Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws

Jason P. Nance
University of Florida Levin College of Law, nance@law.ufl.edu

Philip T.K. Daniel

Follow this and additional works at: http://scholarship.law.ufl.edu/facultypub

Part of the Juveniles Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outlaw@law.ufl.edu.
Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws

JASON P. NANCE* and PHILIP T.K. DANIEL**

I. INTRODUCTION

On March 9, 2005 a “16-year-old developmentally delayed high school student in Columbus, Ohio told a teacher that she had been punched, then forced to perform oral sex on two boys in the school auditorium, while another boy videotaped them.”1 After being notified by a teacher of the incident, the girl’s father arrived at the school, only to be “strongly discouraged” by the school principal from notifying the police.2 According to court records, the principal instructed the school security guard to arrange a meeting with the city police officer assigned to the school and other staff members. She also urged the girl’s father to hold off on action until he returned the next day for that meeting.3 Unsatisfied with this proposed response to the situation, the father called the police himself.4 Subsequently, charges were brought against the principal under an alleged violation of Ohio’s child abuse reporting statute. The principal was later terminated from any employment in the school district.5 As of the writing of this article the parents of the student have filed a civil suit

*Jason Nance is a law clerk for Kent Jordan, Judge, U.S. District Court, Delaware.

**Philip T. K. Daniel is the William and Marie Flesher Professor of Educational Administration Adjunct Professor of Law at The Ohio State University.

1. Alayna DeMartini, Former Principal Not Guilty, Jury Says; Juror: Actions in Mifflin Case Met Minimum Standard, COLUMBUS DISPATCH, April 29, 2006, at 1A.

2. Alayna DeMartini, Ex-Mifflin Principal Goes on Trial over Girl’s Assault; Regina Crenshaw Could Face Up to 30 Days in Jail, $250 Fine, COLUMBUS DISPATCH, April 21, 2006, at 1E; Alayna DeMartini, Former Principal Not Guilty, Jury Says; Juror: Actions in Mifflin Case Met Minimum Standard, COLUMBUS DISPATCH, April 29, 2006, at 1A.


against the school district claiming child abuse, an absence of appropriate security, and knowledge on the part of building administrators of ongoing sexual contact among students in the school.\(^6\)

Child sexual abuse\(^7\) is a problem that plagues the United States. Although statistics on the number of child victims vary,\(^8\) one recent comprehensive study estimates that as many as 500,000 children are sexually abused each year.\(^9\) This same study reports that one in five girls and one in ten to twenty boys will be sexually abused during their childhood.\(^10\) Other studies suggest that one in three girls and one in every four to seven boys are sexually abused before turning eighteen years old.\(^11\) The problem of child sexual abuse has not escaped the nation’s public school systems.\(^12\) Although no one knows exactly how many children have been sexually abused by teachers or other school employees, students from one recent survey indicate that sexual harassment by school staff mem-

\(^6\) Encarnacion Pyle, Former Principal Battling for Name: Administrative Hearing Starts Today for ex-Mifflin Leader, COLUMBUS DISPATCH, September 5, 2006, at 1D.

\(^7\) There are many definitions of child sexual abuse. For purposes of this research, child sexual abuse is defined as “any kind of exploitative sexual contact, attempted sexual contact, or sexual interaction between a child under the age of 18 and any adult.” Gregory G. Gordon, Comment, Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule, 20 PEPP. L. REV. 1359, note 2 (1993).

\(^8\) It is difficult to estimate the number of children that are sexually abused each year because of the wide practice of under-reporting. See John E.B. Myers, Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection, 28 J. FAM. L. 1, 3 (1989) (“It is difficult to estimate how many children are sexually abused each year.”); FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 4 (1980) (attributing some of the difficulties of estimating the extent of child sexual abuse to under-reporting). See also Rochelle Hanson et al., Factors Related to the Reporting of Childhood Rape, 23 CHILD ABUSE AND NEGLECT 559, 559-569 (1999) (stating that nearly 85% of child abuse is not reported, indicating that the number of children sexually abused each year is dramatically higher than the number of incidents reported to authorities).

\(^9\) See David Finkelhor & Jennifer Dziuba-Leatherman, Children as Victims of Violence: A National Survey, 94 PEDIATRICS 413, 413-420 (1994) (citing empirical evidence that over 500,000 children are sexually abused each year). See also KEE MACFARLANE ET AL., SEXUAL ABUSE OF YOUNG CHILDREN: EVALUATION AND TREATMENT 6 (1986) (“[E]stimates of the incidence of sexual abuse vary dramatically. . . . In terms of absolute numbers, current reliable estimates range from 100,000 to 500,000 cases per year.”).

\(^10\) Finkelhor & Dziuba-Leatherman, supra note 3, at 413-420. See also DEBRA WHITCOMB ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 2-4 (1985) (“F[]indings suggest that anywhere from 12% to 38% of all women, and from 3% to 15% of men, are subjected to some form of sexual abuse in their childhood.”).

\(^11\) See Leslie Miller, Sexual Abuse Survivors Find Strength to Speak in Numbers, USA TODAY, Aug. 27, 1992, at D6 (citing childhood sexual abuse statistics).

\(^12\) See Warren ex rel. Good v. Reading Sch. Dist., 278 F.3d 163, 171 (3rd Cir. 2002) (“The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience.”).
bers is pervasive. The survey reports that school personnel have sexually harassed 25% of females and 10% of males in grades 8 to 11. In 1983, approximately one percent of adults reported they received sexual advances from school employees when they were children, with one-third of these indicating that sexual contact occurred. According to another study, 17.7% of males and 82.2% of females graduating from high school reported being sexually harassed by school faculty or staff members at some time during their school years. Thirteen-and-a-half percent of these students also claimed they engaged in sexual intercourse with their teachers. Still another report suggests that up to five percent of public school teachers abuse children.

All fifty states and the District of Columbia have child abuse laws in place that require certain persons to report suspected child abuse. Those held accountable include school teachers, school employees, and school authorities. Under these reporting laws, school officials are required to report suspected sexual abuse of a student to state social agencies or law enforcement authorities. These state agencies will send trained individuals to conduct systematic investigations to ascertain

14. Id.
16. Daniel Wishnietzky, Reported and Unreported Teacher-Student Sexual Harassment, 3 J. EDUC. RES. 164, 164-69 (1991). See also Elizabeth Cohen, Sex Abuse of Students Common: Research Suggests 15% of All Children Harassed, PRESS & SUN-BULLETIN, February 10, 2002, at 1A (reporting that 15% of all students had experienced some type of sexual misconduct between kindergarten and 12th grade ranging from inappropriate touching to forced penetration).
17. Id.
20. See, e.g., ALA. CODE §26-14-3 (1975) (requiring school officials to report victims of child abuse to duly constituted authorities); CAL. PENAL CODE §11165.7 (West 2005) (requiring teachers and administrators to report all cases of suspected child abuse); CONN. GEN. STAT. §17a-101(b) (Rev. to 1997) (mandating that school teachers, school principals, school guidance counselors, and school paraprofessionals are required to report incidents of suspected child abuse); OHIO REV. CODE ANN. §2151.421(A)(1)(b) (Anderson 2004) (stating that those persons required to report suspected child abuse include school teachers, school employees, and school authorities).
21. See, e.g., OHIO REV. CODE ANN. §2151.421(B) (Anderson 2004) (requiring persons to make the report to the public children services agency or to a municipal or county peace officer).
whether a child has been sexually abused, 22 and provide resources to the child and the child’s family. 23 If, in fact, abuse has occurred, the agency official will report the alleged offender to law enforcement officers or prosecuting attorneys. 24

Virtually all courts recognize that a child abuse reporting statute creates a duty to children, the breach of which is the basis of a civil suit for damages. 25 Normally, courts recognize a duty only to the minor child about whom school officials have received the abuse reports. 26 That is, most courts impose civil liability on a school district when school personnel abuse a student and school officials fail to notify the proper authorities. In 2004, the Supreme Court of Ohio extended this duty to third party student victims 27 — causes of action may be brought against school districts when a school employee abuses one student, school officials fail to report the abuse, and the same employee abuses a different student.

