

# Sexual Harassment: Recent Case Law

By:

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

**Condensed from several presentations on the topic.**

## Introduction

National polls indicate that more than 90% of students polled in public schools believe peer-to-peer sexual harassment happens in their schools. 87% of girls polled report having experienced unwanted and unwelcome sexual behavior in school at least once. 77% of boys polled report having experienced unwanted and unwelcome sexual behavior in school at least once.

The United States Supreme Court has turned its attention from sexual harassment in the workplace toward sexual harassment in schools. With this new focus, boards of education and educators are looking to the Court for guidance not only on how to prevent the harassment of students, but also on how to shield themselves from liability. The failure to acknowledge sexual harassment in schools and the traditional tendency to dismiss student conduct simply as “kids being kids” is no longer acceptable and, in fact, may come with a high price tag for local school boards.

To prevent harassment of students and ultimately reduce liability, boards of education must direct prevention efforts not only in instances where school employees may harass students, but also in those instances where students may suffer harassment by fellow students. Boards must also increase awareness that sexual harassment is unlawful, irrespective of the sex of the harasser and victim, or whether they share the same gender.

Two Supreme Court decisions will be discussed that are most important for boards of education to know about and understand in order to provide safe and hostile free environments for their students and to help prevent litigation. These cases are *Gebser v. Lago Vista Independent School District* 118 S. Ct. 1989 (1998) and *Davis v. Monroe County Board of Education* 119 S. Ct. 29 (1998). In *Gebser* the Supreme Court dealt with sexual harassment of students by school employees. In *Davis* the Supreme Court dealt with sexual harassment of students by fellow students. Both of these cases are instructive, set clear boundaries of liability for schools, and provide guidance for the prevention of such harassment.

Title IX of the Education Amendments of 1972 prohibits gender discrimination in federally funded educational programs. (Review the fact that even private schools may accept federal funds that qualify under federally funded educational programs such as milk subsidy and textbooks or equipment.) The U.S. Supreme Court in *Cannon v. University of Chicago* (441 U.S. 677 [1979]) and *Franklin v. Gwinnett County Public Schools*, (502 U.S. 60 [1992]) made it

clear that students could sue their schools for violations of Title IX and possibly obtain money damages. However, the Court did not outline the elements of a cause of action or define the standard of liability that would apply in harassment cases. The Supreme Court, in issuing the *Gebser* and *Davis* decisions, in 1998 and 1999 respectively, resolved several critical questions. This presentation will review the two cases in detail and provide guidance and advise on how to protect students from sexual harassment and how to protect the board of education from liability.

Gebser: Harassment of Students by School Employees

School districts have faced increasing investigative and reporting responsibilities in the area of sexual harassment. However, the Supreme Court has begun to delineate the boundaries of a school district's liability.

In the spring of 1991, when petitioner Alida Star Gebser was an eighth-grade student at a middle school in the Lago Vista Independent School District, she joined a high school book discussion group led by Frank Waldrop, a teacher. During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school in the fall and was assigned to classes taught by Waldrop in both semesters. Waldrop continued to make inappropriate remarks to the students, and he began to direct more of his suggestive comments toward Gebser, including during the substantial amount of time that the two were alone in his classroom. He initiated sexual contact with Gebser in the spring when, while visiting her home ostensibly to give her a book, he kissed and fondled her. The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following school year, and they often had intercourse during class time, although never on school property.

Gebser did not report the relationship to school officials, testifying that while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher. (Discuss the need for clear procedures that are known and understood by students.) In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class. The principal arranged a meeting at which time, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting. He did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator. A couple of months later, in January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista terminated his employment, and subsequently, the Texas Education Agency revoked his teaching license. During this time, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy.

Gebser and her mother filed suit against Lago Vista and Waldrop. After the case eventually came before the Supreme Court, that Court held, in part, that a cause of action against a school district for monetary damages under Title IX would not succeed by reason of a teacher having engaged in a sexual relationship with a student, where the school district lacked actual notice of the teacher's conduct and the school district was not deliberately indifferent thereto. The complaints lodged by other parents charging the teacher with having made inappropriate comments during class were insufficient to alert the principal to the possibility that the teacher was involved in a sexual relationship with a student. Further, upon learning of the relationship, the school district immediately terminated the teacher. Thus, upon receiving notice of the relationship, the district adequately responded to the student's claim. Moreover, the Court found that the district's failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims did not, in itself, constitute actionable discrimination under Title IX.

