



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

FEBRUARY 2009: Vol. 7-6

STUDENT-PEER SEXUAL HARASSMENT 2009: THE FITZGERALD CASE

Overview

Over the past decade sexual harassment of students by other students has become a problem in public school systems across this country. While over the past two decades there have been a number of lower court decisions on point, the extent of the duty to protect students from student-peer sexual harassment (*i.e.*, sexual harassment of students by other students) still remains ripe for litigation. The confounding variable to deal with in such cases is best expressed in the following question: How can acts of student-peer sexual harassment be shown as different from student teasing, name calling, bullying, and immature physical horse play? In other words a clear and concise definition of student-peer sexual harassment does not exist. It therefore follows that court cases are decided from state-to-state on a case-by-case basis mainly because of the unique nature of each situation (*i.e.*, specific facts and circumstances).

Title IX and Remedy for Student-Peer Sexual Harassment. As legal experts tell us, “Title IX ...was enacted to rid educational institutions of sex discrimination.” Alexander and Alexander (2008). And, “[s]tudents aggrieved by peer sexual harassment generally seek redress under Title IX of the Education Amendments of 1972...” Ford (2005) More specifically, these same experts remind us that the United States Supreme Court first applied Title IX (20 U.S.C. 1681 , *et seq.* 1972) to situations of sex discrimination in educational institutions in Cannon v. University of Chicago (1979). Ford (2005) It must be noted, however, that lower courts often have refused to expand the scope of the statute by consistently ruling that Congress did not intend any implied rights under the remedy specific Title IX. Vacca and Boshier (2008)

Section 1983 and Civil Rights Torts. For many years, the Civil Rights Act of 1871 was largely ignored as a source of remedy. Intended to implement the guarantees of the Fourteenth Amendment, and Codified at 42 U.S.C. Sec. 1983 (hereafter referred to as Section 1983), it was not until 1991 that the provisions of the Act (directed at acts of misconduct and abuse by state officials) were made applicable to local public school officials and administrators. Vacca and Hudgins (1982)

While Section 1983 does not provide substantive rights it is, however, a flexible and broad based statute and serves as a viable source of remedy for violations of federally protected rights. It must be stressed that a

A Commonwealth Educational Policy Institute Publication - Copyright © CEPI 2009

CEPI grants permission to reproduce this paper for noncommercial purposes providing CEPI is credited.

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

possibility exists that some Section 1983 actions may come into a federal court after originating in a state court. Vacca and Hudgins (1982) However, to successfully sustain a Section 1983 suit, the complaining party bears the burden of proof to demonstrate that an individual or individuals (person, or persons, or entity) was carrying out state authority when the alleged civil rights violations took place. In recent years, 42 U.S.C. 1983 (often referred to as a civil rights tort action) has given rise to an increasing number of both employee and student litigation—including student-peer sexual harassment cases.

Special Relationship Requirement. The United States Supreme Court made it clear in DeShaney v. Winnebago Department of Social Services (1989), that nothing in the Fourteenth Amendment requires a state to protect the life, liberty, or property of citizens against invasion by private actors, unless a “special relationship” exists between a state agency and a citizen. Over the past twenty years courts have applied the DeShaney rule to public school cases and consistently held that neither the state’s compulsory attendance statute nor its child abuse statute alone create a *special relationship* giving rise to a special duty. B.M.H. v. School Board (E.D.Va. 1993) However, where a special relationship does exist public school officials have an affirmative duty, governed by the foreseeability standard, to take reasonable steps to protect the safety and well being of students.

Deliberate Indifference Standard. In the mid-1990’s things began to change regarding strict application of both the DeShaney rule and the *special relationship requirement* to potential liability of school officials for student-peer sexual harassment A new standard emerged in judicial analysis. In fixing liability of school officials for student injury, courts began to differentiate between harmful acts of one student on another student that were the result of “mere negligence” and “carelessness” on the part of school officials, and harmful acts of one student on another student where the proximate cause was the “deliberate indifference” of school officials. Liability attaches where *deliberate indifference* exists. Walton v. Alexander (5th Cir. 1994) and Yap v. Oceanside Union Free School District (E.D.N.Y. 2004)

Often characterized in the literature by such terms as callous disregard, or callous indifference, or gross negligence, the concept of “deliberate indifference” was clarified by the Fifth Circuit Court in Doe v. Taylor (5th Cir. 1994) when it opined that school officials may be held liable “if nothing is done to prevent or correct a situation where dangerously aggressive and disruptive behavior exists.” Deliberate indifference was further refined by subsequent courts in situations where it was shown that school officials either knew (had actual knowledge) or should have known of a situation but failed to take prompt and appropriate action to correct the situation. Court decisions also expanded the judicial analysis and held that school officials may be liable for student-peer sexual harassment if (1) a special relationship or duty existed to protect students from harm by private persons, (2) the harassment was severe and pervasive, and (3) school officials knew or should have known of the situation but failed to correct the problem. Doe v. Petaluma City School District (N.D. Cal. 1996) and Doe v. Oyster River (D.N.H. 1997)

