

# **DRAWING A LINE ON THE BLACKBOARD: WHY HIGH SCHOOL STUDENTS CANNOT WELCOME SEXUAL RELATIONSHIPS WITH THEIR TEACHERS**

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## **INTRODUCTION**

Jeanette Chancellor and Christian Oakes began a sexual relationship at the end of Jeanette's junior year of high school.<sup>1</sup> Jeanette was seventeen years old and had recently earned the position of drum major in the school band.<sup>2</sup> Mr. Oakes was twenty-nine years old and was Jeanette's band teacher.<sup>3</sup> Jeanette and Mr. Oakes had sex approximately forty-six times during Jeanette's senior year of high school.<sup>4</sup> They had sex during band camp, in a closet in the school's band room, in Mr. Oakes's car, and at a hotel during a band trip.<sup>5</sup>

During the spring of Jeanette's senior year, Mr. Oakes also engaged in a sexual relationship with another student.<sup>6</sup> That student's mother reported the relationship to a local police department.<sup>7</sup> The police ultimately arrested Mr. Oakes and he pled guilty to two counts of corruption of a minor: one count for the other student and one for Jeanette.<sup>8</sup> After Mr. Oakes's arrest, Jeanette, who from an early age struggled with depression, anorexia, and bulimia, attempted suicide and was repeatedly hospitalized for psychiatric reasons.<sup>9</sup>

Jeanette sued her school for sexual harassment under Title IX of the Education Amendments of 1972.<sup>10</sup> On a motion for summary judgment, the school argued that Jeanette "was not 'harassed' because she 'consented' to sex with Oakes."<sup>11</sup> The U.S. District Court for the Eastern District of Pennsylvania held, unequivocally, that "a high school student who is assigned to a teacher's class does not have the capacity to welcome that teacher's physical sexual

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1. Chancellor v. Pottsgrove Sch. Dist., 501 F. Supp. 2d 695, 698-99 (E.D. Pa. 2007).

2. *Id.* at 699.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 704; see 20 U.S.C. § 1681(a) (2006).

11. *Chancellor*, 501 F. Supp. 2d at 705.

conduct.”<sup>12</sup> After stating that sexual conduct qualifies as sexual harassment, and sexual harassment is sex discrimination, the court concluded that “a teacher who has sex with a high school student who is assigned to his class discriminates against the student on the basis of sex in violation of Title IX.”<sup>13</sup>

This holding was one of the factors that allowed Jeanette’s suit to survive summary judgment.<sup>14</sup> Judge Robreno understood the harm that can result from treating a high school student, in this case a minor, as having the legal capacity to consent to sex with her teacher.<sup>15</sup>

While *Chancellor v. Pottsgrove School District* is a significant step in the right direction, the United States Department of Education has ignored the persuasive evidence that demonstrates that high school students lack the capacity to consent to sex with their teachers.<sup>16</sup> The Department of Education has not taken the necessary steps to protect public school students. Currently, there is only a rebuttable presumption that the “sexual conduct between an adult school employee and a student is not consensual.”<sup>17</sup> The Department of Education should advocate that high school students do not have the capacity to consent to sex with their teachers.

In Part I, this Note briefly reviews and explains the history of sexual harassment in public schools, discusses how these claims are grounded in Title IX, and notes the laws currently in place to criminally prosecute teacher-abusers. Part II explores how courts and the Department of Education view the issue of welcomeness as applied to secondary students. Part III identifies the problems with the current approaches taken by courts and the Department of Education. Part IV offers two proposals to resolve these problems. First, age of consent laws should control in inquiries into welcomeness when a teacher sexually harasses a secondary student. Second, courts and the Department of Education should protect all secondary students by finding the unwelcome element of sexual harassment automatically met when a teacher and secondary student are involved in a sexual relationship.

## I. BACKGROUND OF SEXUAL HARASSMENT IN SCHOOLS

The U.S. Supreme Court defined students’ rights under Title IX in several

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12. *Id.* at 708.

13. *Id.*

14. *Id.*

15. *See id.* at 704-08. For ease of reference and to mirror the example of sexual harassment in *Chancellor*, the Author will use feminine pronouns for students and masculine pronouns for teachers. The Author acknowledges that many male students are also sexually harassed in secondary schools.

16. *See id.* at 707.

17. OFFICE OF CIVIL RIGHTS, DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 8 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE].

pivotal cases: *Cannon v. University of Chicago*,<sup>18</sup> *Franklin v. Gwinnett County Public Schools*,<sup>19</sup> and *Gebser v. Lago Vista Independent School District*.<sup>20</sup> In addition to recovery under Title IX, laws exist to criminally prosecute students' sexual harassers. Many of these laws do not allow consent as a defense to the crime.

The issue of the capacity to consent is pivotal in sexual harassment suits under Title IX because it goes directly to the issue of unwelcomeness, which is an element of a prima facie case of sexual harassment.<sup>21</sup> To establish a prima facie case of sexual harassment, the plaintiff must allege that she was subjected to quid pro quo sexual harassment or to a sexually hostile environment; that she alerted an official at the school receiving Title IX funds who had adequate authority to correct the harassment; and that the school's response to the reported harassment amounted to deliberate indifference.<sup>22</sup> To successfully allege hostile environment under Title IX, a plaintiff must show that: (1) she is part of a class protected by Title IX; (2) she was subjected to *unwelcome* sexual harassment; (3) the harassment was based on sex; (4) the harassment was severe enough to "alter the conditions of her education and create an abusive educational environment;" and (5) she has established a basis for institutional liability.<sup>23</sup> The capacity to "welcome" conduct is directly analogous to the capacity to "consent" to conduct.

#### A. Title IX and Sexual Harassment in Schools

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>24</sup> Congress intended to accomplish two objectives with Title IX: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."<sup>25</sup> Title IX "applies to virtually every school district and college in the United States because of the pervasiveness of federal support."<sup>26</sup>

The Supreme Court in *Cannon* found that there is a judicially-implied private

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18. 441 U.S. 677 (1979).

19. 503 U.S. 60 (1992).

20. 524 U.S. 274 (1998).

21. *Chancellor*, 501 F. Supp. 2d at 707; *accord* *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996), *rev'd on other grounds*, 171 F.3d 607 (8th Cir. 1999).

22. *Morse v. Regents of Univ. of Colorado*, 154 F.3d 1124, 1127-28 (10th Cir. 1998) (citing *Gebser*, 524 U.S. at 290).

23. *Kinman*, 94 F.3d at 467-68 (citing *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996)).

24. 20 U.S.C. § 1681(a) (2006).

25. *Cannon*, 441 U.S. at 704.

26. Todd A. DeMitchell, *The Inadequacy of Legal Protections for the Sexual Abuse of Students: A Two-Track System*, 215 W. EDUC. L. REP. 505, 515 (2007).

right of action present in the text of Title IX.<sup>27</sup> The Court held that “Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. [The Court] therefore conclude[d] that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.”<sup>28</sup> However, because the protections of Title IX hinge on the receipt of federal funds, lawsuits alleging a violation of Title IX may be successfully brought only against the public entity that receives the funds.<sup>29</sup> In 1992, the Supreme Court expanded the judicially implied right of action under Title IX in *Franklin v. Gwinnett County Public Schools* by holding that Title IX supported a claim for monetary damages.<sup>30</sup> The Court did not determine when a school district is liable for monetary damages when a teacher sexually harasses a student.<sup>31</sup>

However, in *Gebser*, the Supreme Court addressed when a student can seek monetary damages under Title IX.<sup>32</sup> A student exercised the implied private right of action by suing her school district and seeking monetary damages under Title IX for alleged sexual harassment by a teacher.<sup>33</sup> The teacher and student had engaged in a sexual relationship for over a year.<sup>34</sup> The Court considered and rejected two possible standards for liability: respondeat superior and constructive notice.<sup>35</sup> The Court explained that if either of these standards were used to evaluate liability, “it [would] likewise be the case that the recipient of [federal] funds [would be] unaware of the discrimination.”<sup>36</sup> Rather, “Title IX’s express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient.”<sup>37</sup>

The *Gebser* Court adopted a standard requiring actual knowledge.<sup>38</sup> The Court held that “a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond.”<sup>39</sup> The Court, seemingly aware of the way in which its holding would make damage

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27. *Cannon*, 441 U.S. at 703.

28. *Id.* at 717.

29. *See* *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019 (7th Cir. 1997) (“Because Title IX only protects against discrimination under any education program or activity receiving federal financial assistance . . . a Title IX claim can only be brought against a grant recipient and not an individual.”).

30. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

31. *See id.*

32. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286-90 (1998).

33. *Id.* at 278-79.

