is a presumption that a student with special needs who sexually harasses or assaults a classmate not be removed to a more restrictive environment. Kelly S. Thompson, *Limits on the Ability to Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough?*, 32 IND. L. REV. 565, 577 (1999). Typically, the "least restrictive environment," or the environment most like that of "average" children in which the child with a disability can learn, generally refers to the general education population of the child's school. See 20 U.S.C. § 1412(a)(5)(A).

<sup>73</sup> *Morgan*, 2009 U.S. Dist. LEXIS 9443, at \*74 ("The mere fact that defendants' facially neutral policies had a foreseeably disproportionate impact on an identifiable group does not mean that they violated the Equal Protection Clause.") (internal citations omitted).

<sup>74</sup> Sherene Razack, *From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities*, 19 LAW & SOC. INQUIRY 891, 900 (1994).

MacKinnon's early ideas recognized, above all, that law divided women into two categories: those who are presumed to say yes and those who are presumed to say no. . . . [F]eminists respond to this legal situation with strategies (e.g., rape shield laws) that don't disrupt the categories but seek instead to show that women who encounter sexual violence are on the innocent side of the divide.<sup>75</sup>

This strategy has provoked the not uncommon, but perhaps unfair, criticism that feminist advocates focus so intently on the victimization of women that they actually contribute to further disempowerment by emphasizing weakness and vulnerability, and they alienate potential feminist allies, both male and female, with an overall attitude towards sexuality that is grim and obsessed with exploitation. This so-called "anti-victim feminism," however, is vulnerable to criticism in its own right. For example, many believe that such feminists (alongside anti-feminist critics) are "re-blam[ing] victims"<sup>76</sup> and sacrificing valuable discourse and needed activism on behalf of exploited people out of a misplaced desire to make feminism "less depressing."<sup>77</sup> However, the "anti-victim feminism" perspective has unique relevance to the situation of sexual assault and harassment survivors with intellectual disabilities.

The struggle of people with disabilities has primarily centered on *deemphasizing* vulnerability and the need for protection, and rejecting benevolently paternalistic interference with autonomy. Put another way, these advocates wish to, in Razack's words, "disrupt the category" to which they have been assigned.<sup>78</sup> This naturally conflicts with the traditional feminist emphasis on the need for protection. The comment of a representative of the National Organization for Women (NOW) to the New York Times, regarding the trial of several young men accused of sexually assaulting a cognitively disabled neighbor whose consent to the sexual activity was questioned at trial, is illustrative: "This is a pathetic 8-year-old in a woman's body. How could she consent?"<sup>79</sup> This advocate's words were rhetorically powerful against the perpetrators, but the characterization of the woman at issue as "pathetic" is problematic.

Similar arguments were made about Alicia. While obviously well-intentioned, the

<sup>75</sup> *Id.* at 893 (internal citations omitted).

<sup>76</sup> Alyson M. Cole, *Victims No More (?)*, 64 FEMINIST REV. 135, 135 (2000) [hereinafter Cole, *Victims No More*]. Cole asserts:

Victim-talk and talk about victims are among the most recognizable features of contemporary American politics. This development has been fueled by a conservative campaign to curb the alleged proliferation of individuals and groups who supposedly attempt to secure their status as victims in order to gain various material and psychological rewards. 'Anti-victimists' regard current claims about social injustice as exaggerations at best, and most often as evidence of a large-scale psychological disorder infecting the US with a 'culture of complaint.' . . . [T]he women's movement is a staple target in this crusade.

*Id.* (internal citations omitted). See also Alyson M. Cole, 'There Are No Victims in This Class': On Female Suffering and Anti-Victim Feminism', 11 NWSA JOURNAL 72 (1999) (stating that "their arguments are tied to a larger enterprise of re-blaming victims outside feminism") [hereinafter Cole, *No Victims in This Class*].

<sup>77</sup> Cole, *No Victims in This Class*, *supra* note 76, at 74 ("[anti-victimists] find contemporary feminism too morose, acrid, and pessimistic. 'It used to be fun to be a feminist,' Christina Hoff Sommers [prolific writer and critic] recalls. 'Now . . . it means male-bashing, it means being a victim, and it means being bitter and angry.'") (internal citations omitted).

<sup>78</sup> See Razack, *supra* note 74, at 893.

<sup>79</sup> Robert Hanley, *Jury Chosen in Glen Ridge Assault Trial*, N.Y. TIMES, Oct. 15, 1992, at B7.

vocabulary and strategy used by traditional feminist groups may directly conflict with some of the goals of feminist advocates who are also concerned about disabilities rights.

The feminist community has long been plagued by concerns about the invisibility of or conflict with some groups of women, including, most notably, women of color.<sup>80</sup> Women with disabilities have been similarly marginalized. It has been posited that women with cognitive disabilities are “often disregarded because characteristics of their impairments run counter to the images of women that feminists promote: strong, smart, and powerful.”<sup>81</sup> Whatever the cause, the failure to include a disabilities rights perspective in efforts to combat sexual violence has left some feminist advocates eager to develop a different approach.

Many sex-positive, disabilities rights feminists bristle at the emphasis of anti-sexual violence advocates on protection, arguing that this perspective precipitates a knee-jerk desire to shield children and youth with disabilities from sexual knowledge and contact altogether, which they view as a deprivation benevolently disguised as protection. The “mental age” framework is viewed as a threat to the hard-won, nascent autonomy and independence people with disabilities have only recently begun to enjoy.

It is impossible to fully understand the vehemence of this position without first understanding the long history of sexual oppression of the intellectually disabled.<sup>82</sup> Until the nineteenth century, intellectually disabled children and adults were quite literally hidden away from the rest of society, often in institutions, sanatoriums, or behind curtains or closed doors in their family homes.<sup>83</sup> When they were finally brought out into society during social reforms of the nineteenth century, partly due to waning superstitions about the link between disability and sin or moral failing, their sexuality was still feared and viewed as aberrant: they were alternately seen as sexless, childlike, and in need of protection (the “forever child” syndrome)<sup>84</sup> or as hypersexual (the loose woman, the sexually dangerous man).<sup>85</sup>

The American eugenics movement was an outgrowth of this view, and people with intellectual disabilities were common victims of involuntary sterilization. Between 1907 and

<sup>80</sup> The seminal collection *ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE* (Gloria Hull et al. eds., 1982) is now more than thirty years old. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991) (exploring the race- and gender-based dimensions of violence against women of color); Kimberlé Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 *TULSA L. REV.* 151 (2010) (“By now the fact that there has been a contested relationship between antiracism and feminism is almost axiomatic.”).

