

STATE OF MICHIGAN  
IN THE SUPREME COURT

**GEORGIA KOLOKITHAS**, the Natural  
Mother and Next Friend of **JANE DOE**,  
a minor,

Plaintiff-Appellant

vs.

**ALPENA PUBLIC SCHOOL DISTRICT**  
and **ALPENA BOARD OF EDUCATION**,

Defendants-Appellees.

**MICHIGAN SUPREME COURT**  
Case No. 165441

**MICHIGAN COURT OF APPEALS**  
Case No. 359190

**ALPENA COUNTY CIRCUIT COURT**  
Case No. 19-009053-NZ

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**BRIEF OF AMICUS CURIAE CHILD USA**

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## STATEMENT OF INTEREST<sup>1</sup>

CHILD USA is an interdisciplinary, non-profit think tank fighting for the civil rights of children. CHILD USA's mission is to pair in-depth legal analysis with cutting-edge social science research to protect children, prevent future abuse and neglect, and bring justice to survivors. Distinct from an organization engaged in the direct delivery of services, CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, courts, media, and society to increase child protection and the common good. CHILD USA's Founder, Professor Marci A. Hamilton, is an expert on child sexual abuse and has advised Congress, state governors, legislatures, and courts throughout the United States on matters of child protection.

CHILD USA's interests in this case are directly correlated with its mission to increase child protection and public safety by ensuring that educational institutions are held accountable when they abdicate their responsibilities to address sexual harassment and perpetuate policies that endanger students.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amicus curiae, its members, or their counsel made any such monetary contribution.

## INTRODUCTION

Sexual harassment is a pervasive part of this nation's educational landscape. Failure to adequately respond to sexual harassment not only compounds the harm of the initial abusive experience, but it also emboldens perpetrators, creating an environment of fear and insecurity incompatible with learning. Despite its outright prohibition on discrimination in educational institutions, turning to federal law to seek redress has resulted in courts setting the liability standard so high that for most students a remedy is out of reach. This Court has an opportunity to provide access to justice for victims where the federal law has fallen short. The Elliott-Larsen Civil Rights Act ("ELCRA") already provides a strong foundation for accountability for behavior that enables discrimination to be overlooked by those in the best position to stop it. Adopting a less restrictive standard of liability would give the law its logical force to end the current impunity for sexual harassment in schools so that all students receive the safe and equal benefit of an education without discrimination.

## ARGUMENT

### **I. THE PREVALENCE AND IMPACT OF STUDENT-ON-STUDENT SEXUAL HARASSMENT UNDERSCORES THE NEED FOR SCHOOLS TO IMPLEMENT ADEQUATE PREVENTION AND RESPONSE POLICIES.**

For thousands of students like Jane Doe, sexual harassment is an everyday reality. As discussed below, failure to properly respond to peer sexual can have devastating consequences—both for the individual victim and for the civil rights movement.

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### A. Student-on-Student Sexual Harassment Has Lasting, Detrimental Effects.

There is an epidemic of sexual harassment in our nation's school with more than 80% of students experiencing some form of sexual harassment by the time they graduate high school.<sup>2</sup> The prevalence particularly is shocking given that sexual harassment is rarely reported—only about 9% of victims disclose their experience to their educational institution.<sup>3</sup> As Jane Doe's experience illustrates, sexual harassment, when left unaddressed, can be extremely damaging; it can compromise a student's well-being, their physical and emotional health, as well as their cognitive and emotional development.<sup>4</sup> The traumatic effects can be so severe that the United Nations identifies gender-based peer violence as a direct threat to the fundamental safety of today's school children.<sup>5</sup>

Indeed, children who experience sexual harassment are more likely to suffer from post-traumatic stress disorder, anxiety, depression, and low self-esteem, and to exhibit eating disturbances, suicidality, behavior problems, and substance abuse.<sup>6</sup> Exposure to sexual harassment can also adversely impact academic outcomes. Approximately 40% of

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<sup>2</sup> See Am. Ass'n of Univ. Women (AAUW), *Crossing the Line: Sexual Harassment at School* 20, 30 (2011), <https://www.aauw.org/files/2013/02/Crossing-the-Line-SexualHarassment-at-School.pdf>.