34. *Id.* at 278.

35. *See id.* at 282-83.

36. *Id.* at 287.

37. *Id.* at 288.

38. *Id.* at 290-91.

39. *Id.* at 290.

claims difficult, attempted to soften its holding by expressing great concern over the number of cases of sexual harassment in schools.<sup>40</sup> The Court explained that the harm a student suffers as a result of sexual harassment is undeniable and such conduct by a teacher is reprehensible.<sup>41</sup> The Court identified other rights of recovery available to students under state law and 42 U.S.C. § 1983.<sup>42</sup> While *Gebser* is laudable because it provided a right of action for victims of sexual harassment in schools, the Court should have emphatically held that the sexual abuse of students will not be endured.<sup>43</sup> As the dissent stated, “the Court ranks protection of the school district’s purse above the protection of immature high school students.”<sup>44</sup> The actual knowledge standard set by the *Gebser* Court is extremely high because the non-response by a school district must amount to deliberate indifference before the standard is met, making a student’s burden to successfully claim sexual harassment nearly impossible.<sup>45</sup>

*B. Laws Currently in Place to Protect Students and to Prosecute  
Their Abusers Criminally*

Although a sexual harassment claim is the primary way for student-plaintiffs to demand monetary compensation for the extreme misconduct of a teacher, there are also laws in place to punish the teacher-defendant. The most obvious criminal charge is one of statutory rape. While these laws supplement and reinforce Title IX, they do not eliminate the need for recovery under Title IX.

1. *Statutory Rape Laws.*—There is no federal statutory rape law, and consequently these laws vary state-to-state. Still, the basic premise behind each law remains the same—criminalize sexual conduct with minors under a stated age.<sup>46</sup> “[F]our states set the legal age of consent to sexual activity, absent special circumstances, at age fourteen. Almost half of the states set the age of consent at below the age of majority and only seven set it at eighteen, absent special circumstances.”<sup>47</sup> All of these ages fall among the ages of students at various stages of their high school education.

A subset of statutory rape laws exist in at least one state.<sup>48</sup> Georgia has

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40. *Id.* at 292.

41. *Id.*

42. *Id.*

43. Todd A. DeMitchell, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 50.

44. *Gebser*, 524 U.S. at 306.

45. DeMitchell, *supra* note 43, at 51.

46. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 708 (2006).

47. Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1, 7 (2006) [hereinafter Drobac, *Developing Capacity*].

48. See *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 705 (E.D. Pa. 2007) (“Some states have taken . . . [the] next logical step, explicitly providing that a student cannot consent to

“impose[d] criminal penalties on a person who has sexual contact with a student enrolled in a school when that person has supervisory or disciplinary authority over the student.”<sup>49</sup> The statute that criminalizes such conduct addresses this conduct in the same paragraph as it criminalizes sexual contact between a probation or parole officer and a probationer or parolee.<sup>50</sup> This grouping of relationships hints at how the Georgia legislature views the relationship of school employees and students.<sup>51</sup> The Georgia legislature appears to view the student-teacher relationship as a custodial relationship with the same potential for abuse as in other custodial relationships.

2. *Corruption of Minors Laws.*—In addition to the more serious charge of statutory rape, in some states a teacher can be convicted of corruption of a minor.<sup>52</sup> For example, Pennsylvania has a law that states that anyone over the age of eighteen who “corrupts or tends to corrupt the morals” of anyone younger than eighteen years of age, or “who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.”<sup>53</sup> Consent is not a defense to a corruption of minors charge.<sup>54</sup> The teacher in *Chancellor* (the case described in the introduction) pled guilty to this crime.<sup>55</sup>

Although there are many laws to criminally punish teachers who engage in sexual relationships with their students, criminal prosecution is not enough. Interaction between teachers and students is an everyday reality for school-aged children, and the relationship between teachers and students must never include

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sex with her teacher.”).

49. *State v. Eastwood*, 535 S.E.2d 246, 248 (Ga. Ct. App. 2000).

50. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007):

A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he or she engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or who is enrolled in a school or who is detained in or is a patient in a hospital or other institution and such actor has supervisory or disciplinary authority over such other person. A person convicted of sexual assault shall be punished by imprisonment for not less than ten nor more than 30 years; provided, however, that any person convicted of the offense of sexual assault under this subsection of a child under the age of 14 years shall be punished by imprisonment for not less than 25 nor more than 50 years. Any person convicted under this subsection of the offense of sexual assault shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

51. See *infra* Part IV.C for a detailed discussion of the similarities between a teacher’s custodial role and a prisoner employee’s custodial role.

52. See, e.g., *Chancellor*, 501 F. Supp. 2d at 699. A teacher who engaged in sexual relationships with two students pled guilty to two counts of corruption of a minor. *Id.*

53. See *Corruption of Minors*, 18 PA. CONS. STAT. § 6301(a)(1) (2000).

54. *Commonwealth v. Decker*, 698 A.2d 99, 100 (Pa. Super Ct. 1997).

55. *Chancellor*, 501 F. Supp. 2d at 699.

an inquiry into welcomeness, regardless of whether the inquiry happens in a civil or criminal context.

## II. SEXUAL RELATIONSHIPS BETWEEN SECONDARY STUDENTS AND TEACHERS ARE DIFFERENT THAN SEXUAL RELATIONSHIPS IN OTHER CONTEXTS

Sexual relationships between secondary students and teachers differ from relationships between other parties such as college students and professors or employers and employees. There are many intuitive reasons to support such an assertion, most prominently an innate sense that sex between a teacher and a high school student is simply wrong. As true as this is, more concrete reasons do exist.

### A. *Secondary Students and Teachers Versus College Students and Professors*

Relationships between secondary students and their teachers are significantly different from relationships between college students and their professors. The age difference and subsequent maturity of college students is the most identifiable and the most relevant difference between the two groups.<sup>56</sup> Secondary students range in age from twelve to nineteen—depending on whether junior high school students are considered elementary or secondary students.<sup>57</sup> The majority of college students are of the age of majority and have the legal capacity to consent to sex in every state.

When considering relationships between college students and professors, some of the same concerns present in relationships between secondary students and teachers exist. Most prominent is the presence of power disparity and the extent of trust between student and teacher.<sup>58</sup> Some authors have argued that any “consent” given in professor-student relationships should be legally ineffective because of the “power dependency relationship” present.<sup>59</sup> Under current law, however, having a sexual relationship with an adult, including an adult college student, is not criminal.

There is also a distinction between secondary and college students in claims

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56. William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615, 628 (2000) (“Elementary/secondary education and higher education differ substantially from one another in structure and mission. The ages and maturity levels of students can also vary dramatically from one level to the other, leading to differences in perspective on questions about when conduct is sexual and when sexual conduct is consensual.”).

57. See, e.g., IND. CODE § 20-33-2-6 (2007). Indiana law requires students to begin school during the year the student turns seven years old. *Id.* If a student turns seven while in first grade, the student would turn thirteen during seventh grade, consequently entering seventh grade at age twelve.

58. Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 MICH. J. GENDER & L. 79, 82-84 (1999).

59. Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the “Fair” Sex*, 53 ALBANY L. REV. 95, 95-96 (1988).

involving peer-on-peer sexual harassment.<sup>60</sup> In *Davis v. Monroe County Board of Education*,<sup>61</sup> the Court held that a school may be liable under Title IX for peer-on-peer sexual harassment.<sup>62</sup> The Court emphasized the differences in the amount of control a school can exert over an employee as compared to a student.<sup>63</sup> The student in *Davis* was a fifth-grade girl who was allegedly harassed by a classmate who attempted to touch her breasts and genitals.<sup>64</sup> Although this case was decided in the context of peer-on-peer sexual harassment in an elementary school, the Court explicitly noted the applicability of its holding to colleges, explaining that “[a] university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy. . . .”<sup>65</sup> In light of this standard and the differences between a college and secondary or elementary school, a college is less liable for peer-on-peer sexual harassment than elementary and secondary schools.<sup>66</sup>

*B. Secondary Students and Teachers Versus Employers and Employees*

Just as there is a difference in sexual relationships between college professors and students and secondary teachers and students, there is also a difference in the relationship between secondary teachers and students and employers and employees. Title VII of the Civil Rights Acts of 1964<sup>67</sup> provides the employee’s primary protection from discrimination, including sexual harassment.<sup>68</sup> When deciding whether conduct constitutes sexual harassment, the Equal Employment Opportunity Commission looks at the whole record and at the totality of the circumstances, including “the nature of the sexual advances and the context in which the alleged incidents occurred.”<sup>69</sup>

Relationships between students and teachers are different from the employment context involved in Title VII.<sup>70</sup> Children are not required to work,

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60. See Kaplin, *supra* note 56, at 628-29.