Davis v. Monroe County Board of Education (1999). The United States Supreme Court’s first decision involving student-peer sexual harassment was Davis v. Monroe County Board of Education (1999). In the Davis case Title IX, Section 1983, and the deliberate indifference standard came together and served as the basis for the mother of a fifth grade, female student seeking remedy in a federal district court. In her prayer for relief she alleged that her daughter suffered emotional distress due to sexual battery committed at school by a male student. The mother charged that the school board did not have a student-against-student harassment policy and school officials failed to do anything to mitigate her daughter’s harassment situation. The trial court dismissed the suit and the mother appealed to the Eleventh Circuit where the Court rejected her arguments. Acknowledging that school officials were on notice of the situation the Court nevertheless opined that to hold

school officials directly liable for the wrong doing of a student (private person) is to argue for an extension of liability under Title IX not intended by Congress. Davis v. Monroe (11th Cir. 1996)

In 1999, however, the United States Supreme Court reversed and remanded the Davis decision. In doing so the majority set a standard in place for future courts to apply when deciding student-peer sexual harassment cases. School officials may be liable where: (1) the harassment was so severe and pervasive that it limited the student victim's ability to learn, (2) school officials knew of the harassment, (3) school officials showed a deliberate indifference to the matter, and (4) school officials failed to take reasonable steps to remedy the situation. The Court also said in summary that school officials may be liable for student (peer) harassment where they are "deliberately indifferent to known acts of student-on-student sexual harassment..., and where the student harasser is under the school's disciplinary authority." Davis v. Monroe County Board of Education (1999) Suffice it to say, the four-pronged Davis standard has been consistently applied over the past decade.

Fitzgerald v. Barnstable School Committee, et al. (2009): The Supreme Court Speaks

On January 21, 2009, the United States Supreme Court handed down another decision involving with student-peer sexual harassment. The specific issue in the case, Fitzgerald v. Barnstable School Committee, et al. (2009), asks: Does Title IX of the Education Amendments of 1972 preclude an action under Section 1983 in a case where unconstitutional gender discrimination is alleged? Even though the decision rests on a very narrow and technical question, one can learn much and glean suggestions for local school board policy from the facts of the case.

The Facts: During the 2000-2001 school year petitioners' daughter was a kindergarten student in a public school. One day she told her parents that whenever she wore a dress to school a third grade male student on the school bus would bully her into lifting up her dress. Her mother immediately called the school principal and arranged a meeting that day. Her daughter and another school official also were present at the meeting. Subsequently the bully was questioned and he denied the allegations. Other students who rode the same bus were questioned, but the incidents could not be corroborated.

The daughter later provided more details of alleged abuse to her parents and they in turn informed the principal. This time in her story she reported that in addition to his bullying her to lift up her dress the boy coerced her into pulling down her panties and spreading her legs. A second meeting with the principal was held where the new details were shared with him. Once again the boy and other students were questioned.

An independent investigation was conducted by the local police. The police concluded that there was insufficient evidence to bring criminal charges against the boy. Based partly on the results of the police investigation and the school's own investigation the principal concluded that there was insufficient evidence to warrant disciplinary action against the boy.

Subsequently the principal proposed to parents that steps be taken to remedy the situation. For example, he suggested that they transfer their daughter to ride a different school bus or if she remained on the same bus he would see to it that empty seats would be created between the older students and the kindergarteners. The parents turned down the suggestions. In their view their daughter was being punished and not the boy. They counter suggested that the boy be transferred to a different school bus or that a monitor be stationed on their daughter's bus.

Ultimately the parents drove their daughter to school to avoid bullying. However, their daughter continued to report unsettling incidents occurring at school. The parents reported the new incidents to the principal. Their daughter had an unusual number of absences during the remainder of the school year.

United States District Court Action: In April of 2000, parents filed suit in a federal district court. In addition to state law claims, parents sought remedy under Title IX and 42 U.S.C. for violations of their daughter's Fourteenth Amendment equal protection guarantee. Specifically, parents alleged that the failure of school officials to respond to the sexual harassment of their daughter (by an older male student) was inadequate. School officials filed a motion to dismiss which the district court granted as to the state law and Section 1983 claims. School officials also filed a motion for summary judgment which the district court granted. Impressed with the administrative investigations conducted in response to parental complaints, the district court did not find any evidence of deliberate indifference on the part of school officials. Hunter v. Barnstable School Committee (D.Mass. 2006) Parents appealed.

United States Court of Appeals for the First Circuit: On appeal the First Circuit affirmed the lower court's decision. Under Supreme Court precedents, said the appellate court, Title IX's implied right of private action was sufficiently comprehensive to preclude the use of Section 1983 to advance constitutional claims. Fitzgerald v. Barnstable School Committee, et al. (1st Cir. 2007) The United States Supreme Court granted *certiorari*, at 533 U.S. _ (2008).