<sup>3</sup> Sperry, D. M., & Gilbert, B. O., *Child peer sexual abuse: Preliminary data on outcomes and disclosure experiences*, 29(8) CHILD ABUSE & NEGLECT 8 (2005)

<sup>4</sup> *Supra* n. 2; see also American Psychological Association. Task Force on the Sexualization of Girls. *Report of the APA Task Force on the Sexualization of Girls*, <https://www.apa.org/pi/women/programs/girls/report>.

<sup>5</sup> Global Education Monitoring Report Team & United Nations Girls Education Initiative, *School-related gender-based violence is preventing the achievement of quality education for all*, UNESCO (Mar. 2015), <https://unesdoc.unesco.org/ark:/48223/pf0000232107>

<sup>6</sup> *Supra* n.3; see also Mons Bendixen et al., *The Effects of Non-Physical Peer Sexual Harassment on High School Students' Psychological Well-Being in Norway: Consistent and Stable Findings Across Studies*, 63 INT'L J. PUBLIC HEALTH 3 (2018), <https://link.springer.com/article/10.1007%2Fs00038-017-1049-3>.



students who report sexual violence to their schools experience a substantial disruption in their educations.<sup>7</sup> These students are more likely to struggle academically and to avoid school all together, leading to absenteeism, truancy, and nearly 10% drop out entirely.<sup>8</sup>

The psychological, physical, and educational harms attendant to sexual harassment are compounded when the victim is a member of a marginalized group or protected class.<sup>9</sup> Sexual harassment is a “highly gendered phenomenon” with girls being at a significantly greater risk of experiencing sexual harassment in the first instance.<sup>10</sup> Girls are also more likely to experience revictimization and poor educational outcomes.<sup>11</sup>

Intervening early to address inappropriate behaviors before they escalate can thus significantly reduce a victim’s risk of developing such harms and will also help break patterns of inequality that have plagued our educational institutions for decades.

#### **B. The Negative Effects of Sexual Harassment Are Compounded by Institutional Inaction.**

Students may not find it easy to disclose experiences of sexual harassment to school staff. For the few who *do* choose to disclose, the response they receive can become a distinctively damaging part of the abusive experience—a phenomenon known as

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<sup>7</sup> Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 17-22 (Mar. 2021), <https://www.knowyourix.org/wp-content/uploads/2021/03/KnowYour-IX-2021-Report-Final-Copy.pdf>

<sup>8</sup> *Id.*; see also Petersen J.L. & Hyde J.S., *A longitudinal investigation of peer sexual harassment victimization in adolescence*, 32. J ADOLESC. HEALTH 1172 (2009).; Chiodo D, et al., *Impact of sexual harassment victimization by peers on subsequent adolescent victimization and adjustment: a longitudinal study*, 45 J ADOLESC HEALTH 246 (2009).

<sup>9</sup> *Supra* n.2

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

<sup>11</sup> Attar-Schwartz, S., *Peer sexual harassment victimization at school: the roles of student characteristics, cultural affiliation, and school factors*, 79(30) AM. J. ORTHOPSYCH. 407 (2009).

“betrayal trauma” or “institutional trauma” – when the institutions they depend upon respond dismissively.<sup>12</sup> It is a phenomenon that has emerged in cases such as the cover-up of systemic abuse in the Catholic church and the Boy Scouts of America, and the Larry Nassar scandal at Michigan State University. The negative effects of institutional betrayal exacerbate and often exceed those associated with the original harassment or abuse.<sup>13</sup>

Beyond the harms to the individual victim, a school’s inaction in response to sexual harassment can reduce students’ sense of safety and can, over time, chill reports of sexual violence.<sup>14</sup> Indeed, studies show that when leadership tolerate sexual harassment, teachers and students have less incentive to do anything about it.<sup>15</sup>

Educational institutions are “vehicle[s] for transforming individual behaviors and broader social norms around violence, gender equality and discrimination.”<sup>16</sup> A school’s failure to appropriately respond to incidents of sexual harassment implicitly communicates to students and staff that such behavior is acceptable. As a result, students who are victimized will be left with lifelong scars and their perpetrators will grow into adults who normalize sexual violence thus furthering larger cycles of inequality.

