VIRGINIA COMMONWEALTH UNIVERSITY
VCU Make it real.

THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE
CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

APRIL 2012 : Vol. 10-4

STUDENT-ON-STUDENT PEER SEXUAL HARASSMENT: TITLE IX AND THE DELIBERATE INDIFFERENCE STANDARD

Overview

Title IX, Education Amendments of 1972, 20 U.S.C 1681(a) mandates in pertinent part that "[n]o person in the United States shall, on the bases of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal assistance…." When Title IX first came on the scene attention was primarily focused on issues of gender equity in athletic programs and extra-curricular activities. Over three-plus decades, however, court decisions have expanded the scope and coverage of Title IX to other areas of school system operation (e.g., employment, sexual harassment)—having a profound impact on both local school board policy makers and school administrators.

Student-on-Student Peer Sexual Harassment. Past issues in this commentary series were devoted to policy implications of Title IX as a source of remedy in situations involving student-on-student peer sexual harassment. (Vacca, *CEPI Education Law Newsletter*, vols. 7 and 8, 2009, 2010) The sum and substance of these commentary discussions can be briefly summarized in the following statements:

- Incidents of student-on-student peer sexual harassment have grown in number in public school systems across this country.
- With few exceptions a clear, narrowly characterized, specific, and readily acceptable definition of "student-on-student peer sexual harassment" (different from teasing, name calling, taunting, bullying) has not been established.
- While a number of court decisions on point have been handed down, the extent and scope of responsibility of school officials to protect students from unwanted, unwelcome, and sexually harassing acts of other students remains unclear and ripe for litigation.
- Judges consistently show judicial restraint (refuse to "second guess" school officials) in reviewing the day-to-day decisions made by local school officials—especially those involving student discipline.
- Title IX, Education Amendments of 1972, 20 U.S.C. 1681, *et seq*., (often coupled with other statutes and case law) has been relied on as a key source of remedy in student-on-student peer sexual harassment cases.

- Title IX does not preclude a Section 1983 action.
- A claim of monetary damages is possible as remedy under Title IX.
- To establish liability a complaining party in a Title IX law suit carries the burden to demonstrate that the sexual harassment she/he suffered at the hands of another student or students was unwelcome and "so severe, pervasive, and objectively offensive" that it deprived, or in some way excluded (*i.e.*, effectively denied equal access to) her/him from the educational resources, opportunities, and benefits provided to all students (including students covered by special education law).
- To be successful in court plaintiff must also demonstrate by clear evidence that: (1) the specific acts of peer sexual harassment occurred in situations under the direct control of school officials; (2) school officials had *actual knowledge* of the harassment but were "deliberately indifferent to the behavior;" *i.e.*, school officials knew (had *actual knowledge* of) but did not take reasonable and adequate steps (including efforts to *investigate*) to remedy the situation; and (3) a causal relationship exists between the *deliberate indifference* (different from mere carelessness, or simple negligence) of school officials and the injury actually suffered by the student victim plaintiff.

Case Law

More than twenty years ago the United States Supreme Court held, in a non-school case, that the Fourteenth Amendment does not protect the life, liberty, or property of citizens against invasion by private actors (in this case state governmental agents) unless a "special Relationship" exists between the private actor and the victim. DeShanney v. Winnebago Department of Public Services (1989) Subsequently, the *special relationship standard* was applied in public school cases.

In 1992, the United States Supreme Court held in a teacher-on-student sexual harassment case that damages were available under Title IX. Franklin v. Gwinnett County Public Schools (1992). Two years later the United States Court of Appeals for the Fifth Circuit added the notion of *deliberate indifference* to the liability analysis and offered the following definition as applied in a public school context: "where a school official knows about, or willfully avoids knowing about, the possibility of serious harm to a student, fails to take appropriate action, and the student is harmed. Walton v. Alexander (5th Cir. 1994) However, that same year the Fifth Circuit made it clear that public school officials are not absolved of liability for student injury simply because a special relationship does not exist—especially in situations where they knew of but failed to do anything to protect students where "dangerously aggressive and disruptive" students are present. Doe v. Taylor (5th Cir. 1994) See also, Doe v. Petaluma City School District (N.D. Cal. 1996), and Doe v. Oyster River (D.N.H. 1997)

