

# Schools: Safe Havens no More

By:

**Edward F. Dragan, Ed.D. M.E.L., C.M.C.**

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Major education cases highlight need for expert analysis

The U.S. Supreme Court has recently decided three major education cases, which will most likely generate more interest in pursuing legal action against schools and motivate defense strategies among boards of education.

In the first case, *Gebser v. Lago Vista Independent School*, 524 U.S. 274 (1998), a high school student had a sexual relationship with one of her teachers. Although the school principal had received complaints from the parents of several students that the teacher had made inappropriate comments during class, the student in *Gebser* did not report the relationship with the teacher to school officials. After the couple was discovered having sex, the teacher was arrested and the school district terminated his employment. During this time, the district had not distributed either an official grievance procedure for recording sexual harassment complaints or a formal anti-harassment policy.

The student and her mother sued the district, raising claims under Title IX of the Education Amendments of 1972 and other statutes. The supreme court stated that it would not hold a school district liable in damages for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.

The second case, *Davis v. Monroe Board of Education*, 526 U.S. \_\_\_, \_\_\_, 119 S. Ct. 1661 (1999), involved a then-fifth grade student and the alleged harassment she endured at the hands of her classmates. Specifically, the allegations against the classmate included attempting to touch her on the breast and vaginal areas, directing vulgarities at the student, and behaving in a sexually suggestive manner toward her. The complaint described several separate instances of sexual harassment, occurring an average of once every 22 days over a six-month period. The incidents were reported to this student's teachers and building principal. Although the perpetrator was threatened with disciplinary action, he persisted with his unwelcome advances until he was charged and prosecuted for sexual battery.

The student's mother brought suit on her daughter's behalf against the school board, the teachers involved and the building principal. The complaint alleged

that the "deliberate indifference" shown by the school board and its employees to the unwelcome sexual advances of the other student created an intimidating, hostile, offensive and abusive school environment in the violation of Title IX.

The 11th Circuit Court of Appeals held that the plaintiff failed to state a claim under Title IX, finding that "Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX." The supreme court, however, reversed the court of appeals and held that schools can be sued, in some cases, where one student sexually harasses another and the school does nothing or little to stop the harassment.

The third landmark ruling involved services for students with disabilities. In *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1999), the court addressed whether the Disability Act's definition of "related services" required the school district to provide a disabled student with one-on-one nursing care during school hours. Specifically, G.F. is paralyzed from the neck down and requires continuous one-on-one care, including assistance with a urinary bladder catheter and the suctioning of a tracheotomy tube. His care provider must be familiar with the systems that he uses but does not need to be a physician.

The Cedar Rapids Community School District argued that providing the requested services would place an undue financial burden on it, as they would have to employ a full-time nurse to care for just one student. The court rejected the district's cost-based approach and held that students with disabilities who require special care during the school day are entitled to that care at public expense.

### **More disputes in the making**

The rising number of fatal accidents, hate crimes, sexual molestations, beatings, shootings and other unthinkable incidents in our schools today unequivocally demonstrates that educational institutions unfortunately are no longer the safe havens they once were. As society analyzes the causes of such tragedies and develops plans to prevent future occurrences, the issues of proximate cause and blame are naturally addressed.

The requirement of boards of education to provide a free appropriate education for students with disabilities often causes a face-off between parents and school officials. Providing programs and services for the most disabled students

presents unique challenges to schools and issues of responsibility are often determined in court.

Who is to blame when a New York City girl is killed when the drawstring of her jacket catches on a school bus handrail? Should a Florida teacher face suspension for allegedly showing his class how to make a pipe bomb and where to place it for maximum injuries and damage to the school? Was a Florida school administrator overreacting when he recommended the expulsion of a 15-year-old girl for taking a nailclipper with a two-inch knife to school? How should a school district provide for the education of an 11-year-old with Tourette's Syndrome after he threatened a classmate and pushed a table at his principal? Is it reasonable for an Ohio school to suspend a nine-year-old boy for writing a threatening fortune cookie message? Who is to blame when a 12-year-old learning-disabled girl was sexually assaulted by nine classmates and was raped after she transferred to a new school?

The resolutions to these and hundreds of similar cases nationwide are not so simple. The settlement of resulting legal battles often depends on the findings of a trained education expert who offers objective analysis of the situations in question.

Negligence and disability-related lawsuits have risen considerably. Recent studies indicate that, in a school district with approximately 6,000 students, there will be an average of one student-initiated lawsuit per year.

Implementing federal and state statutes and regulations within the school system is not always smooth. The culture of schools, how they work, the delivery of the curriculum, the reaction of teachers to pupils with disabilities, the accountability issues relating to supervision, and new teaching methodologies all establish how the laws and regulations must be understood. In many instances, the understanding and impartial investigation of issues may necessitate the use of a consulting education expert who is familiar through knowledge, experience, training, and education with schools and the administrative enforcement of the laws and regulations in that environment.

### The expert's role

The education expert, as a provider of litigation support, is one of the most important tools a lawyer can use in the dispute resolution process. Consultants use their expertise to help clients narrow the gap between what they now have or know, and what they want or need to know.

An education expert is not an advocate for one side or the other. Instead, he is an expert in the field in which the litigation is taking place and has the training and ability to effectively act as an impartial authority. The lawyer is the advocate

for the client; the litigation support consultant is an advocate for the principles upon which his opinions are based.

Lawyers need to recognize the need for a consultant early so they can have the greatest impact on the case. Early on, the education expert can assist determining the cause of action, appropriate damages, and whether litigation is warranted. Clients may easily recognize the wisdom of the financial investment in an expert witness and will feel more confident about the outcome of the case.

A lawyer should look for an education expert with a broad background including teaching, supervision, management, curriculum development and program monitoring. An expert with a majority of career activities in one or two areas may not be as credible as one with a broader background. Actual work experience in the field is also more impressive and important than primary experience in the academia. The court is more likely to listen to the real-world opinion of the expert, not the theoretical.

Once an expert is contacted, the lawyer should review the case in detail, share the basic documentation, and ask for an initial reaction. If, after reviewing the issues, the consultant indicates there is no merit, the lawyer should seek advice as to alternative strategies for resolution. If the case seems to have merit, the two should enter into an agreement regarding the case theme. The lawyer and his expert should then review the materials and reports, and discuss a timeframe and fees. The lawyer needs to make it clear on which points the consulting expert may be of assistance. The lawyer should ask the consultant if there are any other points that need to be researched and if additional documents or depositions are needed.

Share the ground rules with the expert. Is the lawyer asking for a report, or just a documentation review with an informal opinion? Perhaps the most important ground rule involves time lines and the case schedule. When will the consulting expert be expected to be deposed and ready for trial? If a report is necessary, when will it be required?

Working together, the qualified education expert and a lawyer can make a formidable team.

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Dr. Edward F. Dragan is the founder and principal consultant for Education Management Consulting, LLC, Lambertville, NJ. He has a doctorate from Rutgers University in Educational Administration and Supervision, a master's

degree in Special Education from The College of New Jersey, and a masters degree in Education Law from Franklin Pierce Law Center. He is also a Certified Management Consultant. He can be contacted at (609) 397-8989 or by visiting his website at [www.edmgt.com](http://www.edmgt.com).