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<sup>12</sup>Parnitzke Smith, C.P. & Freyd, J., *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 1 (2013); see also Elizabeth J. Meyer, *Gendered Harassment in Secondary Schools: Understanding Teachers’ (Non)interventions*, 20 GENDER & EDUC. 555 (2008), <https://www.tandfonline.com/doi/full/10.1080/09540250802213115>.

<sup>13</sup> *Id.*; see also Monteith, L., et al., *Perceptions of Institutional Betrayal Predict Suicidal Self-Directed Violence Among Veterans Exposed to Military Sexual Trauma*, 72 J. CLIN. PSYCH. 743, 750 (2016)

<sup>14</sup> *Id.*

<sup>15</sup> Lichty, L. F., & Campbell, *Targets and Witnesses: Middle School Students’ Sexual Harassment Experiences*, 32(3) J. EARLY ADOLESCENCE 414 (2012).

<sup>16</sup> Sood, S., Kostizak K., & Rodrigues, F., *Social and Behaviour Change Strategies for Addressing Violence Against Children In and Around Schools: Case Studies and Lessons Learned*, UNICEF (2021), <https://www.unicef.org/media/97711/file/C4D-VAC-CS-2021.pdf>

**II. AN EDUCATIONAL INSTITUTION MAY BE LIABLE UNDER THE ELCRA FOR FAILING TO ADEQUETLY ADDRESS STUDENT-ON-STUDENT SEXUAL HARASSMENT.**

The ELCRA was designed to protect students like Jane Doe from unaddressed student-on-student sexual harassment, as evident by its plain text and legislative history. By applying the statutory scheme established under the ELCRA hostile workplace caselaw but adapting the institutional liability element to account for schools *in loco parentis* status, this Court can effectuate the ELCRA's promise of educational equality.

**A. The ELCRA Should Be Broadly Construed to Encompass Hostile Environment Claims Based on Student-on-Student Sexual Harassment Consistent with the Statute's Remedial Purpose.**

Signed into law in 1976, the ELCRA is Michigan's most comprehensive and inclusive civil rights law to date. The Act was consciously "designed to abolish the smallness of mind that clings to pernicious stereotypes founded not on fact but upon historical misconceptions and fear." *Freeman v Kelvinator, Inc*, 469 F Supp 999, 1000 (ED Mich 1979). To that end, the Act protects, among other things, the rights of Michigan citizens to "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" without discrimination on the basis of sex. MCL 37.2302(a). Lawmakers were so concerned about the invidious effects of sex-based discrimination on educational outcomes that they created a separate provision prohibiting educational institutions from, in relevant part, "discrimina[ting] against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution" on the

basis of sex.” Id. Sex-based discrimination under the ELCRA is broadly defined to include sexual harassment. MCL 37.2103(i). Sexual harassment—defined as “conduct or communication [that] has the purpose or effect of substantially interfering with an individual’s . . . education . . . or creating an intimidating, hostile, or offensive . . . educational . . . environment” —is recognized under Michigan law as a form gender-based discrimination. MCL 37.2103(k)(iii).

Taken together, the text is clear: educational institutions may not discriminate on the basis of sex and sex-based sexual harassment constitutes discrimination when it interferes with the victim’s education or creates a hostile school environment. Nothing in the statutory language indicates that lawmakers sought to limit the scope of the ELCRA’s application to hostile environment workplace claims nor does the text evince intent to absolve educational institutions of liability for creating a hostile school environment simply because the perpetrator is a peer rather than a school employee. Such an interpretation would permit and even encourage schools to force victims of peer sexual harassment to sacrifice their educations; that is, it would promote the precise “evil” that the legislature sought to “suppress” by passing the ELCRA. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34 (1988).

Narrowing the Act in this way would not only undermine the ELCRA’s broad policy purpose but also it would be irreconcilable with Michigan’s “unwavering history of faithfully defending an aggrieved individual’s right to a judicial forum to remedy unlawful discrimination.” *Heurtebise v Reliable Business Computers*, 452 Mich 405, 407 (1996). Long before the ELCRA was enacted, Michigan was prioritizing the development