Public school students who are sexually abused by school persons who have previously abused other students already have the option of bringing a cause of action under section 1983 of the Civil Rights Act of 1871, Title IX of the Educational Amendments of 1972, or common law negligence theories. 28 Questions loom as to whether the Ohio approach provides more protection to abused students than these other remedies.


23. See, e.g., Conn. Gen Stat. §17a-101(a) (Rev. to 1997) (requiring “the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.”).

24. See, e.g., Ohio Rev. Code Ann. §2151.421(F)(2) (Anderson 2004) (“The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.”).

25. 38 Am. Jur. Trials §31 (2005); see also Campbell v. Burton, 750 N.E.2d 539, 545 (Ohio 2001) (where the Ohio Supreme Court held that Ohio Rev. Code Ann. §2151.99 expressly imposes liability on school districts for failure to perform the duty to report known or suspected child abuse).

26. See, e.g., Ward v. Greene, 839 A.2d 1259, 1270 (Conn. 2004) (holding that Connecticut’s child abuse reporting laws only protect “children who have been abused or neglected and are, or should have been, the subject of the mandated report.”); Owens v. Garfield, 784 P.2d 1187, 1191-92 (Utah 1989) (holding that Utah’s child abuse reporting statute imposes a duty on the state and county to “protect children who are identified to them as suspected victims of child abuse,” not to create a legally enforceable duty . . . to protect all children from child abuse in all circumstances.”).

27. Yates v. Mansfield Bd. of Educ., 808 N.E.2d 861, 871 (Ohio 2004) (“We hold that...a board of education may be held liable when its failure to report the sexual abuse of a minor student by a teacher . . . proximately results in the sexual abuse of another minor student by the same teacher.”)

28. See infra Part II.
Under § 1983 and Title IX, however, school districts can avoid liability if they demonstrate that once a school official received notice of the incident, the school official did not act with deliberate indifference, notwithstanding the school official's ineffective actions.\textsuperscript{29} Under common law negligence, school districts may also avoid liability if they can demonstrate that the school official's actions were not the proximate cause or a substantial factor in the injury.\textsuperscript{30}

The standard under the Ohio child abuse reporting statute resembles strict liability,\textsuperscript{31} such that if a school official fails to report the allegation of abuse to a child services agency and that teacher subsequently abuses another student, the school district will be held civilly liable as a matter of law.\textsuperscript{32} This is true even if the school official conducted an investigation in good faith and concluded that the student's allegations were without merit.\textsuperscript{33}

The Ohio approach arguably provides students with more protection from sexual abuse because school officials faced with the threat of civil liability and costly litigation have a higher likelihood of reporting incidents of sexual abuse to child social services agencies.

Part I of this Article examines why the Ohio Supreme Court extended the duty to unknown future victims, contravening how other states with similar reporting statutes have ruled. Part II compares the Ohio approach with other remedies available to students and argues that adopting the Ohio approach will furnish students with greater protection from sexual abuse than protections provided under other available remedies. Part III presents the potential negative repercussions of adopting the Ohio approach and discusses how to limit the detrimental effects. It also suggests the benefits of adopting additional measures to supplement the child abuse reporting law.

\textsuperscript{29} See id.
\textsuperscript{30} See infra Part II.
\textsuperscript{31} See infra pp. 24-25.
\textsuperscript{32} The Statute of Limitations in Ohio is two years from the time that either the victim of the offense reaches the age of majority, or from the time that a public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child has been notified of the suspected abuse or neglect. OMO REV. CODE ANN. §2901.13(A)(b) (Anderson 2004), OHIO REV. CODE ANN. §2901.13(I) (Anderson 2004).
\textsuperscript{33} See infra Part II.
II. THE OHIO SUPREME COURT’S DECISION TO EXTEND A DUTY TO UNKNOWN THIRD PARTIES

A. Yates v. Mansfield Board of Education

Amanda, a ninth-grade student at Mansfield Senior High School, reported to school officials on three occasions during the 1996-1997 school year that Donald Coots, a coach and teacher at Mansfield High, "made inappropriate contact with [her] of a sexual nature" and "made sexually explicit comments to [her]." The principal conducted his own investigation and concluded that Amanda was lying. Public school officials took no action against Coots and did not report the alleged abuse to the police or to a child services agency. On February 5, 2000, three years later, Coots engaged in sexual activity with another ninth grade student, Ashley. Ashley informed a friend of the incident, who promptly notified a school counselor. Both Coots and Ashley admitted to participating in the sexual act when the principal confronted them. The principal immediately called the police and Ashley’s parents, and the school district forced Coots to resign as teacher and coach. Eventually Coots was convicted of sexual battery.

Ashley and her parents brought an action against the Mansfield School Board, claiming injury "as a proximate result of [the school officials’] failure to report the sexual abuse alleged in 1996-1997 in violation [of Ohio’s child abuse reporting laws]." The Mansfield School Board moved for summary judgment on the grounds that the board could not be held civilly liable under Ohio’s child abuse reporting laws because the reporting statutes only created a duty to a specific child, not

---

34. 808 N.E.2d 861 (Ohio 2004).
35. Id. at 862. Amanda alleged that Coots “touched [her] with his hands and penis but [they] did not have sex.” Id.
36. Id.
37. Id.
38. Id. Ashley helped record team statistics at a boys’ basketball game. While waiting for her mother to pick her up, Coots and Ashley went inside an equipment room and kissed. Coots “pushed Ashley’s head down and unzipped his pants, at which time Ashley performed fellatio on Coots.” Id.
39. Id. at 862-63.
40. Id. at 863.
41. Id.
42. Id.
43. Id.
to subsequent victims of the abuser. The court ruled in favor of Ashley, holding that a board of education could be held civilly liable when "its failure to report the sexual abuse of a minor student by a teacher in violation of [Ohio's child abuse reporting statutes] proximately results in the sexual abuse of another minor student by the same teacher."

The Ohio Court of Appeals reasoned that because the reporting statute used the singular term "child" and required disclosure of personal information only of the identified abused child, the Ohio Legislature intended solely to protect the abused child. The Ohio Supreme Court rejected this argument, stating that it was inconceivable that the Ohio Legislature intended that liability would pivot on "whether the offending teacher [was] considerate enough of the school's reporting position to avoid molesting the same child twice." The Ohio Supreme Court reasoned that upholding the appellate court position would allow a school official responding to a sexual abuse allegation to dispense with the statutory reporting requirements, preempt an investigation by child services, grant the public educator continued access to students, and escape liability when the teacher abuses another student at the same school. Alternatively, the court saw the use of the statute's requirement to "immediately report"... "knowledge or suspicion" that a child "has suffered or faces a threat of suffering" any injury indicative of abuse or neglect as a desire of the General Assembly to protect these children before they suffer any actual injury or damage.

The Ohio Supreme Court held that school educators and officials "have a special responsibility to protect those children committed to their care and control." School officials, in particular, carry a "special relationship" with teachers and students in that they have "direct control of the environment in which teachers and students interact." When a report is received that a student has been abused, the school official "should readily appreciate that all of [the] schoolchildren are in danger." Hence, the court held
that the school board had an obligation to deal with "the instrumentality of harm to one of its students for the benefit of all of its students." Its members simply could not rationalize prescribing a difference "in the situation where the [official] to whom that child's control and protection has been entrusted also has direct control over the alleged perpetrator, other potential victims, and the environment in which they are brought together." Thus, the court concluded that the statutory duty extended to other students "when the circumstances clearly indicate that there exists a danger of harm to another child from the same source and the reporter has an official or professional relationship with the other child."