The Supreme Court held that “a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination...has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.” Liability may be imposed only if the school official is “deliberately indifferent” to the harassment.

Although the student in *Gebser* had alleged that other students had complained to the principal that the teacher had made sexual remarks in class, this evidence was insufficient to satisfy the Court's newly announced standard, and the judgment in favor of the school district was affirmed. The Court reasoned that the teacher's molestation of the plaintiff was not a “plainly obvious consequence” of the principal's alleged failure to discipline the teacher for making sexually inappropriate comments.

*Gebser* provides guidance concerning the liability standard but it did not address the question: what is sexual harassment under Title IX? Because the parties in *Gebser* presumed that the teacher's conduct constituted sexual harassment, the Court proceeded directly to the liability question. The Sexual Harassment Guidance document published by the Office for Civil Rights (OCR) provides some instruction on the definitions of sexual harassment, but these definitions will need to be modified in light of the Supreme Court's recent opinions on sexual harassment under both Title IX and Title VII. Under the Guidance, “sexual harassment” by a school employee may take the form of *quid pro quo* harassment or hostile environment harassment. *Quid pro quo* harassment occurs when a school employee explicitly or implicitly conditions a student's participation in an educational program, school activity, or bases an educational decision on the student's submission to unwelcome sexual advances including requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. *Quid pro quo* harassment is unlawful whether the

student resists and suffers the threatened harm or submits and thus avoids the threatened harm.

Thus, under the standards set forth in *Gebser*, Title IX plaintiffs must establish actual notice to the school district of inappropriate behavior by a board employee, and deliberate indifference on the part of the districts toward the alleged harassment. This seemingly high standard may indicate a move toward recognizing new limits on a school district's liability. However, the *Gebser* decision should not be construed as forgiving a school district from meeting other statutory obligations, which are triggered when students have been harassed. For example, State Statutes require reporting whenever there is reasonable cause to believe that a child has been subjected to, among other examples of abuse and neglect, an act of sexual abuse. Teachers and school administrators have a duty and a legal obligation to report to the county or state agency responsible for the investigation of such charges.

Under the OCR Guidance, hostile environment harassment is sexually harassing conduct by an employee that is so severe, persistent, or pervasive that it limits a student's ability to participate in or benefit from an educational program or activity, or creates a hostile or abusive educational environment. This sexually harassing conduct can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. The OCR considers several factors, including but not limited to the degree to which the conduct affected the student's education; the type, frequency, and duration of the conduct; the number of individuals involved; and, ages and sex of the participants.

When reviewing a sexual harassment claim by a student, the OCR examines whether the conduct was welcome. However, if elementary students are involved, "welcome" will not be an issue. OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that the sexual conduct between the adult employee and a student was not consensual.

The Guidance recognizes the concept of "legitimate nonsexual touching." The Guidance states that harassment does not include "legitimate nonsexual touching" such as hugging a student who has achieved a goal or consoling a student with an injury.

Davis: Sexual Harassment of Students by Other Students

Sexually aggressive behavior by students directed at fellow students has usually been dismissed as "normal" behavior by curious teenagers. However, school districts must change this mindset and increase awareness among students, faculty and staff that such behavior is unacceptable and unlawful. The Supreme Court has confronted this issue, again under Title IX, in *Davis v. Monroe County Board of Education*. (119 S.Ct. 1661 [1999]),

The *Davis* case involved a then-fifth grader named LaShonda Davis and the alleged harassment she endured at the hands of her classmate, G.F. Specifically, the allegations against G.F. included attempting to touch LaShonda in the breast and vaginal areas, directing vulgarities at LaShonda, and behaving in a sexually suggestive manner toward her. The complaint describes eight separate instances of sexual harassment, occurring on average once every 22 days over a six-month period. The incidents were reported to LaShonda's teachers and the building principal. Although G.F. was threatened with disciplinary action, G.F. persisted with his unwelcome advances until he was charged and prosecuted for sexual battery. La Shonda's mother filed a claim against the Monroe County Board of education under Title IX. The complaint alleged that the harassment by G.F. against LaShonda had "interfered with her ability to attend school and perform her studies and activities," and that the school's "deliberate indifference" created a hostile environment.