The Davis Decision. More than a decade ago, the United States Supreme Court handed down its seminal Title IX student-on-student peer sexual harassment decision. In Davis v. Monroe County Board of Education (1999), by a vote of 5-to-4, the high court held that public school officials may be held liable in student-on-student peer sexual harassment situations "where the harassment is so severe and pervasive that it limits the student victim's ability to learn; where school officials know of the harassment; where school officials show deliberate indifference to the matter; and where school officials fail to take reasonable steps to remedy the situation." The Davis "deliberate indifference" standard of analysis became the tool consistently applied by subsequent courts. See, e.g., Patterson v. Hudson Area Schools (6th Cir. 2009) However, whether or not the *responsibility* of contemporary school officials and administrators to protect students from harm caused by other students grows to a *duty* to protect should not be generalized. It must be determined on a case-by-case basis. (Vacca and Bosher, 2012)

Pahssen v. Merrill Community School District (2012)

Recently, I came across an excellent case on point from the United States Court of Appeals for the Sixth Circuit. The appellate court's rationale and decision in Pahssen v. Merrill Community School District, et al. (2012) offers a comprehensive restatement of the law regarding Title IX and student-on-student peer sexual harassment and, at the same time, contains implications for local school system policy. Briefly summarized the facts are these.

Facts. The mother of a middle school female student filed suit (as next friend and mother) in federal court district (Eastern District of Michigan) on behalf of her daughter (initially against two schools), school board members, superintendent of schools, and a high school principal alleging violations of Title IX, the equal protection and due process clauses of the Fifth and Fourteenth Amendments, and 42 U.S.C. 1983 and 42 U.S.C. 1985.

In her law suit plaintiff claimed that her eighth grade daughter had been sexually harassed, physically assaulted, and ultimately raped by a male, ninth grade, special education (had an IEP) high school student—a student with a lengthy record of disciplinary problems including several allegations of sexual harassment and assault, police arrests, and transfers from one school to another. In this case, when the actual assaults were perpetrated, the middle and high school students were enrolled in schools that occupied different wings of the same building.

Plaintiff's allegations were based on three separate incidents. First, she claimed that the male student shoved her daughter into a locker—an incident witnessed by a science teacher/basketball coach. In the second incident it was alleged that the male student told plaintiff's daughter that "if she wanted to hang out with him anymore, she would have to" perform oral sex on him. Third, plaintiff asserted that during a basketball game the male student made "obscene gestures" toward her daughter, in plain view of the crowd which included students, teachers, and administrators—her daughter was playing in the game. After the game the girl's step father told the male student to stay away from his daughter. The male student responded by assuming an aggressive posture and used profane language. Other parents and school staff defused the situation. After the basketball game incident the female student's step father wrote a letter to school administrators describing the situation. He concluded the letter with the following statement: "I believe [John] is a volcano waiting to erupt and when he does someone will be hurt, student or staff."

Subsequently, the male student's IEP team met and created a plan requiring the male student to be under constant adult supervision while he was at school for thirty days. The plan specified that the team would reconvene to discuss the plan and discuss possible adjustments, as needed. No further acts of harassment were committed during the 30-day period or the seven weeks after the supervision period expired. However, on December 20, 2007, shortly after the school day ended, the male student sexually assaulted the plaintiff's daughter on school grounds. On January 16, 2008, the school superintendent recommended to the school board that the male student be expelled. The board approved the expulsion on January 30, 2008.

District Court Decision. Defendants moved the court to dismiss the complaint or, in the alternative, grant summary judgment. Initially the court granted defendant's motion in part, and dismissing all claims against certain defendants. Following a series of amended complaints, the district court granted summary judgment in favor of the defendants on all counts. Plaintiff appealed the decision. It is interesting to note that the United States Department of Justice Civil Rights Division filed an *amicus curiae* in support of the appellant urging the court to reverse the district court's denial of the Title IX claim. Pahssen v. Merrill Community School District, et al. (E.D. Mich. 2009)

Sixth Circuit Court Rationale and Decision. As mentioned above, the male perpetrator in this case had a lengthy disciplinary history, including several allegations of sexual harassment and assault, prior to his contact with the victim. While for the first few months of the 2004-2005 school year the perpetrator attended the school where the incidents with the victim occurred, he attended another school (where the aforementioned problems continued) from February 2005 until the end of the 2005-2006 school year. When he left the other school in May 2006, he was suspended "pending board action." That school agreed not to expel him and to "purge" disciplinary records in exchange for his withdrawal from the school district. He then transferred back to and was allowed to reenroll in the first school (where his contact with the victim began) for the 2006-2007 school year.