B. Other State Decisions with Respect to the Duty to Third Parties

1. States Extending a Duty to Third Parties Outside the Context of the Public School System

Although the Ohio Supreme Court was the first court to recognize a duty to unknown third parties in the public school context, two other states, South Carolina and Texas, had previously recognized that a duty to report sexual abuse extended to third parties in other circumstances.

The South Carolina Supreme Court was the first to extend the reporting duty, but did so narrowly. In Jensen v. Anderson County Department of Social Services., an action was brought against the Department of Social Services to recover for the wrongful death of three-year-old Michael Clark. The administrator of the child's estate claimed that the Department of Social Services failed to investigate properly a report of abuse of Michael's brother, Shane Clark, under South Carolina's Child Protection Act, which proximately resulted in Michael's death. To determine whether the plaintiff had a private cause of action under the Child Protection Act, the court examined whether there was a special duty owed to Michael that could overcome the general rule of non-liability of government officials when the duty is owed to the public only.
The court employed a “special duty” test comprised of six elements and determined that a special duty did in fact exist. The court reasoned that because Michael’s brother “had visible physical injuries which pointed to child beating,” and the local child protection agency “could foresee that serious injury was likely to come to the Clark children if there were no intervention to protect them,” Michael was part of a “clearly identifiable class” that the Child Protection Act sought to protect and thus the child services agency owed a special duty to Michael.

In the broadest extension of the reporting duty before the Yates decision, the Texas Supreme Court in Perry v. S.N. addressed whether friends of a child day care operator could be held liable for failing to report suspected abuse. Parents of B.N. and K.N. alleged that friends of Daniel Keller, the operator of a day care center, were told by Keller’s wife that Keller had “abusive habits towards children.” The parents also alleged that the friends witnessed Keller bring a number of children out of the day care center into his home and sexually abuse them, although it was unclear whether B.N. and K.N. were among those children. The friends did not attempt to stop Keller from abusing the children, nor did they report the abuse to the police or child services. The parents claimed that Keller’s friends were liable under the Texas Family Code, which states that “[a] person commits an offense if the person has cause to believe that a child’s physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report [the abuse].” The parents’ complaint encouraged the court to adopt this requirement as the standard of conduct and duty in tort law, making the violation of the statute negligence per se.

62. The six elements are as follows: (1) “[A]n essential purpose of the statute is to protect against a particular kind of harm;” (2) “the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;” (3) “the class of persons the statute intends to protect is identifiable before the fact;” (4) “the plaintiff is a person within the protected class;” (5) “the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty;” (6) “the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.” Id.
63. Id. at 619.
64. Id. at 618.
65. 973 S.W.2d 301, 302 (Tex. 1998).
66. Id.
67. Id. at 302-03.
68. Id. at 303.
69. Id.
70. TEX. FAM. CODE ANN. § 261.109(a) (Vernon 2004).
The Texas Supreme Court acknowledged that it was unclear whether B.N. and K.N. were among the children the defendants saw Keller sexually abuse in his home. Nevertheless, the fact that the defendants witnessed Keller abuse any children gave them "'cause to believe' that the 'physical or mental health or welfare' of all children attending the day care center—not only the particular children they saw being abused on that occasion—'may be adversely affected by abuse or neglect.'" Thus, the court determined, B.N. and K.N. were "within the class of persons whom the child abuse reporting statute was meant to protect, and they suffered the kind of injury that the Legislature intended the statute to protect." Although Texas' child abuse reporting statute at issue in Perry is notably broader than other states' child abuse reporting statutes because it imposes a reporting duty on any person who believes that a child's welfare may be adversely affected by abuse or neglect, the court's reasoning can be applied to narrower statutes as well. The court simply extended a duty to children who were not the subjects of the mandated report, but who were under a danger of being subsequently abused by the sexual offender.

2. States Refusing to Extend the Duty to Third Parties

Although there are other states that have child abuse reporting statutes similar to Ohio's, these states have refused to hold parties having a duty to report liable for the abuse of children other than the child whom they suspect or know is being abused.

71. Perry, 973 S.W.2d at 306 n.5 (quoting Tex. Fam. Code Ann. § 261.109(a) (Vernon 2004)).
72. Id. at 305.
73. See Tex. Fam. Code Ann. § 261.109(a) (Vernon 2004) ("A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report as provided in this chapter.").
74. In fact, the court elected not to adopt the statute as establishing a duty and standard of conduct in tort due to the broad reach of this particular statute. Perry, 973 S.W.2d. at 309. The court noted that "determining whether abuse is or may be occurring in a particular case is likely to be especially difficult for untrained laypersons," particularly in cases unlike the one at issue, where an individual learns of possible abuse through "second-hand reports or ambiguous physical symptoms," and thus it is unclear whether it would fall under the statute. Id. at 307, n.6. Nonetheless, as the Ohio Supreme Court noted when referencing the interpretation in Yates, the analysis of the Texas Supreme Court is illustrative regarding liability to unknown third parties, and points out that there is a separate mandatory reporting requirement for certain professionals under Tex. Fam. Code Ann. § 2161.101(b). Id. at 307, note 6; Yates, 808 N.E.2d at 870, n.3.
In Ward v. Greene,75 an opinion released the same year as Yates (2004), the Supreme Court of Connecticut held that “the class of persons protected by [Connecticut's child abuse reporting statutes was] limited to those children who have been abused or neglected and are, or should have been, the subject of the mandated report.”76 In Ward, an action was brought against the Village for Families and Children, Inc. (Village), a private, nonprofit organization that contracted with individuals to provide foster care and day care to children, for the wrongful death of minor Raegan McBride.77 Village contracted with Kathy Greene to provide day care and foster care services to young children,78 and McBride suffered a fatal head injury while attending Greene's day care program.79 The mother of the deceased child claimed that Village had received numerous reports that Greene abused children in her care prior to the time McBride was injured.80 She also alleged that Village had failed to report these abuses as required by law, that Greene subsequently maltreated McBride, and that Village’s failure to report was the proximate cause of the child’s death.81

Despite a strong child abuse reporting law,82 the court limited protection solely to those children who had been abused and should have been the subject of the mandated report. The court’s primary argument for limiting protection was based on legislative intent. Rather than creating hypothetical scenarios, pushing them to their logical extreme, and examining whether the results were consistent with the overall intent of the reporting statutes as the Ohio Supreme Court had done,83 the Connecticut Supreme Court focused on the literal language of the child

75. 839 A.2d 1259 (Conn. 2004).
76. Id. at 1272-73.
77. Id. at 1263.
78. The court acknowledged, however, that that record did not indicate what interest Village had in Greene’s day care operation at the time of McBride’s fatal injury, as Village had ended its contract with Greene as a day care provider in August 1995. Id.
79. Id.
80. Id.
81. Id. at 1265.
82. Connecticut’s child abuse statute reads, “The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect . . . and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed . . . .” CONN. GEN. STAT. § 17a-101 (Rev. to 1997).
83. See Yates, 808 N.E.2d at 866-67 (arguing that if the court carried the lower court’s holdings “to their logical extreme,” a school official would incur no liability if a teacher continued abusing children as long as the teacher did not abuse the same child again).
reporting statutes to discern the legislature’s intent. The Connecticut Supreme Court reasoned that phrases such as “children whose health and welfare may be adversely affected through injury and neglect . . . and for these purposes to require reporting of suspected child abuse . . . and provision of services . . . to such a child and family” suggested that the legislature intended to focus on children who were previously been abused. Similarly, according to the court, the statute contained several reporting requirements that focused on individuals who were previously abused, not third parties who were in subsequent danger of being abused. The court also found that the confidentiality requirement, designed to protect the accused abuser, demonstrated that the legislature did not intend for children other than the abused to benefit directly from the statute. The court concluded that if these children were supposed to benefit directly, parents and guardians would have access to information relative to the abuse reports.