<sup>81</sup> Julia L. Wacker et al., *Sexual Assault and Women With Cognitive Disabilities: Codifying Discrimination in the United States*, 19 *J. DISABILITY POL’Y STUD.* 86, 93 (2008) (“Sexual assault advocacy efforts are largely based on second-wave feminist efforts to end sexual violence against all women. The sexual assault movement has made significant strides in addressing the problem of sexual violence against women. However, given the ongoing prevalence of sexual violence, especially against women with disabilities, more work is needed. Unfortunately, women with cognitive impairments have generally been excluded from prominent feminist writings, advocacy groups, and discourse.”).

<sup>82</sup> Here, historical analysis is limited to the United States.

<sup>83</sup> See Winifred Kempton & Emily Kahn, *Sexuality and People with Intellectual Disabilities: A Historical Perspective*, 9 *SEXUALITY AND DISABILITY* 93, 94 (1991).

<sup>84</sup> *Id.* at 97. See also Murphy & Elias, *supra* note 30, at 400 (arguing that the “forever child” syndrome and a sincere desire to protect the disabled from sexual abuse may actually increase the risk of such abuse, as a lack of unsupervised social contacts and knowledge about sex and relationships can thwart healthy sexual development and prevent children and youth from developing the ability to be assertive about protecting their bodily integrity and reporting violations to trusted adults).

<sup>85</sup> Kempton & Kahn, *supra* note 83, at 95.

1957, about 60,000 disabled people, many of them minors, were sterilized without consent, and oftentimes without their knowledge.<sup>86</sup> World War II and the discovery of racially-motivated Nazi atrocities cooled the American fervor for eugenics, but throughout the 1940s, 50s and early 60s, sexual knowledge and contact was heavily discouraged for disabled children and adults: the “forever child” syndrome remained dominant.<sup>87</sup>

As the 1960s went on and the “normalization” and deinstitutionalization movements emerged, which stressed job training for and social inclusion of the cognitively disabled, tentative steps were taken towards widespread sex education for disabled children and youth.<sup>88</sup> Romantic relationships for the intellectually disabled were also, for the first time ever, socially sanctioned, although such relationships were expected to be sexless, heterosexual, and between two people with disabilities.<sup>89</sup>

Deinstitutionalization was not without its problems, however. While homelessness is perhaps a more well-known after-effect, disabled children and adults who had previously been institutionalized also suffered due to a lack of sexual education and exposure to social norms. Problems with pregnancy and disease were well-known, and sexual assault was common.<sup>90</sup> The sexual revolution of the 1970s reached far, even into the pool of people with developmental disabilities,<sup>91</sup> but any appreciable steps towards sexual liberation were curtailed by the AIDS epidemic and the prominence of the newly-named specter of sexual abuse.<sup>92</sup>

Sex-positive disabilities rights feminist advocates object to viewing sex as “a privilege of the white, heterosexual, young, single and non-disabled,” and protest that “[s]exual portrayals of people who are older, who are larger, who are darker, who are gayer, who are mentally or physically disabled, or who just do not fit the targeted market profile have been conspicuously absent in mainstream media.”<sup>93</sup> They are concerned that the disabled are viewed as undeserving of love and sex for pleasure, and that the mere concept of their sexuality and reproduction is viewed with repugnance.<sup>94</sup> These advocates believe that caregivers and institutions have a responsibility to consider sexual desire and pleasure when helping people with disabilities live out their lives.<sup>95</sup> It should be seen as problematic when people with disabilities do not experience

<sup>86</sup> *Id.* at 96. The practice was widely accepted, and even sanctioned by the United States Supreme Court. *See also* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (approving the sterilization of a “feeble minded” young woman under the Virginia Sterilization Act of 1924, Justice Oliver Wendall Holmes, writing for the majority, reasoned: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”).

<sup>87</sup> *Kempton & Kahn, supra* note 83, at 97.

<sup>88</sup> *Id.* at 97-98.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 98-99. Many previously institutionalized persons also ran afoul of the law themselves, as they were often unaware of what was considered inappropriate touching of children, for example, or could not read social cues indicating that their sexual advances were unwelcome. This is not an insubstantial problem; it is estimated that about 10% of sex offenders in prisons are cognitively disabled. *Id.* at 107.

<sup>91</sup> *Id.* at 99-100.

<sup>92</sup> *Id.* at 106.

<sup>93</sup> Mitchell S. Tepper, *Sexuality and Disability: The Missing Discourse of Pleasure*, 18 *SEXUALITY & DISABILITY* 283, 285 (2000).

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

<sup>95</sup> Whether one would ascribe this responsibility to schools is, of course, an interesting inquiry that depends largely on one’s perceptions of how limited or expansive a role schools should play in the social, emotional, and moral

various relationships, including the normal sexual exploration, curiosity, and consensual sexual contact and dating for children and youth.<sup>96</sup> They stress that it is normal and important for young people with disabilities to engage in these behaviors to prepare them for future relationships and develop positive body-image and self-esteem.<sup>97</sup> Enduring a constant barrage of messages about how they are “different” may cause children and youth to internalize feelings that they are unattractive, undesirable, and undeserving of love and affection.<sup>98</sup> The internalization of such feelings, as noted, *supra*, also increases their vulnerability to sexual exploitation.<sup>99</sup>

Lingering questions of consent do remain. As noted, society has become increasingly comfortable with the idea of sexual conduct between two people with intellectual disabilities.<sup>100</sup> But what about sexual and/or romantic contact between an intellectually disabled person and a person of “average” intelligence, or one who is also intellectually disabled but functions at a higher level? Even if the disabled party “consents,” many would be left with the visceral feeling that he or she has been victimized or exploited, even if he or she enjoyed the encounter. Even if neutral, people would assume the more disabled party was unaware of the meaning of what transpired or was left with the vague feeling that something was wrong, but could not identify it, just like Alicia.