The Supreme Court held that a private damages action may lie against a school board under Title IX in cases of student-on-student harassment: but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, ... such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

The Supreme Court's decision in *Davis* raises a number of important issues. *Davis* established the basis for schools as third parties to be held liable when a student sexually harasses another student on school premises during school hours. The requirements, however, for third party Title IX claims under *Davis* are extremely narrow, potentially acting as an effective bar to almost every other similar claim in the future. The effects of *Davis* on future court decisions and upon the schools themselves will likely be great; however, it remains to be seen if *Davis* will actually cause schools to change their sexual harassment policies. It is too early to tell what effect *Davis* will have on future Title IX decisions. Although students now have an option to complain under Title IX for peer sexual harassment, the facts in *Davis* suggest that courts need only allow Title IX claims that present the most severe and blatant disregard on the part of school officials. The Court correctly decided *Davis*; however, it also opened the door to questionable behavior on the part of school officials that does not rise to the level of indifference exemplified by the *Davis* facts

Writing for the majority, Justice O'Connor wrote that schools may be held liable when they are "deliberately indifferent" to known acts of student harassment. To be actionable, the harassment must be "so severe, pervasive, and objectively offensive" that it has the "systemic effect" of denying the victim an equal educational opportunity.

Justice Kennedy accused the majority of creating a new and dangerously broad cause of action that "will embroil schools and courts in endless litigation

over what qualifies as peer sexual harassment and what constitutes a reasonable response.” Justice Kennedy wrote: Adolescents often have limited life experiences or familial influences upon which to establish an understanding of appropriate behavior and school is the place where they are first learning the rules of social interaction and good citizenship. Federalism, Kennedy explained, demands that the federal courts not second-guess the daily discipline decisions of experienced school officials.

In dissent to this, O’Connor stressed that the new cause of action is a “limited” one aimed at situations involving extreme student misconduct and callously indifferent school officials. The standard, she wrote, generally will exclude claims based on name-calling, teasing, and one-time incidents of harassment. Kennedy criticized these limitations as “illusory.”

### **Same-Sex Sexual Harassment**

Another question decided by the Supreme Court was whether sexual harassment is actionable where a harasser of the same gender as the victim perpetrates the harassment. In *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), the Court answered in the affirmative.

In *Oncale*, a man employed on an offshore oil platform sued his employer under Title VII for the sex-related actions of his supervisors and co-worker. Specifically, the actions included assault and threats of homosexual rape. The Fifth Circuit dismissed the plaintiff’s claim, holding that the plaintiff had not established a cause of action for sexual harassment under Title VII because the alleged harassers were male, the same gender as the plaintiff.

The Supreme Court reversed, holding in a unanimous opinion that same-sex harassment falls within Title VII. To be actionable under Title VII, the Supreme Court held that the harassment must constitute discrimination because of sex; e.g., the harassment must be motivated by the victim’s gender. The Court was careful to note that the standard for proving discrimination remains rigorous, for the Title VII plaintiff must present evidence of harassment, which is “so objectively offensive as to alter the conditions of the victim’s employment.” Moreover, the Court issued the reminder that determinations of sexual harassment must include a consideration of the context in which the alleged behavior occurs. The Court gave the example of a football coach smacking a player on the buttocks as he runs onto the field, and comparing that behavior to that of the coach doing the same to a secretary working in the school district office. Only the latter behavior would reasonably be experienced as abusive and potentially giving rise to a sexual harassment claim.

Many states have a law against discrimination, which expressly prohibits discrimination on the basis of sexual orientation. Thus, school districts must recognize the need to fulfill their obligations under Title VII, regardless of the sex of the alleged harasser and victim.

#### Elements of a Claim

As a result of *Gebser* and *Davis*, the lower courts have focused on the following elements when determining whether a school district may be held liable for acts of sexual harassment under Title IX:

1. 1. The plaintiff was subjected to gender-oriented conduct that was “severe, pervasive, and objectively offensive”;
2. 2. The sexual harassment denied the student an equal educational opportunity or benefit;
3. 3. The district had “actual knowledge” of the sexual harassment;
4. 4. The district was “deliberately indifferent” to the sexual harassment; and,
5. 5. The district’s conduct/indifference caused the plaintiff’s damages.