Comparatively, as noted above, both the Texas and Ohio Supreme Courts interpreted almost identical language as covering more than merely the child who was the subject of the mandated report. The Texas statute also covered children who “may be adversely affected,” and the Ohio statute similarly requires that “services [be] provided on behalf of children about whom the report is made.” Although not persuaded by the laws of either of these states, the Connecticut Supreme Court itself pointed out the extent of the similarity between statutes, declaring that Ohio’s statute is “almost identical” to Connecticut’s.

A state court of appeals in Michigan also refused to extend protection beyond children who were abused and should have been the subject of

84. See Ward, 839 A.2d at 1266-70 (citing various statutory phrases to support the premise that the Connecticut legislature intended only to protect children who had been abused and should have been the subject of the mandated report).
85. CONN. GEN. STAT. § 17a-101 (Rev. to 1997) (emphasis added).
86. Ward, 839 A.2d at 1266-67.
87. For example, once the reporting requirement is triggered, the report must contain detailed information about the abused child, such as name and address, age, gender, and the nature and extent of the child’s injuries. No information is required about other children in the care of the suspected abuser. Id. at 1268.
88. See CONN. GEN. STAT. § 17a-101(k)(Rev. to 1997) (“the information contained in the reports and any other information relative to child abuse, wherever located, shall be confidential subject to such regulations governing their use and access as shall conform to the requirements of federal law or regulations.”).
89. Ward, 839 A.2d at 1269.
90. Id. at 1269-70.
91. Id. at 1267.
the mandated report. In Marcelletti v. Lux, the plaintiffs’ infant son displayed symptoms of “shaken baby syndrome,” which they believed had been caused by defendant babysitter Valerie Lux. The plaintiffs claimed that a doctor had previously treated an unidentified child that Lux had allegedly abused and failed to report the abuse under Michigan’s child reporting statute. Similar to the arguments found in Ward, the court concluded that the legislature did not intend the “statutory reporting duty, with its attendant civil liability, to [run] to any other person than the allegedly abused child.” The court held that the statute confined the reporting requirements to the abuse of a particular child. Further, failing to report abuse could not be the proximate cause of the abuse of another child because the confidential reporting requirements precluded parents and guardians from obtaining any information regarding the abuse.

Finally, in Owens v. Garfield, the Utah Supreme Court held that Utah’s child abuse reporting statute did not create a duty on the part of the state child services agency to warn parents of potential abuse by a daytime babysitter. Although the Utah reporting statute was broad in scope, the statute, the court stated, did not create a duty on the state agency to protect children who were not identified as being in need of protection. The court believed that it would be impossible for the agency to “protect all children from child abuse in all circumstances,” and thus, imposing a legally enforceable duty to do such would be undesirable.

92. See Marcelletti v. Lux, 500 N.W.2d 124, 127-29 (Mich. App. 1993) (holding that Michigan’s statutory reporting duty, with its attendant civil liability, did not extend to any child except the allegedly abused child about whom a report should have been made).
93. Id. at 126.
94. Id. at 127.
95. Id.
96. Id. at 128.
97. Id.
99. Id. at 1193.
100. See UTAH CODE ANN. § 78-3b-1 (1953) (repealed 1988) (current version at Utah Code Ann. § 62A-4a-401) (stating that the purpose of the child abuse reporting statute is “to protect the best interests of children, offer protective services to prevent harm to the children . . . .”).
101. Ward, 784 P.2d at 1191.
102. Id.
III. A COMPARISON OF PUBLIC SCHOOL DISTRICT LIABILITY FOR STUDENT SEXUAL ABUSE UNDER STATE CHILD ABUSE REPORTING LAWS WITH OTHER AVAILABLE REMEDIES

Three other remedies to sue school officials are available to students who are sexually abused by teachers or other school employees: § 1983 of the Civil Rights Act of 1871, Title IX of the Educational Amendments of 1972, and common law negligence actions. Because many states grant sovereign immunity to school districts to protect them from common law negligence suits, empowering abused students to sue under state child abuse reporting laws immediately marks a significant change to the available remedies. It bestows upon the plaintiff the choice of bringing an action under state or federal law (or both), providing the option of selecting either a state or federal forum. Beyond this obvious advantage, questions loom as to whether having this additional remedy will provide a significant advantage to abused students. This section will compare Ohio’s approach to other remedies currently available.

A. Remedies under Section 1983 of the Civil Rights Act of 1871


Section 1983 of Title 42 of the United States Code (§ 1983) is a provision of the Ku Klux Klan Act of 1871, a post-Civil War statute initially designed to provide African Americans with federal remedies for state violations of an individual’s constitutional rights, but now its use extends far beyond this original intention. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected any citizen of the United States or other person within

---

103. See Sperry, Daniel et al., supra note 19, at 114 (“Although some states allow school districts to be sued for negligence, other states continue to grant sovereign immunity from such suits.”).

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.\textsuperscript{105}

To bring a valid claim under § 1983 against a state political subdivision, a plaintiff must show: (1) a deprivation of a constitutional right, and that it was (2) committed by an individual acting under the color of law.\textsuperscript{106} The Supreme Court has held that § 1983 applies to municipalities and other local government entities,\textsuperscript{107} which would include school districts and school boards.\textsuperscript{108}

The first element is relatively straightforward. An educator violates a student's constitutional right when sexually abusing a student, since \textit{ipso facto}, a student has a right to personal security and to bodily integrity as liberty interests under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{109}

Proving that the defendants were acting under the color of law is more challenging. Although demonstrating that a teacher or administrator was acting under the color of law when abusing a student might not be difficult if the educator's contact with the student came from a position as a government employee,\textsuperscript{110} it is much harder to sustain a cause of action against a school board. The U.S. Supreme Court acknowledges that local

\textsuperscript{106} See Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992) ("proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.").
\textsuperscript{107} See Monnell v. Dep't. of Soc. Serv., 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress \textit{did} intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").
\textsuperscript{108} See Lopez v. Houston Indep. Sch. Dist., 817 F.2d 351, 353 (5th Cir. 1987) (holding that the local school district was a local government entities under \textit{Monnell}); Massey v. Akron City Bd. of Educ., 82 F. Supp.2d 735, 746 (N.D. Ohio 2000) (stating that if school districts are local government entities under Monnell, it logically follows that local school boards are as well).
\textsuperscript{109} See Kallstrom v. City of Columbus, 136 F.3d 1055, 1062 (6th Cir. 1998) (explaining why the right to personal security and bodily integrity are incorporated under the Due Process Clause); D.T. v. Indep. Sch. Dist. No. 16, 894 F.2d 1176, 1187 (10th Cir. 1990) (recognizing child sexual molestation as a constitutional tort, but not finding the school district liable under Section 1983 because teacher was not acting under the color of law); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3rd Cir. 1989) (holding that freedom from invasion of personal security through sexual abuse was well established before the alleged sexual violation took place), Smith v. Stoneking, 493 U.S. 1044 (1990) \textit{cert. denied sub nom.}
\textsuperscript{110} See Massey, 82 F. Supp.2d at 746 (stating that the teacher was clearly acting under color of law when he sexually abused a student at school).
government bodies cannot be held liable under the doctrine of respondeat superior in a § 1983 action. Consequently, the plaintiff must show that the school board itself acted under color of law by demonstrating that the board established an official policy condoning child sexual abuse or tolerated or ratified a custom or practice that resulted in the deprivation of the constitutional right, both of which are relatively preposterous propositions in this context.

To establish the existence of a custom or practice, a plaintiff must be prepared to prove: (1) the existence of a clear and persistent pattern of sexual abuse by school employees; (2) that the school board had express notice or constructive notice of the abuse; (3) the school board was deliberately indifferent towards the abuse; and (4) that the school board's indifference was the direct causal link in the constitutional deprivation.