United States Supreme Court Decision: The narrow, technical issue before the Supreme Court was as follows: In a case of student peer-on-peer sexual harassment does Title IX preclude a Section 1983 action alleging unconstitutional gender discrimination? Citing Smith v. Robinson (1984) and other cases on point, the Court opined that Section 1983 would only be precluded where a subsequent statute was intended by Congress to be the "exclusive avenue for remedy." "In light of the divergent coverage of Title IX and the Equal Protection Clause," said the Court, "it must be concluded that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools or as a substitute for Section 1983 suits as a means for enforcing constitutional rights." Fitzgerald (2009) Citing Cannon v. University of Chicago (1979) and Franklin v. Gwinnett (1992), the high court made it clear that while Title IX does not contain an expressed right of private action it does contain an implied right of private action for which both injunctive relief and damages..

Supreme Court Decision: In a unanimous decision written by Justice Alito, the Supreme Court held that that Title IX does not preclude relief under Section 1983. The Court characterized both Section 1983 and Equal Protection Clause claims as parallel and concurrent sources of remedy along with the full range of remedies available under Title IX. What is more, said the Court, these actions "may be brought against individuals as well as state entities." Fitzgerald (2009)

Policy Implications

The United States Supreme Court made it clear in Fitzgerald (2009) that both public school systems and individual school officials may be taken to court where student-on-student sexual harassment situations have occurred in their schools. The Court also made it very clear in Fitzgerald (2009) that parents who allege that that their child is the victim of sexual harassment by other students have access to multiple sources of both injunctive relief and remedy in the form of damages.

Because the issue before the Court was narrow and technical (Title IX), what is not specifically addressed in Fitzgerald (2009) relates to the facts of the case and importance of the immediate responses of the school

principal to parental concerns on behalf of their daughter. Nor does the Court comment on the follow-up investigative steps taken by school administrators. In my view the facts speak for themselves. As the lower courts had determined, plaintiff parents could not demonstrate by sufficient evidence that school officials were deliberately indifferent to their daughter's harassment allegations.

The suggestions that follow are intended for consideration by local school boards as policies dealing with student-peer sexual harassment are drafted. These suggestions have been gleaned from the facts and court opinions in the Fitzgerald (2009) case.

School board policies must make it clear that:

- Acts of student-peer sexual harassment shall not be tolerated on school property, on school buses, and at school sponsored and/or school sanctioned activities.
- All school system personnel (both professional and support personnel) are to immediately report situations of suspected student-peer sexual harassment to the principal of the school where the suspected harassment offenses have occurred and/or where the students involved are enrolled.
- School principals are responsible for immediately contacting the parents of all students involved and promptly launch an administrative investigation into the situation.
- All reports of and investigations into suspected student-peer sexual harassment are confidential.
- Where student-peer harassment is established the school principal shall immediately contact parents of the students involved.
- The perpetrator student shall be promptly disciplined according to appropriate disciplinary options specified in the school system's Student Code of Conduct.
- School counselors, school psychologists, and school social workers shall make themselves available on request to the student victim and her/his parents.

References Cited

Alexander, Kern, and Alexander, M. David, AMERICAN PUBLIC SCHOOL LAW, Seventh Edition (Thompson-West 2009)

B.M.H. v. School Board, 833 F.Supp.560 (E.D.Va. 1993)

Cannon v. University of Chicago, 441 U.S. 667 (1979)

Civil Rights Act of 1871, 42 U.S.C. 1983

Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996)

Davis v. Monroe County Board of Education, 119 S.Ct. 1661 (1999)

DeShaney v. Winnebago Department of Social Services, 489 U.S. 189 (1989)

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

Doe v. Petaluma City School District, 949 F.Supp.1415 (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.

Fitzgerald v. Barnstable School Committee, et al., 504 F.3d 165 (1st Cir. 2007), cert. granted, 553 U.S._ (2008)

Fitzgerald v. Barnstable School Committee, et al., 555 U.S._ (2009)

Ford, Aaron D., "Student-to-Student Sexual Harassment." In Lane, Kenneth E., et al., THE PRINCIPAL'S LEGAL HANDBOOK, 3rd Edition (ELA 2005)

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

Hunter v. Barnstable School Committee, et al., 456 F.Supp.2d 255 (D.Mass. 2006)

Smith v. Robinson, 468 U.S. 992 (1984)

Vacca, Richard S., and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Seventh Edition (LexisNexis 2008)

Vacca, Richard S., and Hudgins, H.C., Jr., LIABILITY OF SCHOOL OFFICIALS AND ADMINISTRATORS FOR CIVIL RIGHTS TORTS (Michie Company 1982)

Walton v. Alexander, 20 F.3d 1350 (5th Cir. 1994)

Yap v. Oceanside Union School District, 303 F.Supp.2d 284 (E.D.N.Y. 2004)

Richard S. Vacca
Senior Fellow CEPI

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