61. 526 U.S. 629 (1999).

62. *Id.* at 643 (“We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX . . . when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”).

63. *Id.* at 645 (“[A] recipient’s damages liability [is limited] to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”); see Kaplin, *supra* note 56, at 628-29.

64. *Davis*, 526 U.S. at 633.

65. *Id.* at 649.

66. See Kaplin, *supra* note 56, at 629.

67. See 42 U.S.C. § 2000(e) (2006).

68. Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1474 (2007).

69. 29 C.F.R. § 1604.11(b) (1999).

70. See Amy K. Graham, Note, *Gebser v. Lago Vista Independent School District: The Supreme Court’s Determination that Children Deserve Less Protection than Adults from Sexual*



but compulsory education laws exist in all fifty states.<sup>71</sup> These laws range from

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*Harassment*, 30 LOY. U. CHI. L.J. 551, 588-96 (1999).

71. ALA. CODE § 16-28-3 (2001) (compulsory between seven and sixteen); ALASKA STAT. § 14.30.010 (2006) (compulsory between seven and sixteen); ARIZ. REV. STAT. ANN. § 15-802 (2002 & Supp. 2007) (compulsory between six and sixteen); ARK. CODE ANN. § 6-18-201 (West 2004) (compulsory between five and seventeen); CAL. EDUC. CODE § 48200 (2006) (compulsory between six and eighteen); COLO. REV. STAT. ANN. § 22-33-104 (West 2005 & Supp. 2007) (compulsory between seven and seventeen); CONN. GEN. STAT. ANN. § 10-184 (West 2002) (compulsory between five and eighteen); DEL. CODE ANN. tit. 14, § 2701 (2006) (compulsory between five and sixteen); FLA. STAT. ANN. § 1003.21 (West 2004 & Supp. 2008) (compulsory between six and sixteen); GA. CODE ANN. § 20-2-690.1 (West 2003 & Supp. 2007) (compulsory between six and sixteen); HAW. REV. STAT. ANN. § 302A-1132 (LexisNexis 2006) (compulsory between six and eighteen); IDAHO CODE ANN. § 33-202 (2006) (compulsory between seven and sixteen); 105 ILL. COMP. STAT. ANN. § 5/26-1 (West 2006) (compulsory between seven and seventeen); IND. CODE § 20-33-2-6 (2007) (compulsory between seven and eighteen); IOWA CODE ANN. § 299.1 (West 1988 & Supp. 2008) (compulsory between six and sixteen); KANSAS STAT. ANN. § 72-1111 (2002) (compulsory between seven and eighteen); KY. REV. STAT. ANN. § 159.010 (West 2006) (compulsory between six and sixteen); LA. REV. STAT. ANN. § 17:221 (2001) (compulsory between seven and eighteen); ME. REV. STAT. ANN. tit. 20-A § 5001-A (2008) (compulsory between seven and seventeen); MD. CODE ANN., EDUC. § 7-301 (West 2002 & Supp. 2007) (compulsory between five and sixteen); MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1996) (ages set by board of education, compulsory to fourteen); MICH. COMP. LAWS ANN. § 380.1561 (West 2005) (compulsory between six and sixteen); MINN. STAT. ANN. § 120A.22 (West 2000 & Supp. 2008) (compulsory between seven and sixteen); MISS. CODE ANN. § 37-13-91 (West 2000 & Supp. 2007) (compulsory between six and seventeen); MO. ANN. STAT. § 167.031 (West 2000 & Supp. 2008) (compulsory between seven and a district-set compulsory attendance age); MONT. CODE ANN. § 20-5-102 (2007) (compulsory between seven and sixteen); NEB. REV. STAT. § 79-201 (2003 & Supp. 2006) (compulsory between seven and eighteen); NEV. REV. STAT. ANN. § 392.040 (West 2006 & Supp. 2008) (compulsory between seven and eighteen); N.H. REV. STAT. ANN. § 193:1 (1999 & Supp. 2007) (compulsory between six and eighteen); N.J. STAT. ANN. § 18A:38-25 (West 1999) (compulsory between six and sixteen); N.M. STAT. ANN. § 22-12-2 (West 2003 & Supp. 2007) (compulsory up to eighteen); N.Y. EDUC. LAW § 3205 (McKinney 2001 & Supp. 2008) (compulsory between six and sixteen); N.C. GEN. STAT. ANN. § 115C-378 (West 2000 & Supp. 2007) (compulsory between seven and sixteen); N.D. CENT. CODE § 15.1-20-01 (2003) (compulsory between seven and sixteen); OHIO REV. CODE ANN. § 3321.01 (West 2005 & Supp. 2008) (compulsory between six and eighteen); OKLA. STAT. ANN. tit. 70, § 10-105 (West 2005 & Supp. 2008) (compulsory between five and eighteen); OR. REV. STAT. ANN. § 339.010 (West 2003) (compulsory between seven and eighteen); 24 PA. STAT. ANN. § 13-1326 (West 1992) (compulsory between eight and seventeen); R.I. GEN. LAWS § 16-19-1 (2006 & Supp. 2008) (compulsory between six and sixteen); S.C. CODE ANN. § 59-65-10 (2004) (compulsory between five and seventeen); S.D. CODIFIED LAWS § 13-27-1 (2004 & Supp. 2008) (compulsory between six and sixteen); TENN. CODE ANN. § 49-6-3001 (West 2006) (compulsory between six and seventeen); TEX. EDUC. CODE ANN. § 25.085 (Vernon 2006 & Supp. 2008) (compulsory six and eighteen); UTAH CODE ANN. § 53A-11-101 (West 2004 & Supp. 2008) (compulsory between six and eighteen); VT. STAT. ANN. tit. 16, § 1121 (2007) (compulsory between six and sixteen); VA. CODE

requiring children ages five to eighteen to attend school, to requiring school attendance for children between the ages of seven and sixteen, and many other possible combinations.<sup>72</sup> Although some of these laws do not require children to attend school past the age of sixteen, the importance of a high school degree is a strong incentive to complete school. This difference between the workplace and schools is important and sobering. An employee can arguably find another place to work to avoid sexual harassment. A student cannot leave his or her school and will often be in contact with the abuser over multiple years.<sup>73</sup>

One author explained the difference between school and the workplace with an analysis of services provided in the respective environments.<sup>74</sup> Students, through their parents, pay for the services schools provide, while in the workplace employers pay for the services provided by employees.<sup>75</sup> These service-provided-relationships flow in different directions, which greatly influences each relationship.<sup>76</sup> A school's purpose is to educate its students and an employer's purpose is to run a successful business.<sup>77</sup> The author then claims that "[s]ex-based harassment in the educational context fundamentally frustrates and interferes with the purpose of the teacher-student relationship."<sup>78</sup> A school must create a supportive environment that helps facilitate its purpose of educating its students. Disrupting that environment results in "a reduction in the educational benefit that the student receives" and lowers the value of services provided.<sup>79</sup>

Another approach that highlights the differences between a school and the

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ANN. § 22.1-254 (2006) (compulsory between five and eighteen); WASH. REV. CODE ANN. § 28A.225.010 (West 2006) (compulsory between eight and eighteen); W. VA. CODE ANN. § 18-8-1a (West 2002) (compulsory between six and sixteen); WIS. STAT. ANN. § 118.15 (West 2004 & Supp. 2007) (compulsory between six and eighteen); WYO. STAT. ANN. § 21-4-102 (2007) (compulsory between seven and sixteen). All of the above ages are subject to several exceptions.

72. See statutes cited *supra* note 71.

73. See Angela Duffy, *Can a Child Say Yes? How the Unwelcomeness Requirement Has Thwarted the Purpose of Title IX*, 27 J.L. & EDUC. 505, 509 (1998) ("[C]hildren do not have a choice about whether to attend school, and most cannot choose which school they attend. . . . [I]n the Title VII context, although still not fair, it is conceivably far easier for an employee to change jobs than it is for a student to change schools."); *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 (7th Cir. 1997) ("[A]s economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school."); see also Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 292 (2004) ("[S]tudents . . . are required to attend school and may not have alternatives to the school where they are harassed.").

74. See Baker, *supra* note 73, at 290-91.

75. *Id.* at 290.

76. *Id.* at 290-91.

77. *Id.*

78. *Id.* at 291.