As the four-part test suggests, to survive a motion for summary judgment the victim must present evidence of a school miasma whereby an educator engaged in sexual abuse acts with students, the school officials knew or should have known these acts took place, the officials manifested deliberate indifference in their failure to act, and this deliberate indifference was a causal link to the abuse. Meeting this burden is very difficult, as demonstrated by the small number of cases that have sur-

---

111. See Monell, 436 U.S. at 694 (“We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.”).

112. See Id. (“[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”). See also City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988) (stating that § 1983 also allows suits for constitutional deprivations resulting from a governmental custom even though the custom may not have received formal approval by the government body).

113. Doe v. Claiborne County Bd. of Educ., 103 F.3d 495, 508 (6th Cir. 1996). See also Jane Doe A v. Special Sch. Dist. of St. Louis, 901 F.2d 642 (8th Cir. 1990) (citing a similar test); Horwitz, supra n. 104, at 1208-09 (“Plaintiff must be prepared to show a persistent and widespread pattern of unconstitutional misconduct on the part of school officials that renders them liable for their failure to act.”), and see Massey, 82 F. Supp. 2d at 746-747 (stating that the school board “tolerated a pervasive custom” of “deliberate indifference” to sexual abuse of students by teacher, which directly caused the deprivation at issue”).

114. For an example of a case that met this burden regarding sexual harassment by other students, see Flores v. Morgan Hill Unified School Dist., 324 F.3d 1130 (8th Cir. 2003) (holding that a failure by school officials to institute discipline or stop sexual harassment by students could constitute deliberate indifference, and that the school district’s continued failure to adequately train staff and students regarding school sexual harassment policies could be found to a tolerance of a custom or practice resulting in the deprivation of a constitutional right).

115. See, e.g., Jane Doe A, 901 F.2d at 646 (holding that school officials’ notice of special education teacher’s physically and sexually abusive behavior that included kissing students on a bus, pushing students down the stairs, pulling students’ hair, and putting his hand’s down a boy’s pants did not cause notice of a pattern on unconstitutional actions).
vived a motion for summary judgment by a school board. Section 1983 still remains an appealing remedy to plaintiffs, however, because courts may award attorneys fees in addition to monetary damages.

2. A Comparison of § 1983 and the Ohio Approach

Compared to § 1983, it is substantially easier for a plaintiff to establish a cause of action under Ohio child abuse reporting laws. Instead of having to prove school authorities engaged in official activity that satisfied the four part test of § 1983, a plaintiff need only show that: a (1) school official; (2) who knew or suspected a child under 18 had been abused or faced a threat of being abused; (3) failed to report this knowledge or suspicion to public authorities.

In Yates, Amanda, the first student who was sexually abused, informed school officials three times of the teacher's misconduct. Although the principal concluded through his own investigation that Amanda was lying, the notice given by the student was sufficient to hold the school district liable under the Ohio child abuse reporting statute. Thus, to establish liability in Ohio, a student who is sexually abused by a teacher need only provide evidence that a school official had notice of the abuse, and the official did not report this abuse to state authorities.

In addition, it is unnecessary for the person asserting abuse to establish that the school official acted with deliberate indifference. In Yates, it would be difficult to prove that the school district was "deliberately indifferent" because after receiving notice that a student was sexually abused, the principal ordered an investigation and concluded that the

---

116. See Sperry, Daniel et al., supra note 19, at 115 ("A number of sexual abuse cases have been brought against school districts in recent years under section 1983, but only a few have survived motions for summary judgment."); Horwitz, supra note 104, at 1210 (stating that meeting this burden is unduly difficult for plaintiffs). However, see C.M. v. Southeast Delco School Dist., 828 F.Supp. 1179 (E.D. Pa. 1993) (surviving motion for summary judgment by administrators and the school district in an "appalling and tragic" case of repeated verbal, physical and sexual abuse of multiple students by a special education teacher, primarily on school grounds during regular school hours, which was permitted to continue despite many complaints by teachers and plaintiff student in particular).

117. See Sperry, Daniel et al., supra note 19, at 115.

118. See Claiborne, 103 F.3d at 508 (citing the elements the plaintiff must meet to establish liability of a school board under section 1983).


120. Yates, 808 N.E.2d at 862.

121. Id.
student was lying. Thus, one could declare that even if the school official had a good faith belief that the student’s allegations were false, this belief would not protect the school district from liability if the school official failed to report the teacher or administrator, who then later abused another student.

It can be asserted plausibly that the Ohio approach takes an affirmative step to curb sexual abuse of students by those educators who have day to day authority over them. Sexual abuse causes extraordinary harm to students and undermines the basic purposes of the public education system. Indeed, the Yates decision serves as a reminder that states must go to great lengths to ensure that children are secure while attending public schools. By having a standard that resembles strict liability, it forces school officials to report more incidents of sexual abuse to state agencies.

Moreover, if school officials rightly or wrongly decide that a student is lying and fail to report the sexual abuse according to state guidelines, as what occurred in Yates, the school official places the school district in great economic danger if the teacher subsequently abuses another student, even if it occurs years later. Given that many school districts already suffer from an acute lack of funding, a costly civil suit could be devastating. It seems likely that school officials will err on the side of caution and report more school personnel to state child service agencies, who will then proceed to conduct further investigations according to state law. An increase in reporting by such officials to state child service agencies has the potential to provide greater protection to students because child service employees are currently better trained than school officials to recognize when a child has been sexually abused.

Section 1983 does not require a prescribed, standardized investigation after a student reports abuse. In fact, courts have stated that they can foresee several good faith but ineffective responses to sexual abuse alle-

---

122. Id. (reporting that the school official “conducted his own investigation of [the student’s] allegations and concluded that [the student] was lying.”). In Sauls v. Pierce County Sch. Dist., 399 F.3d 1279, 1285, 1288 (11th Cir. 2005), the court found that there was no evidence that the school principal was deliberately indifferent to the reports of alleged misconduct by a teacher after the principal’s investigation failed to uncover reasonable evidence that the teacher’s conduct was inappropriate.

123. See Yates, 808 N.E. at 862 (stating that the school official concluded that the student alleging sexual abuse was lying).

124. See id. (holding the school district liable when the subsequent student was abused three years after the teacher abused the first student).
gations that would shield school officials from liability under § 1983.\(^\text{125}\) A school district must only demonstrate that the school official did not act with deliberate indifference in order to avoid liability. Because school officials are only required to make a good faith, though ineffective, effort to respond to student sexual abuse allegations, students would be better served to have a trained professional employee from a child services agency conduct formal investigations to determine if the abuse did in fact occur and begin proceedings to have school personnel removed and brought up on charges. This is the principle on which the Ohio approach rests.\(^\text{126}\)

**B. Remedies under Title IX of the Educational Amendments of 1972**

1. **The Elements of Title IX**

   Title IX of the Educational Amendments of 1972 (Title IX) forbids public education programs from discriminating based on gender. It provides that: “No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”\(^\text{127}\) Although Congress only provided for administrative enforcement of Title IX, the Supreme Court held that Title IX is also enforceable by way of an implied private right of action.\(^\text{128}\)

   In the landmark decision of *Franklin v. Gwinnett County Public Schools*,\(^\text{129}\) the U.S. Supreme Court carved out the role Title IX plays in

---

\(^{125}\) See *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) (“We can foresee many good faith but ineffective responses that might satisfy a school official’s obligation in these situations, e.g., warning the state actor, notifying the student’s parents, or removing the student from the teacher’s class.”) (quoting *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n.12 (5th Cir. 1994) (en banc), *cert. denied sub nom. Lankford v. Doe*, 513 U.S. 815 (1994)); cf. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (refusing to hold that “administrators must engage in particular disciplinary action” to avoid liability).

