Sexual Harassment in Schools: Recent Supreme Court Decisions

* 94% of students polled in New Jersey 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.

As the United States Supreme Court turns its attention from sexual harassment in the workplace toward sexual harassment in schools, local boards of education are looking to the Court for guidance not only on how to prevent the harassment of students, but 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" may soon come with a high price tag for local school boards.

To prevent harassment and reduce liability, boards must direct prevention efforts not only in instances where students may be harassed by board employees, 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.

Sexual Harassment of Students by Board Employees

In recent years, 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. Recently, the Court outlined the scope of a district's liability under Title IX for the sexual harassment of a student by a board employee.
In *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (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 question did not report her 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 lodging 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, 42 U.S.C. Â§1983, and certain other statutes.²

The Supreme Court held, in part, that a cause of action against a school district for monetary damages under Title IX would not lie 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 parents charging that the teacher had made inappropriate comments during class were insufficient to alert the principal³ 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.

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 district 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, New Jersey's Division of Youth and Family Services ("DYFS") statute requires 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.

**Sexual Harassment of Students by Fellow Students**

Traditionally, sexually aggressive behavior by students directed at fellow students has 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 recently confronted this issue, again under the rubric of Title IX, in *Davis v. Monroe County Board of Education* 119 S. Ct. 29 (1998).

The *Davis* case involves 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. include 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 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. LaShonda’s mother brought suit on LaShonda’s behalf against the school board, the teachers involved and the building principal. The complaint alleges that the "deliberate indifference" by the school board and its employees to the unwelcome sexual advances of G.F. upon LaShonda created an intimidating, hostile, offensive and abusive school environment in violation of Title IX.

The Court of Appeals for the Eleventh Circuit 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 choose to accept federal financial assistance under Title IX."

In light of the Gebser decision, the Supreme Court may reverse the Court of Appeals in Davis and find an actionable claim under Title IX. The Supreme Court may find the claim actionable provided the plaintiff can demonstrate actual notice to school officials, coupled with deliberate indifference on the part of the school district in failing to adequately respond to the student’s complaints. The Davis decision is expected this summer and we anticipate that, as in Gebser, the Court will provide added guidance for school boards in defending sexual harassment claims and shielding themselves from liability.

**Same-Sex Sexual Harassment**

Another question recently decided by the Supreme Court was whether sexual harassment is actionable where the harassment is perpetrated by a harasser of the same gender as the victim. 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 a 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.

New Jersey decisions are consistent with the Oncale holding, and the New Jersey Law Against Discrimination expressly prohibits discrimination on the basis of sexual orientation. Thus, school districts must recognize the need to fulfill their obligations under Title VII, irrespective of the sex of the alleged harasser and victim.

**Conclusion**

In sum, courts are increasingly addressing the rising problem of sexual harassment in schools. Recent decisions have allowed plaintiffs 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 students, faculty and staff that sexual harassment cannot be tolerated whether perpetrated by a board employee or fellow student, or whether 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.

**Sources of Guidance**

In January 1999, the United States Department of Education, Office for Civil Rights ("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. We recommend that local school boards interested in a comprehensive overview of harassment issues obtain a copy of the guide through the OCR at **www.ed.gov/offices/OCR**.

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1 These statistics are excerpted from "Nobody Should Joke Around Like That: Sexual Harassment in New Jersey Schools," a report by The Project to Uncover Sexual Harassment in New Jersey Schools (PUSH:NJSHOOLS).
(1994).

2Title IX provides in pertinent part that "[n]o person âshall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. Â§1681(a).

3As part of the "actual notice" prong of the test for liability, the Court held that there must be actual notice to an "appropriate person." The Court notes that an "appropriate person" is someone with the authority to address the alleged discrimination and to institute corrective measures on the school district's behalf. In order for damages to lie under Title IX, this "appropriate person" must have actual knowledge of the discrimination and fail adequately to respond.

Practice:

School Law