First element: Gender-oriented conduct that is “severe, pervasive, and objectively offensive”

The plaintiff must allege that he or she was subjected to sexual conduct that was “severe, pervasive, and objectively offensive.” This definition presumably applies to all Title IX claims, regardless of whether the harasser is a student or a teacher. However, given the differences between adults and children, this element will probably be the subject of further litigation, with plaintiffs arguing for a less rigorous standard in cases of teacher-to-student harassment.

Title IX is concerned only with gender-based harassment. The *Davis* opinion occasionally uses the phrase “peer harassment” as a shorthand phrase. “The statute makes clear that...students must not be denied access to educational benefits and opportunities on the basis of their gender. The gender-oriented conduct must be severe. Whether ‘gender-oriented conduct rises to the level of actionable’ harassment depends on ‘a constellation of surrounding circumstances, expectations, and relationships,’ including the ages of the harasser and complainant. Damages are ‘not available for simple acts of teasing and name calling among school children, however, even where the comments target differences in gender.’”

The *Davis* standard is more demanding than the standard under Title VII of the Civil Rights Act of 1964. Because the Statute of Limitations is tolled until a minor reaches the age of majority, school districts may be forced to defend claims based on incidents occurring long in the past. The *Davis* standard represents a public policy trade-off: The Court recognized a new cause of action, but set the bar high. Given the “inevitability of student misconduct, ‘the Court found it unlikely that Congress intended to invite endless litigation over incidents that were neither severe nor pervasive nor systemically damaging.’”

Second element: Harassment has denied the student an equal educational opportunity or benefit.

This element is not developed in the *Davis* opinion. The Court states that it does not contemplate, “that a mere ‘decline in grades is enough to survive’ a

motion to dismiss.” While a drop in the plaintiff’s grades “provides necessary evidence of a potential link between her education and G.F.’s (the student who was harassing her) misconduct,” the plaintiff’s ability to survive a motion to dismiss “depends equally on the alleged persistence and severity of G.F.’s actions, not to mention the Board’s alleged knowledge and deliberate indifference.” “Moreover,” the Court added, the behavior must be serious enough to have the “systemic effect of denying the victim equal access to an educational program or activity.”

One case that preceded *Davis* indicated the following analysis:

Any student who leaves a school or even stays at home for a few days in response to another student’s teasing might allege that he or she was being “denied” all of the benefits of the program. Because different students may react to the same behavior with varying degrees of discomfort, courts should consider whether a student’s claim that he or she was denied the benefits of an educational program is objectively reasonable. (*Morlock v. West Central Educ. Dist.*, 46 F.Supp.2d 892, 909 [D. Minn. 1999]).

Third element: School district had “actual knowledge” of the harassment.

Although the majority in the *Davis* case does not precisely answer the question “known to whom?”, the majority repeatedly refers to the conduct of “administrators” and the “school board” as the source of potential liability. At the end of the *Davis* opinion, when the Court examines the question of whether the Monroe County School District had notice of the harassment, the Court refers exclusively to the conduct of the principal and the school board: “[T]he complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.’s conduct to seek an audience with the school principal....The complaint also suggests that the petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board...” The majority opinion never analyzes the alleged knowledge of the classroom teachers.

In *Gebser*, liability was determined on notice to “an official of the recipient entity with authority to take corrective action to end the discrimination.” In the enforcement setting, the phrase “appropriate person” almost always refers to an official who has been handed actual administrative responsibilities by the grant recipient.

*Davis* and *Gebser* do not indicate that it is a foregone conclusion that notice to non-administrators will be sufficient to trigger liability under Title IX. While teachers have some authority over students they lack the authority to assign substantial penalties such as suspension, removal to an alternative campus, or expulsion. The failure of a single teacher to take adequate action,

particularly when he or she lacks the authority to impose most types of discipline, should not be deemed “an official decision by the recipient not to remedy the violation,” as required by *Gebser*.

Fourth element: School district responded with “deliberate indifference.”