\(^{126}\) See *Ohio Rev. Code Ann.* §2151.421(F)(1) (Anderson 2004) (requiring the child services agency to conduct an investigation within twenty-four hours of the report that is in cooperation with the law enforcement agency and is in accordance with statutory and administrative guidelines).


incidents of student sexual harassment and abuse in kindergarten through twelfth grade. The Supreme Court ruled that a student who suffered intentional sexual harassment or abuse by a teacher or other school employee can employ Title IX to seek monetary damages. Nevertheless, as with § 1983, Title IX does not bestow a right upon students to sue school districts under the principle of respondeat superior. A school district is liable for monetary damages when the student provides proof of intentional discrimination by the funding recipient, which is normally demonstrated by how school personnel handled the problem of sexual harassment or abuse.

In Gebser v. Lago Vista Independent School District the United States Supreme Court outlined when a school district can be held liable for monetary damages under Title IX for staff to student sexual abuse. A student must establish that "an official of the school district who, at a minimum, had authority to institute corrective measures on the district's behalf had actual notice of, and was deliberately indifferent to, the teacher's misconduct." The Court did not specify, however, what constitutes "actual notice" and "deliberate indifference."

Lower courts have struggled to define the legal parameters of the Title IX actual notice requirement after Gebser. In Gebser, the Court found that the notice received by a principal of a teacher's sexually suggestive comments made during class "was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." Thus, it seems that actual notice by a school official requires more than one report of inappropriate teacher conduct that is not of a severe nature.

130. Id. at 75.
131. The Supreme Court reasoned that whereas Title VII sought to provide remedies for injuries suffered because of past discrimination and applied to all employers without regard to federal funding, Title IX sought to protect individuals from discrimination by those who receive federal funds. Title IX was enacted under Congress' spending power and was contractual in nature. When schools accepted federal funds, the Court believed that school districts agreed not to discriminate on the basis of sex. It is unlikely, however, that school districts further agreed to become liable whenever its employees discriminated on the basis of sex without the school district's knowledge. The Supreme Court also reasoned that Title IX itself contained provisions indicating that Congress did not intend to allow recovery solely on principles of vicarious liability or constructive notice. For example, Title IX's express means of enforcement was by administrative agencies, which operate on assumptions that officials had actual notice of the prohibited discrimination. Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998).
134. Gebser, 524 U.S. at 277.
135. Id. at 292.
Exactly how much must be reported before a court can conclude the school official has actual notice of teacher misconduct has been a difficult line for courts to draw. Many courts subscribe to the reasoning set forth in *Gordon v. Ottumwa Community School*[^36] and *Doe v. School Administrative District No. 19*.[^37] In *Gordon*, the court held that actual notice requires more than a "simple report of inappropriate conduct" by the school employee, but the standard is not set so high that a school district is not put on notice until it receives a clear, credible report that a student has been sexually abused.[^38] A school district is considered to have notice at some point between these poles.[^39]

Hence, courts vary in their interpretations of actual notice; it is not enough to establish liability if the school official only hears of one report of teacher misconduct not of a severe nature. On the other hand, courts do not require the complaint to be "undisputed or uncorroborated before it can be considered to fairly alert the school district of the potential for sexual [abuse]."[^40] Some courts take into account various indicia of the reliability of reports such as the specificity of the information, the source of information, and the manner in which the information was reported.[^41] Nevertheless, as long as the notice provided falls between the two poles espoused in *Gordon*, so that a reasonable jury could find that a school official had actual notice, courts will allow plaintiffs to proceed with their claim.[^42]

Lower courts have also struggled to define the limits of the "deliberate indifference" requirement the Supreme Court set forth in *Gebser*.

[^39]: Id.
[^40]: Doe A. v. Green, 298 F. Supp. 2d 1025, 1034 (D. Nev. 2004). See also Baynard v. Malone, 268 F.3d 228, 238 note 9 (4th Cir. 2001) (stating that the requirement of actual notice could have been satisfied by the knowledge that a student was being abused by the teacher, as it was not necessary to know exactly which student was being abused).
[^41]: See *Gordon*, 115 F. Supp. 2d at 1082 ("[T]he Court concludes a reasonable fact finder could find from the specificity of the information, its source . . . and the manner in which it was reported that the report had enough indicia of credibility to put the District on notice . . .").
[^42]: See, e.g., id. ("If the Plaintiffs are able to prove their allegations concerning the reports made to the school district . . . this Court finds that a reasonable jury could conclude that those reports were sufficient to establish acts of sexual harassment of which school officials had actual notice.") and see, *Massey*, 82 F. Supp. 2d at 744 (declaring that actual notice requires "an agent of the school [to be] aware of facts that indicate a likelihood of discrimination" and that this can also be met "when notice is given to any employee whom the school has designated to respond to harassment complaints").
Gebser indicated that when school officials fail to act or act in a manner that is unreasonable given the situation at hand, school districts may be liable for an official decision not to end the abuse. This standard, however, does little to provide lower courts with guidance on how to evaluate whether a school district was deliberately indifferent to reports of student sexual abuse.

Federal circuit courts of appeal have defined school district deliberate indifference in several ways. For example, the Ninth Circuit found that school districts would be held liable if "the need for intervention was so obvious, or if inaction was so likely to result in [sexual abuse], that it can be said to have been deliberately indifferent to the need," or when a school district has a "conscious or reckless disregard of the consequences of [its] acts or omissions." The U.S. Supreme Court, outside the context of Title IX, defined deliberate indifference as "a state of mind more blameworthy than negligence" but "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." The Fourth Circuit held that "actions that in hindsight are ‘unfortunate’ or even ‘imprudent’” would not constitute deliberate indifference. The Eighth Circuit developed a bright-line approach and concluded that a school district would not be found liable for deliberate indifference unless it "turn[s] a blind eye and [does] nothing," but this rule has been flatly rejected by other courts.

As previously discussed and as indicated above, acting with deliberate indifference is not necessarily equivalent to responding ineffectively to allegations of sexual abuse. Courts have stated that they can foresee several good faith but ineffective responses to sexual abuse allegations that would shield school officials from liability, because school officials are not acting deliberately indifferent.

143. Gebser, 524 U.S. at 290.
144. Monteiro v. Tempe Union High School Dist., 158 F.3d 1022, 1034 (9th Cir. 1998).
149. See Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 260-61 (6th Cir. 2000) ("Such a minimalist response is not within the contemplation of a reasonable response."); Doe, 298 F. Supp.2d 1025, 1036 (“Permitting a school district to avoid liability on the basis of some minimalist and ineffective response to discrimination would be inconsistent with the Supreme Court’s ruling that responses which are ‘clearly unreasonable’ constitute deliberate indifference.").
150. See sources cited supra note 123.
As with actual notice, courts are free to conclude that a school district's conduct, as a matter of law, did or did not amount to deliberate indifference.  Many courts leave the question of deliberate indifference for the jury to decide whether the plaintiffs provide enough evidence that a reasonable trier of fact could make such a finding.

2. A Comparison of Title IX and the Ohio Approach

The differences between an action brought against a school district under Title IX and under state child abuse reporting laws will depend on the jurisdiction in which the suit is brought. Nevertheless, general comparisons of these remedies are warranted. Under the Ohio child abuse reporting statutes, a school district will be held liable when: (1) a school official; (2) who knew or suspected a child under eighteen had been abused or faced a threat of being abused; (3) failed to report this knowledge or suspicion to public authorities. Under Title IX, a district is held liable when: (1) a school official who has the authority to address the discrimination and institute corrective measures; (2) had actual notice of the discrimination; (3) but was deliberately indifferent to the discrimination.

Similar to the discussion comparing § 1983 to the Ohio remedy, the Ohio remedy provides more protection to students than Title IX.