This visceral reaction is reflected in protective legislation enacted in a number of jurisdictions, as discussed *infra*, and is largely informed by doubt and legitimate concern that the intellectually disabled are incapable of consenting to sexual activity on terms we expect of the average actor (*i.e.*, a full understanding of the individual and social meaning of sexual activity, the attendant risks of pregnancy and sexually transmitted illness, etc.). However, it is difficult to conclude that our views are not also heavily informed by prejudice, that we are not so inherently repelled by disability that we simply cannot envision a “normal” person wanting to be sexual or romantic with a disabled person.<sup>101</sup>

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development of children, among other concerns.

<sup>96</sup> Tepper, *supra* note 93, at 287.

<sup>97</sup> See, e.g., Emens, *supra* note 64, at 1317 (arguing that the isolation and desexualization of the disabled deprives them, sometimes by express legal mandate, of fulfilling relationships, marriage, and family, human rights to which they are entitled). People with disabilities are less likely to marry than those without disabilities and are also excluded from the contemporary “dating scene,” most notably with respect to online dating. *Id.* at 1326.

<sup>98</sup> See Nasa Begum, *Disabled Women and the Feminist Agenda*, 40 FEMINIST REVIEW 70, 78 (1992). See also *id.* at 81 (“As disabled women we can be much more vulnerable to sexual abuse and victimization, particularly if we have been bombarded with ideas that our bodies are a neutered object which is repulsive and inferior. A failure to recognize sexual development leaves us open to exploitation . . .”).

<sup>99</sup> *Id.* at 81.

<sup>100</sup> Kempton & Kahn, *supra* note 83, at 97-98.

<sup>101</sup> Responses to the 1999 film *The Other Sister* are revealing. The film, which told the story of Carla (Juliette Lewis) and Danny (Giovanni Ribisi), intellectually disabled young adults falling in love, was not critically successful, as critics deemed the plot trite and the main characters one-dimensional and pointedly adorable. See Desson Howe, *Fundamentally Challenged*, THE WASHINGTON POST, Feb. 26, 1999, at N41 (“The humor works beautifully until [the director] decides to beat the comedy over the head and drum us, once again, with this relentless message: ‘Mentally challenged people in love say the darndest things!’”). However, the romance was generally viewed not as repugnant, but as heartwarming: “[Y]ou can almost feel the movie cheering them on.” Stephen Holden, *The Odds May Be Long, But You Can Bet on Love*, N.Y. TIMES, Feb. 26, 1999, at E16.

Reactions to the sexuality of the main characters were benign. “[S]cenes of the two making elaborate plans to have sex” were described cautiously by one reviewer as “press[ing] uncomfortable emotional buttons.” *Id.* Other critics were less troubled. For example, prominent film critic Roger Ebert (despite giving the film an overall poor review) described a

This “rule by repugnance” is most justifiable when the motive of the sexual partner who is not disabled appears to be one of malice or cruelty. The infamous “Glen Ridge Case” is the paradigmatic illustration of this impulse.<sup>102</sup> In that case, a seventeen-year-old girl with cognitive disabilities was invited down into a basement by a neighbor boy.<sup>103</sup> Once in the basement, he told her that if she pleased him and the other boys present, they would arrange for her to go on a date with another boy they knew she had a crush on.<sup>104</sup> The thirteen boys present were all known to her; they were popular athletes she idolized, as did the community at large, so she complied.<sup>105</sup> She removed her clothes, masturbated and/or fellated several of the boys, and was penetrated by them with a broomhandle and a baseball bat.<sup>106</sup> Six of the boys left, but seven remained; four actively participated in the activities, while the other three egged the others on.<sup>107</sup> Afterward, she lingered for nearly an hour, waiting fruitlessly for her “date” to come and fetch her; he, of course, never did.<sup>108</sup> The next day at school, more than thirty boys encouraged her to engage in a “repeat performance.”<sup>109</sup>

This feels like an easy case. Four boys were convicted of conspiracy, and three of the four were convicted of aggravated sexual assault.<sup>110</sup> They clearly targeted the victim because she admired them and she wanted to be liked and included, making her likely to comply; and they clearly intended to degrade and humiliate her, not to create a meaningful and respectful sexual experience for her.<sup>111</sup> The boys had a long history of mistreating the girl dating back to early childhood, including forcing her to eat dog feces, and calling her slurs like “stupid” and “retard.”<sup>112</sup> Her comprehension of her actions and their attendant meaning was limited. A previous incident in which a classmate “fondled her breasts” had revealed that she “did not comprehend . . . her right to say ‘no,’” and it was apparent that she “knew nothing of birth control, nothing of venereal disease, nothing of pregnancy.”<sup>113</sup>

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scene in which the two, “alone at last, study positions in *The Joy of Sex*,” as “cute.” Roger Ebert, *The Other Sister*, THE CHICAGO SUN-TIMES, Feb. 26, 1999, at 34.

Consider, then, a thought experiment: how would audiences and critics have reacted if Carla or Danny had delved into a sexual relationship with a person of unimpaired cognitive ability? Would plots of clandestine trysts and poring over sex manuals have been “cute”? Would the movie reviewers have cheered them on then?

<sup>102</sup> This case was introduced briefly above, *supra* page 12. See also Hanley, *supra* note 79.

<sup>103</sup> See Leora Tanenbaum, *Boys Town: Did Glen Ridge Raise Its Sons to Be Rapists?*, SALON.COM (Aug. 13, 1997), <http://www.salon.com/1997/08/13/guys970813/>. See generally Tharinger et al., *supra* note 33; Denno, *supra* note 64.

<sup>104</sup> Tanenbaum, *supra* note 103.

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

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

<sup>107</sup> *Id.*

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

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Denno, *supra* note 64, at 362.

<sup>113</sup> *Id.* at 361-62 (internal citations omitted). It is important to note that the young woman’s sexuality and sexual history was repeatedly put at issue at trial through a hole in New Jersey’s rape shield law that allowed such evidence to come in as evidence of consent of a mentally disabled accuser, as New Jersey law specifically carved out sexual contact with a mentally disabled person as presumptively non-consensual. Linda Robayo, *The Glen Ridge Trial: New Jersey’s Cue to Amend its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 305 n. 205, 306 n. 209 (1995). Despite

But, she did not fight back or resist; she went willingly into the basement and participated in all the activities therein.<sup>114</sup> She had known three of the defendants since kindergarten and, as a teenager, had become infatuated with the popular young athletes and considered them her friends.<sup>115</sup> Is it right to foist the mantle of victimhood upon her? At trial, prosecutors argued: “At age eight, [she] became frozen in time . . . incapable of having any sexual desires of her own . . . with the body of a woman and the mentality of a first-grader . . . [who] wanted to be someone who could go out on dates like normal teenage girls do . . . [when] [i]n reality, [she] had almost no friends . . .”<sup>116</sup> Had she heard these words, would she not have cringed?