of civil rights. In 1885, Michigan passed its first public accommodations law under the Civil Rights Act. Public Act No 130 of 1885. Five years later, this Court held the “separate but equal” doctrine unconstitutional under the Civil Rights Act, over 60 years in advance of the U.S. Supreme Court’s decision in *Brown v Board of Education*. 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954); *Ferguson v Gies*, 82 Mich 358; 9 LRA 589 (1890). And in 1964, it became the first state in the country to expressly include civil rights protections into its constitution. See Const 1963, Art 1, § 2. When the legislature passed the Michigan Civil Rights Act in 1976, it expanded protections from discrimination and, with that, citizens’ rights to redressability, rights that may not be diminished by the legislature or the courts. MCL 37.2801, *et seq.*; Const 1963, Art 5 §29 (providing for the preservation of judicial remedies for rights “existing at the time and those subsequently created by legislative enactment or judicial decision . . .”); *see also Holmes v Haughton Elevator Co*, 404 Mich 36 (1978) (holding that that an individual has direct access to court and is not required to exhaust administrative remedies before going to court for a civil rights violation); *Slayton v Michigan Host, Inc*, 122 Mich App 411, 332 NW 2d 498 (1983) (holding that the exclusive remedy provision of the Worker’s Compensation Act does not prevent an employee from pursuing a civil rights claim under the ELCRA).

Because the constitutional right to seek redress through the courts is so integral to the enforcement of civil rights, this Court cannot deny victims access to a remedy for student-on-student sexual harassment under the ELCRA without potentially harming citizens substantive civil rights.

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**B. The ELCRA Provides an Important Remedial Scheme to Address Hostile Environment Claims Based on Student-on-Student Sexual Harassment.**

Whether a civil rights action is stated under the ELCRA for student-on-student sexual harassment is an issue of first impression. Historically, this Court has resolved novel ELCRA issues by reference to the standards applied in corollary federal civil rights statutes. *See, e.g., Sniecinski v Blue Cross Blue Shield*, 469 Mich 124, 666 NW 2d 186, 193 (Mich 2003); *Fonseca v Mich State Univ*, 214 Mich App. 28, 30; 542 NW 2d 273 (1995). Accordingly, for hostile workplace claims brought under the ELCRA, Michigan courts have adopted the standards established under Title VII, the federal civil rights law that prohibits employment discrimination based on race, color, religion, sex, and national origin. 42 USC § 2000e *et seq* (1964). To that end, a plaintiff establishes a prima facie hostile workplace claim under the ELCRA by showing that: 1) they are member of a protected class; 2) they were subjected to unwelcome sexual communication or conduct based on their status as a member of a protected class; 3) the communication or conduct was intended to, or did in fact, create an intimidating, hostile, or offensive work environment; and 4) *respondeat superior*. *Radtke v Everett*, 442 Mich 368, 379-80; 501 NW 2d 155 (1993). Under traditional principles of *respondeat superior*, an employer may be held liable for the discriminatory acts of its employees acting within the scope of their employment, *Hamed v Wayne Cnty*, 490 Mich 1, 10-11; 803 NW 2d 237 (2011), *unless* the employer can demonstrate that it took “prompt and appropriate remedial action” upon notice of the harassment. *Radtke*, 442 Mich at 396; *see also, Chambers v Trettco*, 463 Mich 297, 311, 615 NW 2d 910 (2000). Michigan courts have applied Title VII’s “knew or should have

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known” standard to establish notice on hostile workplace claims under the ELCRA. *Radtke*, 442 Mich at 396.

In determining whether a school may be liable for harassment under the ELCRA where, as here, a plaintiff seeks to hold an institution accountable for their response (or lack thereof) to the actions of a third-party, the court’s analysis in *Owen v L'Anse Area Schools*, Case No 2:00-CV-71 (WD Mich Nov. 14, 2001) proves instructive. In *Owen*, the court considered a hostile environment claim based on student-on-teacher harassment involving a Jewish teacher who had been subjected to relentless anti-Semitic threats from his students. The employer (the school) failed to adequately address the teacher’s repeated complaints and the teacher was ultimately forced to resign as a result of ongoing conduct. Although the Court acknowledged that students are not agents under traditional principles of *respondeat superior*, it still found the school liable—not based on the students’ actions but rather on their own inaction in light of the ongoing harassment. *Id.* The Court explained that the school’s inaction had the effect of implicitly condoning the students’ anti-Semitic acts such that it was reasonably foreseeable that the students would engage in more harassment and that plaintiff would be forced to leave. *Id.* Put another way, the court concluded that the civil rights violation occurred because the school knew (or should have known) about the hostile environment it created when it failed to adequately respond to the teacher’s complaints.