79. *Id.* (quoting Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 540 (1987)).

workplace compares the relationship between students and teachers to the relationship between children and parents.<sup>80</sup> Both relationships involve “custodial and supervisory control” over a child.<sup>81</sup> It is universally acknowledged that the child-parent relationship does not include the sexual abuse of the child or negligently exposing the child to abuse.<sup>82</sup> Clearly there is no question of welcomeness involved in parent-child sexual relationships. However, the question is raised in teacher-student relationships even though the relationship encompasses many of the same features of a parent-child relationship.<sup>83</sup>

The similarities between teacher-student relationships and parent-child relationships emphasize how teacher-student relationships differ from employer-employee relationships. Employers do not have custodial duties over their employees, nor do they wield the extensive power over their employees that teachers possess. The power imbalance in teacher-student relationships is the reason that a student cannot consent to a sexual relationship. The power a teacher exercises over a student aids the teacher in taking advantage of the student.<sup>84</sup> The dissent in *Gebser* recognized this, insightfully observing that “[a]s a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student’s trust.”<sup>85</sup> This same observation has been made by authors who advocate for stronger protection of students and is a primary reason why the teacher-student relationship must be protected in such a way that the welcomeness of student-teacher sexual relationships is never questioned.<sup>86</sup>

### III. THE COURTS’ AND THE DEPARTMENT OF EDUCATION’S CURRENT APPROACHES TO WELCOMENESS AND STUDENTS

#### A. The Courts

An excellent example of why the issue of a student’s welcomeness is important is *Mary M. v. North Lawrence Community School Corp.*<sup>87</sup> In this case, a thirteen-year-old eighth grade student and a cafeteria employee engaged in a flirtatious relationship that culminated in the student and employee leaving

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80. DeMitchell, *supra* note 43, at 50.

81. *Id.* at 35.

82. *Id.*

83. *Id.* at 50.

84. *Id.* at 34 (“Sexually abusive teachers . . . misuse the authority of their positions when they sexually molest children under their control.”).

85. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 299 (1998) (Stevens, J., dissenting).

86. DeMitchell, *supra* note 43, at 33 (“[S]chool employees are aided in their misconduct by the power and authority they have over children given to them by virtue of their school employment and its attendant in loco parentis status.”).

87. 131 F.3d 1220 (7th Cir. 1997).

school to have sex.<sup>88</sup> The district court held that it was appropriate for a jury to consider whether the conduct was unwelcome when reaching its verdict.<sup>89</sup> The student appealed the case to the Seventh Circuit,<sup>90</sup> which specifically addressed the issue of welcomeness.<sup>91</sup> After finding that an eighth grade student was an elementary student in the particular school district, the court held that “[w]elcomeness is an improper inquiry to be made in Title IX cases involving sexual discrimination of elementary school children.”<sup>92</sup>

The Seventh Circuit engaged in a lengthy discussion of welcomeness and elementary school students, citing several reasons why welcomeness should not be a question of fact in Title IX cases.<sup>93</sup> These reasons include concerns over subjecting a young student to intense scrutiny and the differences between Title VII and Title IX cases.<sup>94</sup> The court supported its holding by listing several differences that exist between the classroom and the workplace, including the greater control and influence teachers have over students.<sup>95</sup> The court also emphasized the greater harm that results from sexual harassment in the classroom when compared to sexual harassment in the workplace. “[T]he harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior.”<sup>96</sup> The court also noted the affect sexual harassment has on the development of students’ intellectual potential, the fact that schools act in loco parentis while employers do not, and that employees are “older and (presumably) know how to say no to unwelcome advances, while children may not even understand that they are being harassed.”<sup>97</sup> While all of these reasons seem to apply to secondary students with equal force, the Seventh Circuit explicitly declined to address “whether secondary school students can welcome sexual advances in harassment claims arising under Title IX.”<sup>98</sup>

Disagreement exists among courts as to whether age of consent laws make it a legal impossibility for a student under the age of consent to welcome the harassing conduct. The Seventh Circuit in *Mary M.* acknowledged that there was no case on point as to the capacity of an elementary student to welcome sexual conduct and consequently looked to criminal law.<sup>99</sup> Indiana, the state in which the sexual relationship between the student and teacher occurred, set the age of

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88. *Id.* at 1221-23.

89. *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 951 F. Supp. 820, 826-27 (S.D. Ind.), *rev'd*, 131 F.3d 1220 (7th Cir. 1997).

90. *Mary M.*, 131 F.3d at 1221.

91. *See id.*

92. *Id.* at 1225.

93. *Id.* at 1226-27.

94. *Id.*

95. *Id.* at 1226 (citing *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997) (en banc)).

96. *Id.*

97. *Id.* at 1226-27.

98. *Id.* at 1225 n.6.

99. *Id.* at 1227.

consent at sixteen.<sup>100</sup> The court concluded that “[i]f elementary school children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous.”<sup>101</sup> This reasoning is consistent with the Department of Education’s Guidance discussed below.

However, other courts do not apply criminal age of consent laws to civil litigation. The United States District Court for the Western District of Oklahoma, when considering a case involving a fourteen-year-old eighth grade student who “became sexually involved with her basketball coach,” decided that “the criminality of [the alleged harasser’s] actions, standing alone, have no bearing on the [defendant’s] liability.”<sup>102</sup> The Northern District of Alabama has also identified the inconsistency in which courts address civil liability when, under criminal law, the student was legally incapable of consenting to a sexual relationship: “The court finds other districts have taken unreconcilable [sic] positions on the question of whether the inability to consent under criminal law renders voluntary actions non-consensual under federal civil law.”<sup>103</sup>

State courts have also considered what weight the seemingly “voluntariness” of the sexual conduct between a student and teacher should have on civil liability. In *Christensen v. Royal School District No. 160*,<sup>104</sup> the Supreme Court of Washington addressed the question of whether a student’s voluntary participation in a sexual relationship can be an affirmative defense in a negligence action.<sup>105</sup> A teacher and thirteen-year-old student engaged in a sexual relationship with the sexual activity occurring in the teacher’s classroom.<sup>106</sup> The court decided that voluntariness or consent was not an affirmative defense because

the societal interests embodied in the criminal laws protecting children from sexual abuse should apply equally in the civil arena when a child seeks to obtain redress for harm caused to the child by an adult

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100. *Id.*

101. *Id.* Other courts have also concluded that age of consent laws should have great bearing on the issue of welcomeness. *See Bostic v. Smyrna Sch. Dist.*, No. 01-0261 KAJ, 2003 WL 723262, at \*6 (D. Del. Feb. 24, 2003) (“It would be a bizarre rule indeed that, for purposes of civil liability, would call a teenager’s ‘consent’ sufficient to make a relationship ‘welcome’ and thus not a basis for civil liability, when the very same relationship is rape under the exacting standards for criminal liability.”).

102. *R.L.R. v. Prague Pub. Sch. Dist.* I-103, 838 F. Supp. 1526, 1527, 1534 (W.D. Okla. 1993). *See Benefield v. Bd. of Trs. of the Univ. of Ala. at Birmingham*, 214 F. Supp. 2d 1212, 1217-18 (N.D. Ala. 2002) (quoting R.L.R. with approval and rejecting the plaintiff’s argument that “the sex in question could not be consensual because the plaintiff was below the age of consent at the time the acts in question occurred”).

103. *Benefield*, 214 F. Supp. 2d at 1217 n.12.

104. 124 P.3d 283 (Wash. 2005).

105. *Id.* at 285.

106. *Id.*

perpetrator of sexual abuse or a third party in a position to control the conduct of the perpetrator.<sup>107</sup>

The court also rejected any claim that the student had a duty to protect herself from abuse by a teacher because it conflicted with Washington law that “a school district has an enhanced and solemn duty to protect minor students in its care.”<sup>108</sup> Other state courts have reached similar conclusions that evidence of consent or voluntariness is as inadmissible in a civil case as in a criminal case when a child is under the age of consent.<sup>109</sup>

### *B. The Department of Education Sexual Harassment Guidance*

The Department of Education describes itself as “the agency of the federal government that establishes policy for, administers, and coordinates most federal assistance to education.”<sup>110</sup> Its mission “is to serve America’s students—to ensure that all have equal access to education and to promote excellence in our nation’s schools.”<sup>111</sup> One of the ways in which the Department of Education accomplishes its mission is by “identif[ing] the major issues and problems in education and focus[ing] national attention on them” by “mak[ing] recommendations for education reform.”<sup>112</sup>

In 2001, the Department of Education published “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” (Guidance).<sup>113</sup> This Guidance replaced its 1997 predecessor which was published pre-*Gebser*<sup>114</sup> and pre-*Davis*.<sup>115</sup> The stated purpose of the Guidance is “to provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving [f]ederal financial assistance.”<sup>116</sup> In other words, the Guidance advocates policies for schools to follow in order to safeguard the federal funds they receive. The Guidance defines sexual harassment as

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107. *Id.* at 286.