## VII. A SUGGESTED FRAMEWORK FOR SCHOOLS

There is no easy answer. However, “the supposed dichotomy between . . . the need to protect women from sexual exploitation and . . . the need to promote the sexual autonomy of women[] is not a useful or accurate way of thinking about sexual violence.”<sup>117</sup> Doing so obscures the real goal of ensuring all people freedom from sexual violence.<sup>118</sup>

Perhaps a different sort of solution is in order. Perhaps we need one that incorporates a healthy and inclusive view of the sexual development of disabled youth; one that focuses on schools—the loci of life for children and youth—rather than more distant and removed courts; and one that attempts to prevent assaults and harassment, instead of merely attempting to apply remedies *ex post*.

Focusing on students with disabilities in the matter of consent to the exclusion of other considerations, as with the 2001 Guidance and the Dear Colleague letter, blinds us to a more appropriate strategy. Importantly, in *Davis v. Monroe County Board of Education*, the United States Supreme Court explicitly acknowledged that in the school context, “[w]hether gender-oriented conduct is harassment . . . depends on a constellation of surrounding circumstances, expectations, and relationships, including, *but not limited to*, the harasser’s and victim’s ages . . .”<sup>119</sup> The Court further observed that the lower courts “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.”<sup>120</sup>

Did Alicia consent? Was she harmed? These questions are simple on the surface, but probing deeper makes them difficult to parse. In order to develop a more effective method of

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her obvious limitations in understanding the meaning, if not the mechanics, of sexual behavior, she was portrayed at trial as a loose, promiscuous temptress, a “Lolita.” Denno, *supra* note 64, at 363-64. Feminist advocates, including NOW, were outraged, and their activism led to amendments to New Jersey’s rape shield statute that would protect future victims from the same humiliating treatment. See Robayo, *supra* note 113, at 307-08.

<sup>114</sup> Tanenbaum, *supra* note 103.

<sup>115</sup> Denno, *supra* note 64, at 362.

<sup>116</sup> *Id.* at 366-67 (internal citations omitted).

<sup>117</sup> Jane Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief*, 52 MCGILL L.J. 243, 245 (2007).

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

<sup>119</sup> *Davis*, 526 U.S. at 651 (emphasis added) (internal citations omitted). *Davis* is, of course, one of the cases referenced in the *Gebser/Davis* standard for assessing Title IX liability. See *supra* note 54.

<sup>120</sup> *Davis*, 526 U.S. at 651.

preventing and responding to the harassment of and assaults against vulnerable students, there is a need to develop a holistic approach that considers the needs of the individual child, and strikes a balance between encouraging healthy sexual development and preventing harassment and assaults. What follows is an attempt to fill the gaps that make existing guidance deficient and establish a framework for schools to better prevent and remedy the sexual harassment and assault of students with special needs.<sup>121</sup>

### *A. Education for Vulnerable Students*

A key tactic for empowering students with special needs to fend off unwanted sexual comments and contact is improving sex education. It is unconscionable that the students most vulnerable to exploitation are also least informed about sex and an important array of associated issues, including pregnancy and sexually transmitted diseases. Students must receive education about relationships and sexuality. These children are as capable and deserving of reciprocal and rewarding relationships as other non-disabled children and youth, but may need extra information about how to express their feelings, how to read social cues, how to care for and relate to others, and so on, in order to build successful relationships and avoid becoming victims, or perpetrators, of inappropriate behavior. Any educational program should include components about self-image and self-esteem, not only because it is important for their psychological wellbeing, but because empowered and strong children are less vulnerable to abuse.

Schools should also use education to enable students to identify sexual harassment and assault so schools can take quick corrective action. This would require ensuring that students are provided with enough information to distinguish appropriate and desirable comments and contact from that which is inappropriate and unwelcome; a vocabulary for describing inappropriate and unwelcome behavior suitable for their cognitive abilities; and—in line with the dictates of the Dear Colleague Letter—an easy-to-follow set of procedures for when, where, and how to report abuse, with the burden on teachers and administrators to ensure that once an allegation is raised, it is properly and promptly investigated and addressed. All materials used should be accessible and specifically tailored to students with disabilities. Materials that are too difficult to understand are a waste of critical resources.<sup>122</sup>

### *B. Social Mainstreaming / Inclusion*

Under the strict mandates of the IDEA, schools have developed relative expertise at mainstreaming students with disabilities into general education classrooms. However, social inclusion has remained elusive. The social isolation of disabled students from the general student population is a contributing factor to the prevalence of abuse. The need for acceptance makes students with special needs vulnerable to exploitation, and the pervasive “othering” of these students may diminish the sense of respect other students feel for their bodily integrity and emotional well-being. Had the young woman at Glen Ridge not been so ostracized by the neighborhood children, and had the school taken an active role in incorporating students like her

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<sup>121</sup> Each recommendation is inspired by a factor increasing the vulnerability of students with special needs to sexual harassment and assault identified, *supra*, or by a trend noted in case law. When the latter is the inspiration behind the recommendation, reference is made to cases that typify the problem the recommendation is intended to address.

<sup>122</sup> See generally Kathleen Conn, *Peer Sexual Harassment in Elementary Schools: Is Title IX the Answer?* 219 WEST’S EDUC. LAW. REP. 25 (2007).

into its social fabric, would thirty of her classmates have expressed no scruples about abusing her?