Where, as here, an institution has a duty to control the environment and they know (or should know) of the harassment but fail to meaningfully respond to the same, the

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court may impose liability for their role in creating and maintaining a hostile environment.

**C. Liability for Student-on-Student Sexual Harassment Under the ELCRA Should Attach to Schools Through Their Status as *In Loco Parentis*.**

The doctrine of *respondeat superior* embodies the general rule that an employer is responsible for the negligent acts or omissions of its employees. See *Hamed*, 490 Mich at 10-11. Its policy rationale is to induce employers to adopt and enforce practices and procedures that will minimize the risk of harm to third parties.<sup>17</sup> *Respondeat superior* liability makes sense given the nature of the employer-employee relationship, but the doctrine is too restrictive to apply to the educational context. Because the ELCRA recognizes a civil right to be free from a hostile educational environment based on student-on-student sexual harassment, the institutional liability element must reflect the school's status as *in loco parentis*.

The doctrine of *in loco parentis*, Latin for "in the place of a parent," applies to educational institutions acting in a supervisory role over students when they step in to assume parental responsibilities of disciplining, guiding, and providing for the physical welfare of the child.<sup>18</sup> When a school assumes parental authority over its students, they have a corresponding legal duty to protect those over whom they exercise this control.

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<sup>17</sup> Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999), <https://scholarship.law.wm.edu/wmborj/vol7/iss3/5>

<sup>18</sup>BLACK'S LAW DICTIONARY 803 (9th ed. 2009).; see also, John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and its Impact on Whether k-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 Indiana Law Rev. 711, 713 (2013).



See generally *Mayberry v Pryor*, 422 Mich 579, 584; 374 NW 2d 683 (1985); *Hush v Devilbiss Co*, 77 Mich App 639, 649 n. 1; 259 NW 2d 170 (1977).

Any analysis of duty requires an understanding of the contextual relationship between the parties and the foreseeability of harm.<sup>19</sup> The relationship and inherent power differential as between educators and their students demand a duty be imposed upon schools to compel them to act reasonably to protect those minor students from the foreseeable sexual harassment that has been known to plague such institutions.

Blindly applying employment law theories in the educational context, ignores the unique vulnerabilities of children and schools' authority over, and responsibility to students when they assume traditional parental functions. "[W]here a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent." *Ferguson*, 82 Mich at 365. If employers owe a duty to their adult employees to protect them from sexual harassment, schools should owe at least an equal duty to the students in their care. Authority without responsibility, at best, begets indifference and, at worst, abuse of those least able to protect themselves.

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<sup>19</sup> *Supra* n. 17.

**III. THIS COURT SHOULD ADOPT A CONSTRUCTIVE NOTICE LIABILITY STANDARD FOR STUDENT-ON-STUDENT HOSTILE ENVIRONMENT CLAIMS UNDER THE ELCRA AND SHOULD FIND THAT THE ALPENA SCHOOL DISTRICT MAY BE LIABLE UNDER THAT STANDARD.**

Congress enacted Title IX, 20 USC §1681, *et seq*, with two objectives in mind: to avoid the use of federal funds to support discriminatory practices in educational programs, and to provide individuals protection against those practices. See *Cannon v University of Chicago*, 441 US 677, 704 (1979). Though student-on-student sexual harassment is covered under Title IX, courts have manufactured a notice standard for liability that is so high that for most students the promise of a remedy is out of reach. Adopting a different notice standard for ELCRA claims will help restore the promise of educational equality.

**A. Adopting Title IX's Liability Standard Would Be Contrary to the Objectives of the ELCRA.**

In the fifty years since its passed, Title IX has barely moved the needle on overall rates of school-based sexual violence. This suggests that the liability standard is far too deferential to educational institutions such that they are unmotivated to make significant change.