151. See Davis, 526 U.S. at 649 (“In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not ‘clearly unreasonable’ as a matter of law.”).
152. See Hart v. Paint Valley Local Sch. Dist., No. C2-01-004, 2002 WL 31951264, at *9 (S.D. Ohio Nov. 15, 2002) (stating that the deliberate indifference standard “does not lend itself well to a determination by the Court on summary judgment). See also Doe, 298 F. Supp.2d at 1036 (deciding not to rule on whether a school district was deliberately indifferent as a matter of law, but holding that a reasonable jury could find that the school district acted with deliberate indifference). An illustrative example of a U.S. Supreme Court Title IX claim that arose out of the differing scenario of harassment by a fellow student, rather than by a teacher, is demonstrated in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). The Court noted that while it is more difficult to satisfy the requirements when the harassment at issue is peer-to-peer rather than teacher-to-student, it is nonetheless possible. Id. at 653. Specifically, the Court held that in such a case: (1) “the deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it;” and (2) “the harassment must take place in a context subject to the school district’s control.” at 644-645. In all, to establish a violation of Title IX in this case, “the plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” at 651.
154. See Gebser, 524 U.S. at 277 (outlining the elements of a Title IX discrimination action).
Under Title IX, although a plaintiff does not need to establish a pattern or practice of sexual abuse in the school district, or a causal link between the deliberate indifference and the abuse as with § 1983, the student must provide enough evidence so that a reasonable jury could find that a school official had actual notice of the possibility of sexual abuse by a teacher and acted with deliberate indifference. Under the Ohio child abuse reporting remedy, the law affords fewer opportunities for a school district to escape liability.

Under Yates, if a school official fails to report the allegation of abuse by one student to the appropriate authorities, and the same teacher subsequently abuses another student, the school district will be held liable as a matter of law. A plaintiff is not required to bring forth enough evidence so that a reasonable trier of fact could find that the school official had actual notice and acted with deliberate indifference. A plaintiff must only bring forth evidence that the school official was informed once that abuse had occurred and did not report the incident to a child social services agency.

A comparison of Title IX and the Ohio approach leads one to the same conclusion that emerged from the comparison of § 1983 and the Ohio approach. That is, the Ohio approach will better protect students from sexual abuse because school officials will report more incidents of abuse to state authorities. As with § 1983, conducting an investigation in good faith after receiving a report of sexual abuse but failing to report the incident to state authorities will most likely be sufficient to avoid liability under Title IX because a plaintiff will not be able to show that the school official acted with “deliberate indifference,” even if the same teacher abuses again.

Courts have defined “deliberate indifference” as acting with a “conscious or reckless disregard” or having “a state of mind more blameworthy than negligence.” Conducting an investigation in good faith after receiving a report of sexual abuse is not acting with reckless disregard, even if the investigation is handled ineffectively. Under the Ohio approach, however, conducting an investigation in good faith will not suffice if the educator subsequently abuses another student and school

156. Farmer 511 U.S. at 835.
157. See, e.g., Sauls, 339 F.3d at 1285-87 (holding that the principal who conducted an investigation that failed to uncover reasonable evidence demonstrating that a teacher’s conduct was inappropriate was not deliberately indifferent to the reports of alleged misconduct); Doe, 220 F.3d at 387-89 (holding that the principal did not act with deliberate indifference after he conducted an investigation of the teacher’s alleged misconduct); see also supra note 123 and accompanying text.
officials have failed to report the incident to state authorities. As previously stated, by having a standard that resembles strict liability, school officials will report more incidents of misconduct to child services agencies, who are better trained and equipped to uncover abuse and remove alleged harmful teachers.\textsuperscript{158}

C. Remedies under State Common Law Negligence Theories

Many states\textsuperscript{159} do not permit school districts to be sued under negligence laws because school districts are state political subdivisions immune from civil liability.\textsuperscript{160} For those students living in those states, providing a cause of action under child abuse reporting statutes could be a tremendous asset, as this permits a student to bring a cause of action in either a state forum under the child abuse reporting laws or a federal forum under § 1983, Title IX or both.

For those states that do allow school districts to be sued under negligence laws, such actions might include failure to warn or negligent hiring, retention, or supervision of school employees, among other negligence claims.\textsuperscript{161} As with negligence theories generally, a plaintiff must meet the standard elements of duty, breach, causation, and injury or damages. That is, the plaintiff must establish that the school district owed a duty to care to the plaintiff, that the school district breached the requisite standard of care, that the plaintiff was injured physically or emotionally, and that school officials’ actions were the proximate cause or a substantial factor in this injury.\textsuperscript{162}

Once again, the Ohio approach provides more protection to students\textsuperscript{163} because a plaintiff can establish a cause of action more easily under state

\textsuperscript{158} See discussion infra Part III.

\textsuperscript{159} A thorough discussion of potential school district liability under state negligence actions is beyond the scope of this Article, as state common law negligence actions vary widely across states.

\textsuperscript{160} Citizens generally cannot bring civil actions against state entities unless the state allows for such actions. See SPERRY, DANIEL ET AL., supra note 19, at 114-15 (describing school district immunity from civil actions generally).

\textsuperscript{161} See Doe, 298 F. Supp. 2d at 1038-40 (discussing various state law negligence claims brought by a student who claimed she was sexually abused by her teacher).

\textsuperscript{162} See SPERRY, DANIEL ET AL., supra note 19, at 114 (setting forth the elements to establish a common law negligence suit).

\textsuperscript{163} The Ohio child abuse reporting statute covers private school students under the age of eighteen. See OHIO REV. CODE ANN. §2151.421(A)(Anderson 2004) ("No person . . . who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division.")
child abuse reporting laws than under negligence theories. Under the state reporting laws, a student would not have to establish causation between a school official’s actions (or inaction) and the sexual abuse, which could prove to be difficult in most situations.

As a corollary, adopting the Ohio approach may offer the most protection to sexually abused students attending private schools. Private school students cannot invoke § 1983 or Title IX remedies against private schools because private school officials are not state employees, and private schools are not government institutions. Students attending private schools must rely exclusively on state remedies, normally limited to negligence actions, so as to seek civil redress for the abuse. The Yates decision, focusing on Ohio’s child abuse statute, can be read to indicate that entities such as private schools and private individuals may be held liable under the child abuse statute. The law applies broadly to a number of different professions including those in law, medicine, other health care, psychology, and education. The education provision includes private schools.164

IV. POTENTIAL NEGATIVE REPERCUSSIONS OF ADOPTING THE OHIO APPROACH AND SUPPLEMENTAL MEASURES LEGISLATURES MAY ADOPT TO LIMIT THESE REPERCUSSIONS

Extending a duty to unknown third parties under the child abuse reporting laws provides a strong incentive for school officials to monitor and curb student sexual abuse in public schools. Sexual abuse causes extraordinary harm to students and undermines the basic purposes of the public education system. Nevertheless, while the Ohio approach will provide students with more protection from abuse than § 1983, Title IX, and common law negligence remedies, the costs of implementing such a policy cannot be overlooked.

Conducting a good faith investigation after receiving a report of sexual abuse most likely would be sufficient to avoid liability under the traditional remedies if the school official concluded that the allegations were false. As noted under the Ohio approach, such an investigation would not be enough to avoid liability if the same teacher abuses again.

After *Yates*, school districts, in effect, do not have the option of conducting their own investigations to see if the allegations have merit. The possibility of negative publicity and monetary loss are simply too great. If school officials conduct an investigation, conclude that the allegations are false, and do not report the alleged abuse to state authorities, there is the risk of exposing the school district to liability if the teacher abuses again. A standard that approaches strict liability will cause school officials to report public school educators even when school officials are not fully convinced that the allegations are credible, creating possible undesirable effects on state agencies, public school systems, and innocent employees.