*C. Train Staff to Identify Students Experiencing Harassment and Assault, and Who May Have Difficulty Reporting*

It is important for schools to train staff to identify students experiencing harassment and assault and those who may have difficulty reporting. Many students with disabilities may, as a result of their disabilities, lack the vocabulary or background knowledge necessary to easily communicate the fact that they are being harassed or assaulted. For example, in *Rost v. Steamboat Springs RE-2 School District*, the plaintiff student, K.C., a seventh grader with cognitive disabilities traceable to a traumatic brain injury suffered in early childhood, tried to tell her school counselor that she was being harassed by four boys, who called her “retard,” pestered her for oral sex, and threatened to spread rumors that she was promiscuous and took nude photos.<sup>123</sup> However, K.C. could only express that the boys were “bothering” her, and the school took no further action.<sup>124</sup> While the Tenth Circuit ultimately held that K.C.’s comments about being “bothered” did not constitute notice triggering Title IX liability,<sup>125</sup> the dissent specifically noted that the school counselor did not ask the sort of questions that would enable a student like K.C. to express what had happened to her.<sup>126</sup> Schools should provide education and training to school personnel about how to facilitate conversations with students who are exhibiting signs of depression or withdrawal or those who report general claims of being “bugged” or “bothered,” but may be trying to express something more serious.

*D. Instruct Staff to Supervise Vulnerable Children and Punish Those Who Fail to Do So*

Students who are particularly at risk of victimization *or* offending should be subject to stricter supervision, and teachers, aides and any other school personnel responsible for such supervision should be held responsible for ensuring it is adequately carried out. This does not mean that all students with special needs require a heightened level of monitoring: the inquiry should be specific to the individual student in order to not validate fears within the disabilities rights community that disabled children and youth are presumptively at-risk or dangerous and must be subject to embarrassing surveillance. However, there is a common thread in cases involving victims and perpetrators who have mental or emotional impairments in which some

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<sup>123</sup> *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1117 (10th Cir. 2008). In a further illustration of the comparative futility of an *ex post* examination of consent as a defining factor, a police report generated in response to the factual undergirding of this case “indicate[d] that the incidents occurred in a variety of private locations and social settings, and a few of the incidents appeared to be ‘consensual.’” *Id.*

<sup>124</sup> *Id.* The court observed that “at that time, K.C. did not know to use the word assault and did not describe the incidents in more specific terms.” *Id.*

<sup>125</sup> *Id.* at 1120 (“[W]hile it is tragic that K.C. did not clearly communicate that she was being sexually harassed . . . [,] K.C.’s statement . . . that ‘these boys [are] bothering me’ was insufficient to give actual notice of the sexual harassment.”).

<sup>126</sup> *Id.* at 1127 (McConnell, J., dissenting) (“K.C. was attempting to communicate what was happening to the counselor but did not have the words. One would think a trained middle school counselor, faced with a mildly retarded young student who was severely distressed about being ‘bothered’ by some boys in her class, would ask the obvious follow-up question—in what way are they bothering you?—especially since one of the boys had previously been disciplined for engaging in sexual harassment.”).

harm is done when either party was supposed to be under close watch because a particularized inquiry demonstrated there was a special need.

For example, in *Porto v. Town of Tewksbury*, SC, a student with fetal alcohol syndrome and generalized developmental delays, was subject to sexual contact by another student in his special education class.<sup>127</sup> After the sexual contact, which included several incidents of oral sodomy, was reported to both students' parents, teachers, and administrators, teachers and aides were repeatedly instructed to keep the boys separated at school and on the bus.<sup>128</sup> Several semesters later, the boys were discovered in a school bathroom having just engaged in sexual intercourse; it was revealed that they had been engaging in sexual conduct once a week.<sup>129</sup> The First Circuit acknowledged the Town had been *negligent* in fulfilling its promise to supervise the boys, but reversed a jury verdict for SC on his Title IX claim that the school system had been *deliberately indifferent* to his sexual harassment by a peer.<sup>130</sup>

Although no Title IX liability was found in SC's case, the case does not deny that a lack of supervision could rise to the standard to impose liability in a different case, nor does it deny that providing necessary supervision is a valuable goal in itself as a tool for preventing harm. In order to identify students in need of special supervision, schools should consider a range of factors, including specific vulnerabilities caused by the child's individual disability, the child's ability to identify and report unwelcome conduct, and the child's history of victimization and/or offending. In order to make these assessments, schools must take not only the students' past trauma histories seriously, but also past offenses, particularly when those students interact with vulnerable children. This includes a duty to affirmatively investigate any past allegations of misconduct if a reasonable person would be on notice that such an investigation is necessary to assemble the information needed to ensure the safety of that child and/or other children in the school.

In *Lopez v. Metropolitan Government of Nashville & Davidson County*, Gilberto, a nine-year-old boy with autism, mental retardation, emotional disturbance, and speech and language impairments, was orally raped by Kolby, a nineteen-year-old student, while riding a public school bus for special needs children.<sup>131</sup> Gilberto had been harassed on the bus many times, and his mother had repeatedly requested a monitor be appointed to the bus.<sup>132</sup> His mother's pleas went unheeded, however, and not only was Gilberto not closely supervised, he was permitted to sit next

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<sup>127</sup> *Porto v. Town of Tewksbury*, 488 F.3d 67, 70 (1st Cir. 2007).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 71. Again illustrating the complexity of consent, SC appears to have indicated early on that RC's advances were unwelcome, and on at least one occasion, SC attempted to physically repel RC. *Id.* at 70 ("RC allegedly touched SC on the buttocks and SC elbowed him in response."). On other occasions, the boys were seen touching each other and the incidents in the bathroom took place after SC "asked to go to his locker, [when] he was really going to go to the bathroom to meet RC." *Id.* at 71, 74.

<sup>130</sup> *Id.* at 74 ("[T]he fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by Tewksbury at the time. The test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight. . . . [T]o prove deliberate indifference, the Portos had to show at least that Tewksbury *knew* that the failure to accompany SC to his locker would lead to SC following RC to the bathroom and that there was a high degree of risk that SC would be subject there to inappropriate sexual behavior by RC.").

<sup>131</sup> *Lopez v. Metro. Gov't of Nashville & Davidson Cnty.*, 646 F. Supp. 2d 891, 896, 898-99 (M.D. Tenn. 2009). Kolby was criminally charged with respect to the incident, but found incompetent to stand trial. *Id.* at 899, 899 n.5.