“Deliberate indifference” is a “stringent standard of fault” requiring omissions that rise to the level of “intentional choice” rather than “negligent oversight.” *Southard v. Texas Bd. of Crim. Justice*, 114 F.3d 539, 551 (5<sup>th</sup> Cir. 1997). Ineffectiveness, as a matter of law, is insufficient to prove deliberate indifference. *E.G., Hagan v. Houston Indep. Sch. Dist.*, 51 F.3d 48, 52-53 (5<sup>th</sup> Cir. 1995) (the principal took “more than a minimal amount of action” in response to complaints about the coach); *Black v. Indiana Area School Dist.*, 985 F.2d 707, 712-713 (3d Cir. 1993) (the plaintiffs were required to prove more than “a negligent failure to recognize [a] high risk of harm”); and, *Jane Doe “A” v. Special School Dist.*, 901 F.2d 642, 646-47 (8<sup>th</sup> Cir. 1990) (holding that school officials’ negligence in monitoring a school bus driver was insufficient to impose liability). A recent Fifth Circuit case illustrates the proper application of the “deliberate indifference” standard. In *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5<sup>th</sup> Cir. 1998), the Fifth Circuit wrote:

Plaintiffs nevertheless contend that Patrick’s failure to reprimand [the accused] formally or to transfer him indicates that she was deliberately indifferent to the rights of J.H. We disagree...The deliberate indifference standard is a high one. Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference.... [Patrick] warned [the accused] to examine his behavior closely...The fact that Patrick misread the situation and made a tragic error does not create a genuine issue of material fact as to whether she acted with deliberate indifference...

A good example of an appropriate response by a school is cited in *Soper v. Hoben*, 195 F.3d 845 (6<sup>th</sup> Cir. 1999). In this case a female special education student allegedly was assaulted and raped. When the parent reported her complaint to the teacher, the school district reported the information to law enforcement, told the student’s teachers to arrange a plan of increased supervision, provided an escort, hired an aide for the classroom, and implemented a hall pass system. Ultimately, one of the male students was expelled. The Court of Appeals affirmed dismissal of the claims against the district because the plaintiff did not allege that the school had knowledge of the harassment until after the fact. The Court described the district’s response as quick and effective. This response was not “clearly unreasonable in light of the known circumstances.”

When a school official learns that prior discipline has proven ineffective, “it may be required to take further steps to avoid new liability.” *Wills v. Brown Univ.*, 184 F.3d 20 (1<sup>st</sup> Cir. 1999). In *Cantry v. Old Rochester Regional Sch. Dist.*, 66 f.Supp.2d 114 (D. Mass. 1999), the school district’s motion for summary judgment was denied. The student alleged that a coach had raped her. Although the district did not believe the girl’s allegations, the district reprimanded him. Subsequently, he continued to have inappropriate sexual contact with her. For purposes of summary judgement, the court found it “disingenuous” for the district to argue that the reprimands and restrictions on the coach were timely and that reasonable measures to end the harassment were established. The Court determined that the district should have taken additional steps after realizing that the initial measures were ineffective.

Fifth element: Damages.

In order to state a claim, the plaintiff must show that the harassment had a “systemic effect” of denying the plaintiff an equal educational opportunity. Once satisfied, to obtain damages for a violation of one’s civil rights, a plaintiff must show with specificity the actual harm caused by the violation. Nominal damages are awarded when the plaintiff proves a violation but is unable to show actual damages. Punitive damages, of course, may not be awarded against a governmental body.

### **Conclusion**

Courts are increasingly addressing the rising problem of sexual harassment in schools. Recent decisions have allowed a plaintiff the additional avenue of bringing an action under Title IX, but have done so without lowering the standards for establishing sexual harassment or leaving local school boards defenseless. In order to minimize the risk of liability, school boards must take affirmative steps to educate the students, faculty and staff. Sexual harassment cannot be tolerated whether perpetrated by a school employee or fellow student, or whenever the alleged harasser and victim are of the same gender. The one certain message emanating from courthouses across the country is that the failure of local school boards to take the issue of sexual harassment seriously will lead to high emotional, social, and financial cost.

### **Resources**

In January 1999, the United States Department of Education, OCR, in conjunction with the National Association of Attorneys General, compiled a guide for local school boards entitled “Protecting Students from Harassment and Hate Crime.” The guide has been endorsed by the National School Boards Association and provides step-by-step guidance in developing anti-harassment policies, responding to incidents of harassment, and handling complaint and grievance procedures. The guide also includes sample school policies, checklists, and a list of other reference materials. Local school boards interested in a comprehensive overview of harassment issues can obtain a copy of the guide through the OCR at [www.ed.gov/offices/OCR](http://www.ed.gov/offices/OCR).

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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 the firm's website at [www.edmgt.com](http://www.edmgt.com).