Relying mainly on the Davis (1999) *deliberate indifference* criteria, the appellate court emphasized that an individual bringing a Title IX claim is in court as an individual and not part of a class. She as an individual party cannot use incidents involving third party victims (i.e., victims other than the one in this case), and incidents at another school, as evidence that she was deprived of access to educational opportunities and benefits. Plaintiffs in such cases must assert their own legal rights and interests and show that actions of the school where the incidents occurred deprived her/him of access to the school's educational opportunities and benefits. Moreover, school officials must have *actual knowledge* of a student's prior conduct. Citing the district court's opinion the appellate court emphasized that a school district has no control over conduct that occurs at another school in another school district or off school grounds.

The court saw the response of school officials (including the IEP deliberations and adjusted plan), as being prompt, reasonable, and not deliberately indifferent. Also, the court cited the fact that Child Protective Services was informed of the student perpetrator's expulsion from school due to "criminal sexual conduct," four days after the board approved the expulsion.

The appellate court rejected appellant's assertion that the "special relationship' and "state created danger" exceptions applied in this case—and, as such, affirmed the district court's dismissal of appellant's due process claim under Section 1983. Regarding appellant's Section 1985 conspiracy claim the court emphasized that it must be shown that school officials, as accused conspirators, entered a conspiracy "for purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." In this case appellant failed to establish a discriminatory animus toward her to deprive her of her civil rights.

Final Decision: The judgment of the district court is affirmed.

Policy Implications

The facts of the Pahssen (6th Cir. 2012) case describe and demonstrate the possibility of a very disturbing situation—one that should not be present in any public school system in this country. As we know, in addition to the hurt suffered by victims, student violent acts against peers (both male and female) undermine and destroy the very core of the school environment where the safety and security of students and staff are foundations upon which effective teaching and learning rest.

At the same time the Sixth Circuit's rationale in Pahssen demonstrates the heavy burden carried by those who go into court on behalf of victims—where the key elements in the court's rationale likely involve application of the Davis (1999) criteria—namely, that: (1) the harassment was so severe and pervasive that it limited the victim's ability to learn; (2) school officials had actual knowledge of the harassment; and (3) school officials failed to take reasonable steps to remedy the situation. Added to the Davis criteria is the Title IX requirement that evidence of harassment of third parties by the perpetrator is not a basis upon which a victim can base

her/his claim that she/he was excluded from participation in; or denied the benefits of, or subjected to discrimination by the actions or inactions of school officials.

In today's public school systems it behooves local school board policies to make it clear that:

- The Board does not tolerate any acts of discrimination and/or harassment (including, but not limited to, name calling, taunting, bullying, physical contact) perpetrated by students on their peers, while on school property (including, but not limited to, school bus stops and school buses), and/or while in attendance at school sponsored and/or school sanctioned activities and events.
- School staff members are required to report all acts of suspected student-on-student peer discrimination and/or harassment to their building level administrator.
- All reported acts shall be immediately investigated by building level administrators and where verified immediate and appropriate disciplinary action shall be taken as specified in the school system's *Student Code of Conduct*.
- Parents (of both victim and perpetrator) will be immediately notified and involved where such conduct is verified.
- Local police and/or other appropriate community agencies (e.g., social welfare, child protective services) shall be notified and involved in situations where the facts uncovered in an administrative investigation require such notification and involvement.

References Cited

Civil Rights Act of 1872, 42 U.S.C. 1983 and 1985

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)

DeShanney v. Winnebago Dept. of Social Services, 489 U.S. 189 (1989)

Doe v. Oyster River, 992 F.Supp.2d 467 (D.N.H. 1997)

Doe v. Pataluma City School District, 949 F.Supp.2d 1515 (N.D. Cal. 1996)

Doe v. Taylor, 15 F.3d 443 (5th Cir. 1994)

Education Amendments of 1972, Title IX, 20 U.S.C. 1681, et seq.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)

Pahssen v. Merrill Community School District, et al., 2009 U.S. Dist. LEXIS 30246 (E.D. Mich. 2009)

Pahssen v. Merrill Community School District, et al., 668 F.3d 356 (6th Cir. 2012)

Patterson v. Hudson Area Schools, 551 F.3d 438, (6th Cir, 2009), cert. denied, 130 S.Ct. 299 (2009)

Vacca, Richard S., CEPI Education Law Newsletter, vol. 7 and 8 (2009, 2010)

Vacca, Richard S. Vacca, and Bosher, William, C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Eighth Edition (LexisNexis, 2012)

Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.