<sup>132</sup> *Id.* at 897-98.

to Kolby, a much larger, older boy with a long history of sexual misbehavior.<sup>133</sup>

Shortly after he began attending Genesis, the same academy as Gilberto, Kolby allegedly touched a young girl between the legs.<sup>134</sup> At the school Kolby had attended prior to Genesis, there were several incidents of sexual contact with consenting, age-appropriate female students.<sup>135</sup> There was also an incident in which he exposed his penis on the bus and told a new student he was going to “do it to him.”<sup>136</sup> The previous school developed a plan for supervising him in school and a bus safety plan that had Kolby sitting in the front of the bus with all the surrounding seats marked off so other students could not sit there.<sup>137</sup> Further, when Kolby was transferred to Genesis, the school was warned, “Supervise with girls, sexual assault.”<sup>138</sup> Although Genesis was given Kolby’s current Individualized Education Plan (“IEP”)<sup>139</sup> and a prior IEP, neither IEP had the Functional Behavioral Assessment (“FBA”)<sup>140</sup> or Behavioral Intervention Plan (“BIP”)<sup>141</sup> attached, and neither indicated that there was a FBA or BIP in place.<sup>142</sup> Genesis did not receive Kolby’s cumulative file for *eight months* and the behavioral interventions his previous school had

<sup>133</sup> *Id.* at 898, 900-03. The human cost of this lapse was truly heartbreaking. After the incident, Gilberto became oppositional and aggressive, attempted to cut off his own genitals, defecated on himself and his belongings, had nightmares about Kolby, attempted to set fire to his own home, and heard voices saying that Kolby was coming to get him and instructing him to kill his family. *Id.* at 900. He eventually had to be removed from school and placed in an in-patient treatment facility. *Id.*

<sup>134</sup> *Id.* at 902.

<sup>135</sup> *Id.* at 900.

<sup>136</sup> *Id.* at 901.

<sup>137</sup> *Id.* at 900-01.

<sup>138</sup> *Id.* at 902.

<sup>139</sup> 20 USCS § 1400. The IDEA requires public schools to develop an IEP for every student with a disability found to meet the federal and state requirements for special education services. *Id.* The purpose of the IEP is to map out goals and strategies for attaining them tailored to the individual child’s needs to ensure that every child receives the free appropriate public education (“FAPE”) to which they are entitled. *Id.* In order to provide a FAPE, schools must provide students with an educational program “that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” *Id.*

An IEP contains many components, the most notable of which are a current assessment of the child’s performance, goals, a plan for tracking progress towards the stated goals, and an outline of the special services and accommodations that will be provided to ensure success, with the caveat that the child be placed in a “least restrictive environment” that minimizes the child’s isolation from the mainstream school population. *See generally A Guide to the Individualized Education Program*, U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERV., <http://www2.ed.gov/parents/needs/speced/iepguide/iepguide.pdf> (last visited Sept. 27, 2013) (explaining the components of an IEP and providing assistance to those who must carry it out).

<sup>140</sup> *See generally Safeguarding Our Children: An Action Guide*, U.S. DEP’T OF EDUC. OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERV. [http://www2.ed.gov/admins/lead/safety/actguide/action\\_guide.pdf](http://www2.ed.gov/admins/lead/safety/actguide/action_guide.pdf) (last visited Sept. 27, 2013) [hereinafter *Safeguarding Our Children*] (explaining that an FBA is performed when a student exhibits “problem behavior,” and the purpose of the FBA is to identify the underlying cause of the problem behavior and assist IEP teams in selecting interventions that will address it).

<sup>141</sup> A BIP is the intervention plan an IEP team assembles after an FBA has been performed on a child. *Id.* It focuses on preventing “outbursts” of problem behavior, positive behavioral support, etc. *Id.* Once in place, school and staff are legally obligated to follow the BIP if it is part of the student’s IEP. *See generally Safeguarding Our Children, supra* note 140 (instructing schools on how to provide students with services they need to improve their behavior).

<sup>142</sup> *Lopez*, 646 F. Supp. 2d at 904.

put into place went unreplicated, at great cost to Gilberto.<sup>143</sup>

*Lopez* illustrates the need for schools to supervise children who have exhibited warning signs that they pose a danger to other students, particularly when they are around vulnerable children.<sup>144</sup> *Lopez* also illustrates the need for schools to ensure they know every student's full history.<sup>145</sup> Finally, *Lopez* illustrates, brutally, the importance of paying special attention to the concerns of parents, who are their children's greatest advocates and are most familiar with their predilections and needs.<sup>146</sup>

### E. Require Teacher Intervention

Teachers must be instructed that they have a duty to intervene when any kind of sexual harassment or misconduct is occurring with their knowledge. This seems almost too obvious to include, but unfortunately, it bears repeating. *T.Z. v. City of New York* is instructive; in that case, C.G., a special needs student, was sexually assaulted by two other students in a classroom while the teacher was present.<sup>147</sup> C.G. was sitting in class when two boys surrounded and assaulted her by pulling down her pants, caressing her chest and buttocks, and holding her down as she screamed and struggled to get away.<sup>148</sup> A small crowd assembled as she screamed for help; eventually, a friend forced the boys and the crowd away from C.G.<sup>149</sup> For the duration of the assault, which lasted some minutes,<sup>150</sup> the teacher, Mr. Raskin, remained at his desk.<sup>151</sup> After the crowd dispersed and the assault had come to an end, Mr. Raskin approached C.G., who was crying, and told her to get up and go to her seat.<sup>152</sup> C.G.'s friend told a different teacher about the incident, at which point the assault was reported to administrators, the police, and C.G.'s family, and disciplinary steps were taken against the perpetrators.<sup>153</sup> During the course of litigation, at the summary judgment phase, the defendants, perhaps disingenuously, disputed whether Mr. Raskin had witnessed the assault.<sup>154</sup> The District Court held that there was a dispute of fact necessitating trial but held that had Mr. Raskin been aware that an assault was taking place and not intervened

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<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* The *Lopez* court recognized this principle, observing: "Ideally, a school should be provided with each student's cumulative educational file, so that they can have a clear understanding of the student and his profile. However, in practice, schools sometimes did not receive a complete record for students." *Id.*

<sup>146</sup> See *id.* A troubling number of cases involve child victims whose parents—like Gilberto's mother—tried to warn schools of their children's vulnerability and were rebuffed, only to have their children be once again offended against. See, e.g., *Soper v. Hoben*, 195 F.3d 845, 848-49 (6th Cir. 1999) (regarding Renee, a 12 year old student with cognitive disabilities, who was forcibly raped by one boy and fondled by two others while she went unsupervised in the back of a classroom and on the school bus, despite the fact that her mother had discussed Renee's history of sexual abuse with the teacher in charge of implementing Renee's IEP because she believed her daughter was particularly vulnerable to such behavior and wanted to make sure she would be protected and supervised).