108. *Id.*

109. *See Doe ex rel. Roe v. Orangeburg County Sch. Dist. No. 2*, 518 S.E.2d 259, 262 (S.C. 1999) (holding that evidence of the plaintiff’s willing participation in a sexual relationship is inadmissible when the plaintiff is under the age of consent); *Wilson v. Tobiassen*, 777 P.2d 1379, 1384 (Or. Ct. App. 1989) (holding that “a person’s incapacity to consent under [the Oregon criminal code] extends to civil cases”).

110. United States Dep’t of Educ., An Overview of the U.S. Department of Education, <http://www.ed.gov/about/overview/focus/whattoc.html?src=ln> (last visited Mar. 12, 2009).

111. United States Dep’t of Educ., What Is the U.S. Department of Education?, <http://www.ed.gov/about/overview/focus/what.html#whatis> (last visited Mar. 12, 2009).

112. United States Dep’t of Educ., What Does the Department of Education Do?, [http://www.ed.gov/about/overview/focus/what\\_pg2.html](http://www.ed.gov/about/overview/focus/what_pg2.html) (last visited Mar. 12, 2009).

113. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at i.

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

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

116. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at i.

“unwelcome conduct of a sexual nature.”<sup>117</sup> It can include “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>118</sup> The Guidance then links sexual harassment to sex discrimination by explaining that harassment “can deny or limit, on the basis of sex, [a] student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.”<sup>119</sup>

Regarding welcomeness, the Guidance states that “[c]onduct is unwelcome if the student did not request or invite it and ‘regarded the conduct as undesirable or offensive.’ Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.”<sup>120</sup> Especially relevant to the issue of welcomeness and secondary students, the Guidance then explains that

[i]f younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, [the] OCR [Office of Civil Rights] will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.<sup>121</sup>

After describing how it determines when a student has the capacity to welcome sexual conduct, the Guidance divides students into three categories: elementary, secondary, and postsecondary.<sup>122</sup> Elementary students unequivocally cannot consent to a sexual relationship with a teacher: “OCR [the Office of Civil Rights] will never view sexual conduct between an adult school employee and an elementary school student as consensual.”<sup>123</sup> Regarding relationships involving postsecondary students, there is no mention of a presumption of consent or non-consent; rather, the Guidance states that “OCR will consider these factors in all cases involving postsecondary students.”<sup>124</sup>

The issue of consent is clouded with respect to secondary students. “[T]here will be a strong presumption that sexual conduct between an adult school employee and a [secondary] student is not consensual.”<sup>125</sup> The “OCR will consider a number of factors in determining whether a school employee’s sexual

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117. *Id.* at 2.

118. *Id.*

119. *Id.*

120. *Id.* at 7-8 (quoting *Does v. Covington Sch. Bd. of Educ.*, 930 F. Supp. 554, 569 (M.D. Ala. 1996)).

121. *Id.* at 8.

122. *Id.*

123. *Id.*

124. *Id.* The factors referred to are “the age of the student, the nature of the conduct involved, and other relevant factors.” *Id.*

125. *Id.*

advances or other sexual conduct could be considered welcome,”<sup>126</sup> with respect to the secondary students subject to this presumption.

The factors that will be considered in determining whether the relationship between the secondary student and teacher is welcome include “the nature of the conduct and the relationship of the school employee to the student” and “whether the student was legally or practically unable to consent to the sexual conduct in question.” The student’s age or certain types of disabilities will thus be important.<sup>127</sup>

The Guidance then lays out a totality of the circumstances test, outlining “types of information [that] may be helpful in resolving the dispute” over whether harassment occurred or whether it was welcome.<sup>128</sup> The types of relevant information include: witness statements; “[e]vidence about the relative credibility of the allegedly harassed student and the alleged harasser”; whether the alleged harasser had harassed others; whether the student previously made false allegations; the student’s reaction after the alleged harassment; whether the student filed a complaint or otherwise protected the conduct after the alleged harassment; and other contemporaneous evidence.<sup>129</sup>

#### IV. PROBLEMS WITH EVALUATING WHETHER A SECONDARY STUDENT “WELCOMED” A SEXUAL RELATIONSHIP WITH A TEACHER

There are many problems with the courts’ and the Department of Education’s approach to welcomeness and secondary students. The *Chancellor* court identified several flaws in the Guidance itself and other courts have identified problems with engaging in a welcomeness inquiry when students are involved. Among these criticisms, the most pressing are: (1) the problem with equating consent with the capacity to consent;<sup>130</sup> (2) the problems that arise when applying Title VII standards to Title IX cases;<sup>131</sup> and (3) the problems associated with subjecting secondary students, some as young as fourteen, to the intense scrutiny of a welcomeness inquiry.<sup>132</sup>

##### A. *Consent Versus Capacity to Consent*

The Guidance pays lip service to the principle of legal capacity to consent.<sup>133</sup> The Guidance states that “[w]hether the student was legally or practically unable

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126. *Id.*

127. *Id.*

128. *Id.* at 9.

129. *Id.*

130. *See* *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 707 (E.D. Pa. 2007); *see also* Drobac, *Developing Capacity*, *supra* note 47, at 57-59 (arguing that “[a]dolescents are, in every way, embryonic human adults. Since we cannot tell whether an adolescent behaves maturely at any given time, we cannot tell which ‘consent’ we should treat as legally binding”).

131. *See* *Chancellor*, 501 F. Supp. 2d at 707.

132. Duffy, *supra* note 73, at 510.

133. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 8.



to consent to the sexual conduct in question” is a factor to be used to determine “whether a school employee’s sexual advances or other sexual conduct could be considered welcome.”<sup>134</sup> Whether a student was legally unable to consent should not be a factor in determining whether the relationship can be considered welcome. If a student is unable to legally consent to the relationship, the relationship should be automatically considered unwelcome. When considering this flaw, it is important to remember that consent is very closely related to the issue of welcomeness. Welcomeness is an element of a *prima facie* case of sexual harassment.<sup>135</sup> Indeed, the Guidance defines sexual harassment as “unwelcome conduct of a sexual nature.”<sup>136</sup>

Although the Guidance does not explicitly state how it will determine whether a student was legally able to consent to the alleged sexual conduct, it appears that this age will be determined in light of statutory rape statutes or age of consent statutes in the jurisdiction in which the sexual conduct occurred. These laws are inconsistent across the states,<sup>137</sup> and using the laws as a marker for when a student can consent to a sexual relationship with a teacher would result in the possibility that any high school student, from freshman year through senior year, could have the legal capacity to consent to sex.<sup>138</sup> The age at which a student is protected would be entirely dependent on the jurisdiction in which she lives.<sup>139</sup> While it is true that this already occurs across the country due to the varied laws, the severity of the circumstances that surround sexual relationships between students and teachers require a different approach. A bright line rule that protects *all* secondary students, regardless of relevant age of consent laws, easily can be achieved by making all students incapable of consenting to a sexual relationship with a teacher.

The Guidance is not binding on courts, as noted by the court in *Chancellor*.<sup>140</sup> The Guidance “re-grounds [the] standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages.”<sup>141</sup> However, it can affect how courts view the issue of welcomeness and the capacity to consent because it is offered, by its very title, as guidance. Additionally, because it is meant as a guide to schools, the Guidance could greatly affect how school districts address sexual harassment. Therefore, because of its great influence, the Guidance should be revised.

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134. *Id.*

135. See *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996), *rev'd on other grounds*, 171 F.3d 607 (8th Cir. 1999).

136. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 2.

137. For further discussion, see *supra* Part I.B.

138. Professor Drobac acknowledges the same result when discussing sexual harassment of minors under Title VII. Drobac, *Developing Capacity*, *supra* note 47, at 7-8.

139. *Id.*

140. 501 F. Supp. 2d 695, 707 n.13 (E.D. Pa. 2007) (“The DOE’s Sexual Harassment Guidance provides just that: guidance. It is not binding on this Court, but rather a resource on the DOE’s position.”)

141. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at i.

*B. Problems with Applying Title VII Welcomeness Jurisprudence to Title IX*

The numerous differences between a Title VII employment discrimination case and a Title IX school discrimination case make the direct application of Title VII standards of welcomeness to Title IX cases unworkable.