In *Ward*, one of the primary reasons the Supreme Court of Connecticut did not wish to extend a duty to unknown third parties was a fear of overburdening state agencies with non-meritorious reports of child abuse. The court was concerned that school districts, in seeking to shield themselves from potential civil liability, would "feel compelled to report incidents that rightfully should not be reported, thereby diverting valuable resources from the claims that demand immediate attention." The traditional remedies allow school officials to conduct investigations knowing that if they pursue them in good faith and in a reasonable manner they will not be held liable even if their efforts are ineffective. This results in school officials acting as a type of buffer to non-meritorious reports of child abuse to state officials. States adopting the Ohio approach, however, will lose this buffer because school officials essentially will turn the investigation proceedings directly over to social service agencies rather than conducting the investigations themselves. On the one hand, state authorities are better trained to conduct such investigations and are more likely to detect whether a child was actually abused. On the other hand, state agencies in those states adopting the Ohio approach should be prepared to investigate more claims, many of which may be extremely tenuous.

Another cost of implementing the Ohio approach is the adverse effect increased reporting may have on innocent educators and the education profession generally. As the trend increases towards reporting all sexual abuse claims to state authorities, including those that are non-meritorious, undoubtedly innocent professionals will be injured. While it is true

166. Id.
167. See supra note 123 and accompanying text.
that many states have confidentiality requirements in place designed to protect the alleged abuser, these requirements restrict access to such reports, but do not prevent those involved from discussing the allegations. News of such allegations could quickly taint or even ruin a teacher’s or administrator’s career, even if an investigation reveals there are no findings of reasonable cause to suggest that the abuse occurred. Already facing teacher shortages, state policymakers can ill afford to give yet another reason why prospective educators should reconsider entering the profession.

While these potential costs of implementing the Ohio approach raise some concerns, they should not dissuade states wishing to address the student sexual abuse problem from adopting more stringent reporting standards. If protection of innocent educators is a concern, legislators might consider formal training in how to detect child abuse, how to conduct a child abuse investigation, and how to properly report such abuse to state authorities.

State legislatures could either require administrator certification programs to provide training as part of their coursework, or they could require that state agencies provide this training directly to prospective and current administrators. The legislation would still compel school officials to report suspected child abuse to state authorities, but only after an investigation conducted in a manner approved by state authorities led to legitimate suspicions. To wit, if a school official received a sexual abuse report from a student, conducted an investigation in a manner approved by state authorities, concluded that the allegations were false, but made a timely report to a child social services agency, the

168. See, e.g., CONN. GEN. STAT. §17a-101(k)(Rev. to 1997) (“the information contained in the reports and any other information relative to child abuse, wherever located, shall be confidential subject to such regulations governing their use and access as shall conform to the requirements of federal law or regulations.”)

169. Some states already have in place programs designed to train school officials to identify and report child abuse. OHIO REV. CODE § 3319.073 (2004) (“Each person employed by any school district or service center to work in an elementary school as a nurse, teacher, counselor, school psychologist, or administrator shall complete at least four hours of in-service training in child abuse prevention within three years of commencing employment . . .”) ALASKA STAT. §47.17.022 (Michie 2004) (mandating that school district employees required to report child abuse receive initial and periodic training in how to recognize and report child abuse); CONN. GEN. STAT. §17a-101 (Rev. to 1997) (“The Commissioner of Children and Families shall develop an educational training program for the accurate and prompt identification and reporting of child abuse and neglect. Such training program shall be made available to all persons mandated to report child abuse and neglect at various times and locations throughout the state as determined by the Commissioner of Children and Families.”).
school district would be able to raise the affirmative defense, even if a teacher subsequently abused another student. If, on the other hand, the school official did not conduct an investigation at all or did not conduct an investigation in an approved manner, and the teacher subsequently abused another student, the school district would be held liable as outlined in *Yates*.

Affording school districts the opportunity to raise this affirmative defense would accomplish a number of results. First, it would not deter the Ohio approach’s result of providing more protection to students from sexual abuse. School officials would investigate reports by students in a manner promulgated by state law and turn serious allegations over to state authorities or risk exposing the school district to civil liability. Second, it would grant state agencies the authority to utilize their resources more effectively by investigating only legitimate claims of sexual abuse. While it is true that the state would have to invest some resources in a training program for school officials, arguably such a training program would cost less than trial fees and the payouts of successful student sexual abuse remedies, and it would also heighten awareness in school officials and the public school system in general of the seriousness of student sexual abuse. Finally, instead of having to

---

170. *A Note on State Child Abuse Reporting Training for Teachers and School Officials:* Due to the mandatory reporting statutes in place in all fifty states and the District of Columbia, as well as the federal reporting requirements under Title IX mentioned in the Introduction, many states have further enacted a requirement that teachers and other school officials complete training on proper compliance with these reporting requirements as a condition of certification or licensure to teach. The following are just a few examples of the content included in such training programs. However, it should be emphasized that these requirements vary by state, and therefore it is imperative that the reader refer to the requirements of the prospective state as to what is required in individual circumstances Ohio Rev. Code § 3319.073 (2006).

Ohio law requires elementary school employees to receive formal training in child abuse prevention. This is an in-service program for persons employed by any school district or service center to work with students, kindergarten through sixth grade, as a nurse, teacher, counselor, school psychologist, or administrator. Each person must complete at least four hours of in-service training in child abuse prevention within three years of commencing employment. The Ohio statute also has a provision for students in grades K-6 to receive instruction in personal safety and assault prevention, as part of the requisite course of study, Ohio Rev. Code § 3313.643 (2006); Del.Code Ann. Tit.14 § 4123 (2005). Delaware requires full-time teachers to receive one hour of training per year on the detection and reporting of child abuse, under the direction of the Division of Family Services. Examples of training presentations and video resources provided by the Division of Family Services are available at www.state.de.us/kids/information/school.shtml; N.Y. Law § 6507 (McKinney 2006). New York requires that teachers and administrators receive two hours of training on the identification and reporting of child abuse and maltreatment in order to receive licensure or certification. This training is now a component within the certification or licensure process. A description of this requirement and a list of approved training providers is provided at www.op.nysed.gov/camemo.htm; Va. Code Ann. § 22.1-298.1(4)(D)(2) (2006); Virginia requires
undergo an intrusive state investigation that might damage an otherwise stellar or potentially stellar career, innocent educators would be subjected to a less conspicuous investigation conducted by a school official.

V. CONCLUSION

By extending a duty to unknown third parties, the Ohio Supreme Court in *Yates* grants an additional remedy to sexually abused students. A comparison of this new remedy with other remedies currently available, namely § 1983, Title IX, and common law negligence actions, reveals that the Ohio strict liability approach does more to protect students from sexual abuse.

Facing an increased threat of liability, school districts in Ohio and other states adopting this approach in the future undoubtedly will report more cases of suspected abuse to child services agencies. An increase in reporting by school officials to state child services agencies has the potential of providing greater protection to students from sexual abuse. In addition, child services employees are required to conduct the investigations in a manner that accords with statutory and administrative guidelines. In order to avoid liability under § 1983, Title IX, and common law negligence theories, school officials need not respond to sexual abuse allegations in any particular manner; moreover, liability may be avoided even where responses are ineffective, perhaps even foolish, if conducted in good faith.

Although an increase in reporting may have negative repercussions such as taxing overburdened state social services agencies or harming innocent educators, states can minimize these harmful effects by man-

---

171. See *Ohio Rev. Code Ann.* §2151.421(F)(1)(Anderson 2004)(requiring the child services agency to conduct an investigation within twenty-four hours of the report that is in cooperation with the law enforcement agency and is in accordance with statutory and administrative guidelines).

172. See *supra* note 125 and accompanying text.
dating licensure-based pre-service or in-service training programs for detecting child abuse that follow a standardized investigative and communications procedure.