<sup>147</sup> *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 266 (E.D.N.Y. 2009).

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

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

<sup>150</sup> *Id.* at 266 n.5.

<sup>151</sup> *Id.* at 266.

<sup>152</sup> *Id.* at 266-267.

<sup>153</sup> *Id.* at 267.

<sup>154</sup> *Id.* at 269.

to stop it, his inaction could constitute deliberate indifference for the purpose of imposing liability under Title IX.<sup>155</sup>

Teachers must know that turning a blind eye will not be tolerated. They should receive training on appropriate methods of intervention and be held accountable for breaches that occur under their watch, including by way of discipline, termination, or withdrawal of immunity.

#### *F. Refrain from Punishing Complainants*

Another component of any effective regulatory guidance would be a mandate against punishing complainants. This includes retaliation for making complaints, refraining from punishment for engaging in nonconsensual conduct that would have been punishable had it been engaged in consensually, providing amnesty for punishable offenses the complainant may admit to having engaged in when making the report of the harassment or assault (such as cutting class or drinking alcohol), and punishing both students involved in an alleged incident pending investigation or disposition as a misguided measure of fairness.

In *Renguette v. Board of School Trustees, J.R.*, a twelve-year-old seventh-grader, was sexually abused by D.A.V., a fourteen-year-old high school freshman, on a number of occasions while riding the bus to school.<sup>156</sup> Her mother learned of the abuse after noting a marked decline in J.R.'s mood and after learning that J.R. had begun "cutting," a type of self-harm.<sup>157</sup> Ms. Renguette made an official complaint to Brownsburg and D.A.V. was immediately suspended, then placed in an in-school expulsion program.<sup>158</sup> However, Brownsburg school officials also suspended J.R. from school for having engaged in (allegedly nonconsensual) sexual activity on the school bus and provided her with a written notice of an expulsion hearing.<sup>159</sup> This provoked severe emotional distress in J.R., who was cognitively impaired and suffered suicidal thoughts and had to be admitted to a mental health care facility for treatment.<sup>160</sup> She raised a number of claims against the school district and individual defendants, but summary judgment was granted on all claims and the school's actions in punishing J.R. were not found to have been actionable.<sup>161</sup>

Similarly, in *Murrell v. School District Number 1 of Denver, Colorado*, the plaintiff student, Penelope, who had spastic cerebral palsy and severe cognitive delays, was repeatedly sexually assaulted by another student with special needs.<sup>162</sup> Despite knowing that he had a history of behavioral problems, including sexually inappropriate behavior, the school had appointed the

<sup>155</sup> *Id.* at 269.

<sup>156</sup> *Renguette v. Bd. of Sch. Tr.'s*, 540 F. Supp. 2d 1036, 1038, 1039 n. 3 (S.D.Ind. 2008). It should be noted that J.R.'s consent to the sexual activity was heavily contested by the parties. *Id.* at 1039 n.3, 1041 n.8. For example, J.R. had specifically asked to "move seats in order to sit next to D.A.V.," and had at no point requested to be switched back. *Id.* at 1039. However, the Court notes that "[w]hether the sexual conduct between D.A.V. and J.R. was voluntary has no bearing on the liability, if any, of the School Defendants." *Id.* at 1041 n.8. J.R. suffered serious psychological symptoms in the aftermath of the incidents, discussed *infra* note 157, and self-identified as a victim of abuse. *Id.* at 1039.

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

<sup>158</sup> *Id.* at 1039-40, 1040 n.4.

<sup>159</sup> *Id.* at 1040.

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

<sup>161</sup> *Id.* at 1038, 1045-46.

<sup>162</sup> *Murrell v. Sch. Dist. No. 1 of Denver, Colo.*, 186 F.3d 1238, 1243 (10th Cir. 1999). In a nod to the mental age framework, the court observed that Penelope "functioned intellectually and developmentally at the level of a first-grader." *Id.*

offender, “John Doe,” as a “janitor’s assistant,” which gave him access to unsupervised areas of the school, where he took Penelope to assault her.<sup>163</sup> Although Penelope told her teachers after at least one of the incidents, the school never notified her parents, who had actually informed the school upon their daughter’s enrollment that she had been sexually assaulted at her previous school and needed to be protected.<sup>164</sup> Penelope’s mother only discovered the abuse when her daughter entered a psychiatric hospital after engaging in self-harm and finally disclosed the nature of the trauma she had experienced.<sup>165</sup> Of import here, the principal suspended only the victim pending the outcome of an investigation, as her behavior was considered “detrimental to the welfare, safety, or morals of other pupils or school personnel”; Doe was left in his position as a janitor’s assistant with the same access to secluded areas of the school.<sup>166</sup>

Such outcomes are totally unacceptable. Not only do they do a grave disservice to complainant students who have already suffered harassment or assault by victimizing them again, they send a ringing message of deterrence to other students: come forward and accept your punishment.

### *G. Put the Burden of Relief on the Accused*

Along the same lines, when developing and implementing measures to prevent and/or correct harassment, schools should ensure that any burden resulting from such measures falls on the accused, not the complainant. This suggestion is supported by the 2001 Guidance, which stipulates that responsive measures should be crafted in a way that reduces the burden on the student or employee who was allegedly victimized.<sup>167</sup>

*Patterson v. Hudson Area Schools* is instructive; D.P., a student with emotional impairments, was subjected to brutal harassment and abuse at school over a period of years.<sup>168</sup> He was called names like “fag” and “queer,” and was repeatedly pushed and shoved; teachers ignored the harassment and even joined in.<sup>169</sup> When D.P. gave a presentation in class, students wrote “[D.P.] is a fag” on the backs of his notecards so the message was displayed to the class.<sup>170</sup> They wrote pornographic and crude graffiti on his planner and locker (with shaving cream and permanent marker), urinated in his locker, and in one appalling incident, a student blocked a door while another student mounted D.P.’s back and rubbed his nude penis and scrotum all over D.P.’s face and neck.<sup>171</sup> The school responded to each incident by dealing with the perpetrators on an

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

<sup>164</sup> *Id.* at 1243-44. In a particularly appalling show of indifference, after one assault, during which the victim vomited on herself and bled heavily, the teachers merely tied other clothing around Penelope’s waist to hide the soiled clothing and told her “not to tell her mother about the incident and encouraged her to forget it had happened at all.” *Id.* at 1244.