In a successful Title VII hostile work environment harassment claim, a plaintiff must show that: “(1) the employee belonged to a protected group, (2) the employee was the subject of unwelcome sexual harassment, (3) the harassment complained of was based on sex, [and] (4) the harassment was sufficiently severe to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment.”<sup>142</sup> In Title VII cases, the issue of whether the allegedly harassed employee has the capacity to welcome sexual harassment rarely arises. Instead, it is a question of whether the employee actually welcomed the specific alleged harassment.<sup>143</sup> However, in some Title VII cases, courts have expressed mild concern over the capacity to consent when minor employees are involved. The Seventh Circuit stated in *Doe v. Oberweis Dairy*<sup>144</sup> that courts “should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision in Title VII cases.”<sup>145</sup>

While the Seventh Circuit’s statement in *Oberweis Dairy* would appear to make welcomeness in Title VII cases involving minors an issue of capacity to consent, the Seventh Circuit did not end its analysis there. The court explained in dicta that although many problems exist with inquiring about an individual minor’s maturity, “a jury should be able to sort out the difference between an employer’s causal contribution to the statutory rape by its employee of a 16-year-old siren (if that turns out to be an accurate description of [the plaintiff]) and to similar conduct toward, say, a 12-year-old.”<sup>146</sup> The court envisioned a jury applying this difference when determining damages. Pursuant to the Seventh Circuit’s view of teenage sexuality, a teenaged student’s damage award for sexual harassment could be reduced simply because current fashion includes body-baring clothing, which could qualify the student as a “siren.”

While the Seventh Circuit’s troubled conclusion has no effect on criminal

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142. Sara L. Johnson, Annotation, *When is Work Environment Intimidating, Hostile, or Offensive, so as to Constitute Sexual Harassment in Violation of Title VII of Civil Rights Act of 1964, as Amended* (42 U.S.C.A. §§ 2000e et seq.), 78 A.L.R. FED. 252 (1986).

143. See *Chancellor*, 501 F. Supp. 2d at 707 (“[U]nder Title VII, the question is not whether the subordinate employee had the capacity to welcome the superior’s sexual advances, but rather whether the subordinate in fact did so.”).

144. 456 F.3d 704 (7th Cir. 2006).

145. *Id.* at 713. For a discussion of *Oberweis Dairy* before the court announced the decision, see Jennifer A. Drobac, ‘Please Don’t; I Have My Standards!’, 27 BNA’S EMP. DISCRIMINATION REP. 55 (2006).

146. *Doe*, 465 F.3d at 715.

prosecutions for statutory rape, the holding can decrease the damages that an abused minor can collect. This problem, exhibited in Title VII cases, showcases the exact problem that will arise from the Department of Education's totality-of-the-circumstances test. Allowing a jury or court to consider the individual student's maturity undermines even the small protection that statutory rape laws provide students. These laws are in place because of the belief that children under a certain age are incapable of making a reasoned decision about sex. It is inconsistent, for a minor not to have the capacity to consent to sex in criminal proceedings, but for the same minor to have the capacity to welcome sexual harassment in a civil proceeding.<sup>147</sup> The law should not change based on whether the proceeding is civil or criminal; either an individual has the capacity to welcome sexual conduct or he or she does not.

As the *Chancellor* court noted, any totality-of-the-circumstances test is likely to reach logically ridiculous conclusions:

Under the DOE Sexual Harassment Guidance's factors for "welcomeness," a high school teacher's having sex with some students might violate Title IX, while the same teacher's having sex with other students in the same class, because they are of a different age or mental capacity or the sex occurs under slightly different circumstances, would not.<sup>148</sup>

This difference in treatment already occurs in statutory rape law. "The system (criminal or civil), the geographic region (or jurisdiction), and the particular claims alleged all influence the legal treatment of adolescent 'consent.' A teenager in California can expect very different treatment than a teenager in Colorado, where the 'age of consent' is three years lower."<sup>149</sup> While these differences in the outcomes of very similar cases are a direct consequence of the fact that statutory rape laws are state laws and thus differ state-to-state. This difference in treatment should be rectified by state law or an established standard followed by all federal courts in Title IX cases to better protect all students. At the very least, a situation involving two students who are both above the age of consent and who are engaged in a sexual relationship with the same teacher should never result in a ruling that one student welcomed the conduct and the other did not. The Department of Education should act to protect students, not just teachers and school districts, and make a bright line rule: students do not have the legal capacity to consent to sex with their teachers, and thus any sexual

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147. See *Bostic v. Smyrna Sch. Dist.*, No. 01-0261 KAJ, 2003 WL 723262, at \*6 (D. Del. Feb. 24, 2003) ("It would be a bizarre rule indeed that, for purposes of civil liability, would call a teenager's 'consent' sufficient to make a relationship 'welcome' and thus not a basis for civil liability, when the very same relationship is rape under the exacting standards for criminal liability."); see also Duffy, *supra* note 73, at 510 ("The current legal situation creates the illogical possibility . . . that one could be convicted of child molestation and not be responsible for sexual advances under Title IX.").

148. *Chancellor*, 501 F. Supp. 2d at 707-08.

149. Drobac, *Developing Capacity*, *supra* note 47, at 7-8.

conduct is unwelcome on the part of the student for purposes of Title IX sexual harassment suits.

*C. Teacher-Student Relationships Should be Considered Custodial and Consequently Deserving of More Protection*

The court in *Chancellor* briefly identified the custodial nature of the student-teacher relationship when it addressed whether the student had the capacity to consent to sex with her teacher.<sup>150</sup> The court stated, “the custodial situation, in which the aggressor, by virtue of his position of custody or authority over the aggrieved party, renders the aggrieved party incapable of offering her effective consent.”<sup>151</sup> The court then analogized the custodial relationship of prisoners and prison guards.<sup>152</sup>

In situations involving sexual abuse outside of custodial relationships, consent is usually a highly disputed issue. However, in a custodial relationship, “consent is a legal impossibility: the federal government, the District of Columbia, and forty-seven states now criminalize sexual contact between correctional staff and prisoners . . . . These statutes are formulated on the belief that the power imbalance between guard and guarded renders true consent impossible.”<sup>153</sup> In this custodial situation, “[t]here is widespread agreement both domestically and internationally that rape simply is ‘not part of the penalty’ offenders should pay for their criminal conduct.”<sup>154</sup>

While the realities of life in prison are very different than the public school setting, there are enough similarities to argue that teachers and students are in a custodial relationship.<sup>155</sup> Attendance in school is compulsory.<sup>156</sup> Power over bathroom passes, when the student can speak in class, and what grade the student receives, are all examples of how a teacher exercises great authority over the

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150. *Chancellor*, 501 F. Supp. 2d at 705.

151. *Id.*

152. *Id.*

153. Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 39-40 (2004). See also 18 U.S.C. § 2243(b) (2006).

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is (1) in official detention; and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

*Id.*

154. Golden, *supra* note 153, at 38 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

155. See *Chancellor*, 501 F. Supp. 2d at 705.

156. See statutes cited *supra* note 71.

student's direct actions, and can influence the student's future.<sup>157</sup>

The Supreme Court has acknowledged the custodial aspect of the teacher student relationship: "[T]he nature of the power over students 'is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'"<sup>158</sup> The term "custodial relationship" denotes that a certain amount of responsibility attaches to the custodian. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."<sup>159</sup> When a teacher takes on the awesome responsibility of caring for another's child for more than six hours a day, it is reasonable to give those students the same rights afforded to prisoners.<sup>160</sup> The teacher has a duty to assume some responsibility for the child's safety and general well-being. This is not achieved through sexual relationships with those students.

The state of Georgia has explicitly recognized the similarities between the custodial teacher-student relationship and the relationship between correctional staff and prisoners.<sup>161</sup> In a case before the Supreme Court of Georgia, an assistant high school principal allegedly engaged in sexual acts with a student enrolled in the high school.<sup>162</sup> The principal was indicted under a criminal statute that stated that a "custodian or supervisor of another person . . . commits sexual assault when he or she engages in sexual contact with another person who is . . . enrolled in a school . . . and such actor has supervisory or disciplinary authority over such other person."<sup>163</sup> The defendant-principal challenged the statute on vagueness and constitutionality grounds, but the court ultimately upheld the statute.<sup>164</sup>

The importance of this statute is revealed when the other custodial or supervisory relationships listed in the statute are analyzed.<sup>165</sup> In full, the statute states:

A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he

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157. See Graham, *supra* note 70, at 594-96 ("[A] teacher does more than give grades. Teachers are charged with the supervision of children and are directed to create a safe environment conducive to education." (citing Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1375 (1996))).

158. DeMitchell, *supra* note 43, at 24-25 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

159. *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 199-200 (1989).

160. See *Chancellor*, 501 F. Supp. 2d at 705.

161. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007).

162. *Randolph v. State*, 496 S.E.2d 258, 260 (Ga. 1998).

163. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007).

164. *Randolph*, 496 S.E.2d at 260.