Since it first recognized student-on-student sexual harassment as a form of discrimination under Title IX in *Franklin v Gwinnet County School Board*, 503 US 60 (1992), the U.S. Supreme Court has significantly narrowed the circumstances in which victims of sexual harassment can pursue a private cause of action. See *Davis ex rel LaShonda D v Monroe Co Bd of Ed*, 526 US 629, 650; 119 S Ct 1661; 143 L Ed 2d 839 (1999); *Gebser v Lago Vista Indep Sch Dist*, 524 US 274, 277 (1998). To hold a school liable under Title IX a victim must prove that an "appropriate person" had "actual knowledge" of the sex-based

harassment, which was severe and pervasive, and that the school responded with deliberate indifference. *Id.*

The actual knowledge standard is a key element of Title IX's failure to prevent and remedy school-based sexual violence. Rather than require schools to proactively assess the risk of harassment amongst students, this restrictive standard of liability removes the school's incentive to adopt and implement effective prevention policies that would avoid such harm. In fact, the actual notice standard encourages schools to turn a blind eye to acts of discrimination or even actively avoid learning about such behavior because the less knowledge it has the more likely it will be protected from liability.<sup>20</sup>

Even after decades of evolution, courts still analyze Title IX claims by focusing on how schools respond to reports of sexual harassment, essentially requiring that students be harmed before schools take any accountability. Schools need not take affirmative steps to reduce the problem but are free to quietly facilitate the spread of discriminatory harassment.

It also creates a standard for Title IX sexual harassment claims that are more burdensome than standards applicable to workplace sexual harassment under Title VII.

**B. Adopting a Constructive Notice Standard Is Essential to Achieving the ELCRA's Objectives.**

To deliver the ELCRA's promise of access to education without discrimination, preventing sexual harassment is as important as responding to it when it occurs. Adopting a constructive notice standard which draws upon similar agency principles

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<sup>20</sup> *Supra* n.17.

established under Title VII would give the ELCRA the teeth it needs to compel educational institutions to undertake considerable preventative measures.

More precisely, a “knew or should have known” standard forces schools to consider the foreseeability of harassment. That risk analysis is essential to incentivizing schools to proactively address sexual harassment by shifting the inquiry from whether the school responded to each individual incident to whether the school is creating and maintaining a safe learning environment for all students by making it clear that sexual harassment will not be tolerated.

By distinguishing the ELCRA from Title IX in this way, this Court can ensure accountability for schools that fail to implement effective policies and procedures to prevent sexual harassment in their hallways and classrooms. Similarly, the constructive notice standard will restore students’ right to a remedy where the actual notice standard has fallen short.

**C. Institutional Accountability Is Necessary to Uphold the ELCRA’s Promise of Educational Equality.**

For victims of sexual harassment, acknowledgement of the wrongdoing by culpable parties is an essential part of their recovery. But history has proven that institutions cannot be trusted to self-police particularly when there are strong financial and reputational interests that favor sweeping harassment under the rug. Without fear of liability, educational institutions have considered enacting new policies and procedures costly, whereas there is little to no cost felt by the institution when a student is victimized by a peer. Creating a foundation of accountability under the ELCRA will change the cost-

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benefit analysis for the benefit of the victims by making indifference economically burdensome.

Civil accountability not only provides justice for victims of the past but is also an opportunity to prevent future harm. While an individual perpetrator's bad acts should be condemned, courts have historically limited fault to the perpetrator while underplaying the contribution of the institutions and public entities actions (or omissions) that facilitated the abuse. As a result, these institutions were able to perpetuate their false narratives of powerlessness over individual perpetrators to avoid civil liability. Not only does this strategic denial result in failures to intervene in the face of known sexual harassment, it also affirmatively creates conditions that tend to embolden this form of discriminatory behavior.<sup>21</sup>

Civil liability is an effective, meaningful method of acknowledging systemic failures, reaffirming institutions' ongoing duty to prevent similar harm in the future, and, most importantly, it sends a clear message that our society will not tolerate it when schools turn a blind eye to the sexual harassment of children in their care.

### **CONCLUSION**

For the reasons explained above, this Court should find that unaddressed student-on-student sexual harassment is cognizable under the ELCRA as a form of unlawful discrimination and should apply a modified hostile workplace scheme that includes an

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<sup>21</sup> *Supra* n. 17.

element of in *loco parentis* under which the Alpena School District may be held liable and should reverse and remand for further proceedings.

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT**

This brief contains 4,245 words in the sections covered by MCR 7.212(C)(6)-(8).

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, I electronically filed the foregoing using the TrueFiling/MiFile System, which will send notification of this filing to all registered Counsel of record.

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