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

<sup>166</sup> *Id.* In his zeal to punish Penelope, “the principal allegedly suggested that the sexual contact between [her and Doe] might have been consensual, *although she knew . . . that [Doe] had admitted assaulting [Penelope] after she had resisted his advances.*” *Id.* (emphasis added).

<sup>167</sup> 2001 GUIDANCE, *supra* note 58, at 16.

<sup>168</sup> *Patterson v. Hudson Area Sch.’s*, 551 F.3d 438, 440-41 (6th Cir. 2009).

<sup>169</sup> *Id.* at 440. For example, D.P. was told “kids will be kids, it’s middle school,” *id.* at 439, and, after being assaulted by a female classmate, was asked by a teacher, “[H]ow does it feel to be hit by a girl[?]” *Id.* at 440.

<sup>170</sup> *Id.* at 442.

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

individual basis and no single perpetrator ever re-committed a documented offense against D.P.; but harassment in the aggregate continued unabated.<sup>172</sup> Finally, exasperated, the school responded by altering D.P.'s special education accommodations: during D.P.'s tenth grade year they assigned him to a local elementary school where he was told his teachers would visit to assign and help him with work, but the teachers failed to follow through on this plan, rarely visiting or communicating with D.P., and his grades and emotional health suffered.<sup>173</sup> For D.P.'s eleventh and twelfth grade years he was assigned to take college classes instead of classes at the high school, but his parents were required to pay for them.<sup>174</sup>

Special education accommodations should not be used in such a manner, enabling a school to end harassment by sequestering a special needs student at the cost of his or her educational opportunities. To do so is to blatantly misuse the requirement to provide such accommodations to the detriment of the very students it exists to support.

Schools also must not permit the burden of relief to fall on a complainant by way of a misguided attempt to preserve the educational opportunities of an accused when the accused is (also) disabled. A noted example of failure in this area is depicted in *Jones v. Indiana Area School District*, in which the plaintiff student, Rachel, was sexually harassed by another student, "John Doe," who was mentally retarded and suffered from Sturge-Weber syndrome.<sup>175</sup> Over a period of four years, John Doe stalked Rachel in school, asking her to be his girlfriend, showering her with gifts and notes, following her from class to class, and waiting for her outside track practice and by her locker.<sup>176</sup> After Rachel repeatedly rebuffed his advances, John Doe became threatening: on one occasion he trapped her physically inside the gym weight room for 30 minutes until another student discovered the situation and intervened to secure her release; on another occasion, he followed her out to her car and held on to the door handle, shouting and banging on the window as she attempted to drive away.<sup>177</sup> Rachel reported the harassment early on and repeatedly, but nothing was done for the first two years beyond repeatedly telling John Doe to stay away from Rachel, which clearly had no effect.<sup>178</sup> Administrators then switched John Doe's homeroom and locker away from Rachel's and put him under constant line of sight supervision but Rachel reported multiple incidents in which she saw John Doe without a "tail" and his behavior continued undeterred.<sup>179</sup> Administrators' next proposal was to offer Rachel Homebound Instruction, which would require her to drop the Advanced Placement classes she was taking to prepare for college and to no longer attend classes with her friends and participate fully in school life.<sup>180</sup> An equal burden was not proposed for John Doe; by contrast, during an IEP conference, the school deactivated John Doe's behavior plan, recommended no behavior plan or services, and checked "no" in response to a form question that asked, "Does the Student Exhibit Behaviors that impede his/her learning or that of others?"<sup>181</sup>

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<sup>172</sup> *Id.* at 442-43.

<sup>173</sup> *Id.* at 443.

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

<sup>175</sup> *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 634 (W.D.Pa. 2005).

<sup>176</sup> *Id.* at 635-36.

<sup>177</sup> *Id.* at 636-37.

<sup>178</sup> *Id.* at 634-36.

<sup>179</sup> *Id.* at 635, 639

<sup>180</sup> *Id.* at 639.

<sup>181</sup> *Id.* at 636. At the time this was done, John Doe's fixation on and harassment of Rachel had persisted for

Of course, some students with disabilities who sexually harass others do so as a manifestation of their disability. As noted, there is a presumption that a student with special needs who sexually harasses or assaults a classmate not be removed to a more restrictive environment.<sup>182</sup> That does not mean that schools provide protection only at the expense of the harassed student. The burden is on the school to craft a solution that preserves the rights of both parties, with no excuses.

## VIII. CONCLUSION

Sexual harassment and sexual assault have no place in society, but are especially repugnant in elementary and secondary schools, where we send our children assuming they will be safe. The enhanced vulnerability of students with special needs dictates a specialized approach to this already complex problem. The current framework is one which focuses on *ex post* assessments of consent and competence rather than a more individual, contextualized approach that enlists schools as leaders in preventing and addressing inappropriate behavior. Particularly in light of the fact that legislative and judicial remedies have been unsatisfactory, schools are the institutions best situated to provide relief to affected students. However, the alternately frustrating, heartbreaking, and hair-raising tales of school system failures explored herein reveal that guidance in this area is gravely necessary.

The *Morgan* Court recognized that “[s]tudents with disabilities, like [Alicia], are a ‘vulnerable population’ who are ‘more easily taken advantage of.’”<sup>183</sup> Rather than lamenting this fact, we must act to empower students and schools to take away its force. We must craft a framework for prevention and response that both respects the right of every student to develop fully as a human being, including their potentialities for love and relationships, and recognizes the heightened responsibility we have to ensure that that potential is not curtailed by acts of exploitation.

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four years.

<sup>182</sup> See *Morgan*, 2009 U.S. Dist. LEXIS 9443, at \*71; see also *G.C. v. N. Clackamas Sch. Dist.*, 654 F. Supp. 2d 1226 (D. Or. 2009) (regarding a developmentally disabled boy who was accused of sexually assaulting a disabled female student but was not removed from the school because he would have had to have been moved to a more restrictive environment).

<sup>183</sup> *Morgan*, 2009 U.S. Dist. LEXIS 9443, \*9.