165. See *Chancellor*, 501 F. Supp. 2d at 705.

or she engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or who is enrolled in a school or who is detained in or is a patient in a hospital or other institution and such actor has supervisory or disciplinary authority over such other person.<sup>166</sup>

The statute groups persons in the custody of the law in with persons enrolled in a school. This illustrates the Georgia legislature's cognizance that the issue of consent is clouded when there is a great power disparity between the persons involved in the sexual act.

*D. Students Should Not be Subjected to the Strict Scrutiny a Welcomeness Investigation Would Require*

The factors listed in the Guidance that describe the way in which welcomeness should be evaluated are extensive and burdensome.<sup>167</sup> An examination of witness statements, evidence of credibility, the student's reaction, and other contemporaneous factors could result in intense scrutiny of the student.<sup>168</sup> Not only does the very idea of weighing a student's reaction to a sexual relationship with her teacher seem nonsensical, it is persuasive support that all sexual relationships between students and teachers should be deemed unwelcome. If a court followed the Guidance and evaluated the "types of information" suggested by it, the court will likely question how a student reacted to sexual harassment.

These factors show a misunderstanding of the welcomeness requirement. The logic behind age of consent laws and rules surrounding the execution of contracts by minors is that those children below the applicable age do not have the capacity to understand the gravity of their decisions. Legislatures have made the decision to protect the minors from themselves. A student's reaction to a sexual relationship with her teacher varies immensely. In one case, the student may attempt suicide or be "repeatedly hospitalized for psychiatric reasons."<sup>169</sup> In other cases, a student may defiantly assert that she consented to the relationship and her reaction only comes at the end of the relationship.<sup>170</sup> This analysis shows the need for a change in how the welcomeness requirement is

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166. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007).

167. For a list of the factors, see DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 8-9.

168. *Id.* at 9.

169. *Chancellor*, 501 F. Supp. 2d at 699.

170. See, e.g., Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 471-72 (2004) [hereinafter Drobac, *Sex and the Workplace*] (describing a case where a fifteen-year-old girl had sex with her forty-year-old manager after the manager told her he had a terminal brain tumor. The girl became pregnant and the manager's girlfriend took her to have an abortion. She refused to cooperate with the district attorney until the police told her that the manager did not have a brain tumor and had lied to her.).

viewed in Title IX cases. This type of examination should never occur. If all sexual relationships between school employees and secondary students were deemed unwelcome, this examination *would* never occur. In addition, this type of blanket rule would protect teachers and school districts. Even if a student tried to initiate a relationship with a teacher, the teacher would know unequivocally that it would not matter that the student voluntarily entered a relationship. The only thing that would matter is that he is a teacher and she is a student, and that relationship is one in which consent is a legal impossibility. The teacher would know that pursuing the relationship would subject the teacher to the possibility of a criminal conviction and both the teacher and school district to civil liability.

V. SOLUTIONS: PROTECT SECONDARY STUDENTS BY FINDING THAT THEY DO NOT HAVE THE CAPACITY TO WELCOME A TEACHER'S SEXUAL CONDUCT

A uniform, national standard is the most logical approach to determining whether a student can welcome the sexual harassment of a teacher. At the very least, all courts should find that the relevant age of consent law controls in a Title IX case where the issue of welcomeness is disputed. An even better solution is that the element of welcomeness is met in every case where a secondary student and teacher engage in a sexual relationship while that student is enrolled in the school where the teacher is employed.

*A. An Initial Step: Age of Consent Should Control*

The most expedient way to establish uniform protection for students is for the age of consent laws in the relevant jurisdiction to apply to Title IX cases, without exception. This protection should extend to exclude any evidence of purported welcomeness as it applies to liability or the level of damages. Without protection in both facets of a civil trial, the student's actions will come under strict scrutiny in an end-run maneuver that would circumvent the protection established by applying age of consent laws.

It is possible to remove the welcomeness requirement entirely from Title IX suits, but this is too drastic a step. Welcomeness should not be completely removed from Title IX analyses because of cases involving college and graduate students in which the majority of students are over the age of eighteen.<sup>171</sup> While many arguments surrounding the power disparity between secondary students apply to college students as well, some of the most important arguments that protect secondary students do not. College is not compulsory, and college imbues students with many choices that are not given secondary students. Additionally, at some point a law that is meant to protect becomes stifling.<sup>172</sup>

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171. See Kaplin, *supra* note 56, at 628 ("Title IX, applies to all education institutions receiving federal funds, elementary/secondary and higher education alike.").

172. Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U.J. GENDER & L. 269, 300 (1996) ("In arguing that women lack capacity to consent to particular sexual relationships, and that we may disregard the woman's own

This is likely to occur in Title IX cases if college students are deemed to be legally incapable of welcoming a sexual relationship with a professor.<sup>173</sup> Although there are certainly predatory professors at universities, the welcomeness requirement would sufficiently protect these older students.<sup>174</sup> If the student did not welcome the conduct, then he or she can present evidence to support that assertion.

*B. The Next Step: Protect All Secondary Students, Regardless of Relevant Age of Consent Laws*

Using age of consent laws to remove any question of welcomeness for students who have not reached the age of consent is a step in the right direction, but it is not sufficient. The best protection is to extend the protection currently given to elementary students to include secondary students, never considering a relationship between a teacher and student as consensual or welcome.<sup>175</sup>

Professor Jennifer Ann Drobac argues for more protection of adolescents within the employer-employee relationship under Title VII.<sup>176</sup> She advocates for law reform and legal regulation that makes an adult's sexual harassment of a minor a "strict liability offense for which consent is no defense" and encourages this reform to be influenced by the scientific evidence of adolescent development.<sup>177</sup> Professor Drobac proposed making adolescent consent voidable in much the same way that contract law protects minors by making their consent to a contract voidable.<sup>178</sup>

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perception that this relationship is one that she has chosen and continues to value, proponents of consensual relationship policies disregard a fundamental principle of feminism.").

173. *Id.* at 299 (Policies that ban consensual relationships between professors and students do not "address a situation where there has been an abuse of power, nor do they increase the power or control of the [students] they are allegedly designed to protect. Instead, [these] policies presume that the [students] are incapable of exercising responsible choice, and so deprive them of any choice at all.").

174. *Id.* at 279 ("Consensual relationships, by definition, fall outside Title IX's prohibition of sexual conduct that is 'unwelcome.' Therefore, banning consensual relationships should not have any impact on the institution's legal liability.").

175. See DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 8 (conclusively stating that relationships between teachers and elementary students will never be viewed as consensual).

176. See Drobac, *Developing Capacity*, *supra* note 47, at 1-2; Jennifer Ann Drobac, *I Can't to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories and Ethical Dilemmas*, 70 ALB. L. REV. 675, 681-82 (2007) [hereinafter Drobac, *I Can't to I Kant*]; Drobac, *Sex and the Workplace*, *supra* note 170, at 473.

177. Drobac, *Sex and the Workplace*, *supra* note 170, at 543. Professor Drobac explains the importance of understanding the developing mental capacity of teenagers by using the simple explanation that "[a]nyone who has bought shoes for a teenager knows that adolescents mature and grow with astonishing rapidity." *Id.* at 541.

178. *Id.* at 544-45. She explains:



Professor Drobac's proposal—making sexual harassment of minors under Title VII a strict liability offense—certainly offers a high level of protection from sexual abuse. However, the differences that exist between Title VII and Title IX are significant, and these differences require a different approach under Title IX. Here, the most important difference is the standard used in determining liability. A sexual harassment claim under Title IX falls under the “actual knowledge” standard set out by the Supreme Court in *Gebser*<sup>179</sup> and a school district is the only proper defendant in a Title IX action brought by a secondary student.<sup>180</sup> A sexual harassment claim under Title VII is based on common law agency principles, which provide more protection for employees than students.<sup>181</sup> While the actual knowledge standard established by the Supreme Court in *Gebser* has been harshly criticized, some valid reasons exist for such a standard.<sup>182</sup> If a school district truly did not know of a sexual relationship occurring between a student and a teacher, then holding the school district liable for the actions of a teacher may accomplish little.<sup>183</sup> The congressional intent behind Title IX was to prevent federal funding of sexual discrimination in the nation's schools.<sup>184</sup> An explicit private right of action does not exist in Title IX as it does in Title VII.<sup>185</sup>

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An adolescent might still choose to engage in sex with an adult co-worker, who would still run the risk of civil and criminal liability. In essence, this scheme operates like adolescent “consent” to a contract. The sex “contract” is voidable by the adolescent but not void. The adolescent can retract the consent if she realizes during her minority (or shortly thereafter) that her adult partner took advantage of her “developing capacity” at the workplace.

*Id.*; see also Drobac, *I Can't to I Kant*, *supra* note 176, at 739.

179. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998). The Court explained its holding by stating:

[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond . . . . [M]oreover . . . the response must amount to deliberate indifference to discrimination.

*Id.* at 290.

180. See Kaplin, *supra* note 56, at 630-31 (“It is now generally accepted that Title IX creates liability only for the educational institution itself. Individual employees are not themselves ‘education program[s] or activit[ies],’ nor do they ‘receiv[e] Federal financial assistance;’ they are therefore outside the scope of Title IX.” (alterations in original)).

181. Graham, *supra* note 70, at 588-89. As Graham notes, the Supreme Court decisions announcing this standard came out the same week as *Gebser*. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

182. See *Gebser*, 524 U.S. at 291-92. The author of this Note agrees that the actual knowledge requirement is misguided, but that is beyond the scope of this Note.

183. The Supreme Court acknowledged this reason in support of its holding in *Gebser*. *Gebser*, 524 U.S. at 285-86.

184. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

185. Compare 20 U.S.C. § 1681(a) (2006), with 42 U.S.C. § 2000e-5 (2006).

Students can sue under Title IX because the Supreme Court determined that an implied private right of action exists.<sup>186</sup> The differences in the basis of the rights of action and in the proper defendants create at least some explanation for the differences in standard. This was the reasoning behind the Supreme Court's decision in *Gebser* and its adoption of an actual knowledge standard: "Under a lower standard, there would be a risk that the recipient [of federal funds] would be liable in damages not for its own official decision but instead for its employees' independent actions."<sup>187</sup>

In light of the Supreme Court's actual knowledge standard for Title IX sexual harassment, a strict liability approach is unlikely to gain traction. The better approach under Title IX is for courts and the Department of Education to establish a rule that sex with a secondary student of any age is conclusively unwelcome. This creates a "strict liability" approach only to the unwelcomeness requirement of a successful Title IX sexual harassment claim. A student would still have to prove actual knowledge by the school district.

This proposal may seem too small a step to truly impact Title IX sexual harassment litigation. It is true that this proposal does not seek to change the actual knowledge standard set by the Supreme Court that protects employees more than school children and this standard in and of itself creates many problems for students claiming sexual harassment.<sup>188</sup> But this proposal is a manageable and attainable step that does not require overturning Supreme Court precedent that has now been in place for ten years.<sup>189</sup> By making all sexual relationships between students and teachers unwelcome as a matter of law and policy, students will be protected from their own immaturity, the intense scrutiny of a welcomeness examination, and unnecessary and harmful sexualization that already pervades our culture.<sup>190</sup>

A problem arises when viewing sexual relationships between eighteen-year-old secondary students and teachers.<sup>191</sup> Eighteen-year-old students are legally adults and are of the age of consent under any state's relevant statute. Setting the age of consent to eighteen for all sexual activities may seem extreme and could do more harm than good.<sup>192</sup> Adolescence is a time for sexual exploration. Nonetheless, protection from sexual activities in this circumstance, a sexual relationship with a teacher, does not have the same consequences as removing the capacity to consent in all relationships. A clear-line rule can be established. A student, regardless of age, cannot legally consent to a sexual relationship with his

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186. See *Cannon*, 441 U.S. at 699.

187. *Gebser*, 524 U.S. at 290-91.

188. Graham, *supra* note 70, at 586-87.

189. See *Gebser*, 524 U.S. at 274. The *Gebser* decision was announced on June 22, 1998.

190. See Drobac, *I Can't to I Kant*, *supra* note 176, at 730; see also *id.* at 730 n.282.

191. See Drobac, *Developing Capacity*, *supra* note 47, at 59. Professor Drobac supports the age of majority to be set to twenty-one years of age, but acknowledges that this is politically impossible. She advocates the age of consent to be set to eighteen years of age at the youngest.

192. See *id.* ("If we raise the age of consent, however, we may preclude adolescents from engaging in the experimentation that they need to build wisdom.").

or her teacher when the teacher is employed at the student's school. By limiting the breadth of this clear-line rule to include only relationships with teachers, the zone of protection is limited to an area of undeniable importance.

#### CONCLUSION

Congress created Title IX to prevent discrimination in schools receiving federal funds and to protect individuals from discrimination.<sup>193</sup> The enactment of Title IX is best known for its affects on athletics, specifically the drastic increase in female participation in athletics.<sup>194</sup> In the last two decades, Title IX's application to sexual relationships between students and teachers and the relevant standards have been decided by the Supreme Court.<sup>195</sup> The Supreme Court did not take advantage of the opportunity to protect high school students,<sup>196</sup> and courts and the Department of Education have not taken the necessary additional steps.

The protection of children should be of utmost concern. There are too many examples of teacher-student sexual relationships, from case law and popular media, to ignore the problem of teachers taking advantage of students.<sup>197</sup> Students attend school to learn and should never be subjected to abuse. Additionally, a parent should never have to worry that his or her fifteen-year-old child, however mature and knowledgeable the child seems, could someday be scrutinized to a damaging degree, questioning the child's clothes, maturity, and

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193. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

194. Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity On and Off the Court*, 21 WIS. WOMEN'S L.J. 175, 175 (2006) ("For high school girls, the number who participated in sports rose by approximately 850%, from 294,015 in 1972 to over 2.8 million in 2002." (citing Ellen Staurowsky, *Title IX in its Third Decade: The Commission on Opportunity in Athletics*, 2 ENT. L. 70, 72 (2003))).

195. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

196. See *Gebser*, 524 U.S. at 306 (the dissent stated that "the Court ranks protection of the school district's purse above the protection of immature high school students").

197. See, e.g., Eleanor Chute, *Ex-Moon Area Teacher to Stand Trial in Sex Case*, PITTSBURGH POST-GAZETTE, Jan. 23, 2008, at B-3 (twenty-six-year-old teacher admitted having sex with fourteen-year-old freshman); Jim O'Neill, *His First Day in Court: Bail Set for Teacher in Sexual Assault*, STAR-LEDGER, Jan 31, 2008, at 27 (thirty-seven-year-old teacher and girls soccer coach accused of sexual relationship with seventeen-year-old student); Jennifer Radcliffe, *Parents Updated on Teacher Arrest: Spring District Mails Out Letters in Latest Sex Case*, HOUS. CHRON., Jan 9, 2008, at B1 (reporting on three teachers in same Texas school district in which one teacher was accused of asking a student where to buy marijuana and later beginning sexual relationship with him; one teacher was accused of inappropriately touching an eighteen-year-old student in a school barn; and one teacher was accused of performing oral sex on a sixteen-year-old student inside a locked classroom). In this last case, one can almost hear the defense that perhaps students in this particular school district are extremely mature and seek out sexual relationships with teachers.

any other relevant fact under a “totality of the circumstances” *after* the child has endured a sexual relationship with a teacher.

A solution to this problem is to conclude that all sexual relationships between teachers and secondary students are unwelcome. This solution prevents students from the traumatic experience of trying to prove they did not welcome the relationship, and it prevents teachers and school districts from avoiding liability if a student believes the relationship was welcome. Even if a student believes she welcomed the relationship, the law will consider this irrelevant because a student does not have the capacity to welcome sexual conduct. If this is too drastic a solution for some, then at least age of consent laws should control and any relationship a teacher engages in with a student under that age of consent should be conclusively unwelcome in a Title IX claim.

This proposed solution is not much to ask. While the term “students” is used throughout this Note, these “students” are children who do not understand much about the world.<sup>198</sup> This proposal does not take much protection from school districts because students would still have to show actual knowledge and deliberate indifference.<sup>199</sup> This proposal attempts to protect the child, the secondary high school student, who may find herself in the middle of a Title IX case. After all, protecting students, nurturing their development and growth, is the responsibility of teachers. When that fails, protection should be in place. A student like Jeanette Chancellor, who had a long term sexual relationship with her band teacher and consequently attempted suicide and was hospitalized,<sup>200</sup> should never have to explain that she did not welcome the sexual harassment perpetrated by her twenty-nine year old teacher.

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198. Indeed, the Author remembers the reaction of adolescent boys when the infamous Mary Kay LeTourneau case hit the media. Many boys expressed the opinion that the sixth grade twelve-year-old boy was lucky to be in a sexual relationship with an adult female, and ridiculed the idea that they would come forward if they were so fortunate. See Angela Mosconi, *Report: Cradle-Rob Teacher Threatened to Castrate Teen Lover*, N.Y. POST, Feb 22, 1999, at 2 (recounting some of the details of the relationship between LeTourneau and the young student).

199. See *Gebser*, 524 U.S. at 274.

200. *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 699-704 (E.D. Pa. 2007).