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Michael W. McClain

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New Standards for Peer Sexual Harassment in the Schools: Title IX Liability Under *Davis v. Monroe County Board of Education*

Introduction

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States 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." [1] Much litigation has ensued over this statute, with courts split on just how far Title IX's reach extends. The latest issue arising under Title IX is whether a school district can be held liable for a student's sexual harassment of another student. Federal courts were divided on this issue, but the Supreme Court on May 24, 1999 reversed an Eleventh Circuit case [2] and resolved the conflict.

Prior to the Supreme Court's consideration of the issue of peer sexual harassment, the Court had decided only that a school could be held liable for a teacher's sexual harassment of a student. [3] Thus, unguided lower courts were not uniform in their treatment of peer sexual harassment. For example, the Eleventh Circuit refused to find schools liable for peer sexual harassment under Title IX under any circumstances, [4] while the Ninth Circuit held schools liable for peer sexual harassment under Title IX, analogizing Title IX claims to Title VII claims that involve sexual discrimination in the workplace. [5]

This paper seeks to analyze the state of the law regarding peer sexual harassment in light of the Supreme Court's decision in *Davis*. Apparently utilizing the framework set out in *Gebser v. Lago Vista Independent School*

1. 20 U.S.C. § 1681 (1994).
2. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997), *rev'd*, 119 S. Ct. 1661 (1999).
3. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998).
4. *See Davis*, 120 F.3d 1390.
5. Oona R.-S.- v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 2039 (1999).

District, [6] the Supreme Court held that a school district can be held liable if it has actual knowledge of the harassing conduct and responds with deliberate indifference to the complaining student. [7] This framework allows schools to quickly address legitimate complaints and weed out frivolous complaints as well by conferring a degree of deference to school officials' decisions. Thus, the new standard should give fairly clear guidance to school administrators and should not pose any unreasonable burdens on school districts.

1. The Evolution of Judicial Application of Title IX

1. While Title IX is devoid of specific language granting a private right of action, it is well settled that an implied right of action exists under the statute. In *Cannon v. University of Chicago,* [8] the Supreme Court held that individuals aggrieved by Title IX violations can pursue a private right of action. The Court listed two purposes implying the availability of private actions under Title IX. First, Title IX was enacted to ensure that the federal government does not promote or support discriminatory practices. [9] Second, Title IX was to provide individual citizens effective protection against those practices when they were found to exist. [10] The Court reasoned that if a remedy is "necessary or at least helpful to the accomplishment of the statutory purpose, the Court [would be] decidedly receptive to its implication under the statute," [11] and adopted the Department of Health, Education, and Welfare's position that an individual remedy under Title IX will provide effective assistance to achieving the statutory purposes. [12]

The next development in Title IX liability occurred when the Supreme Court decided *Franklin v. Gwinnett County Public Schools.* [13] There the Court held that a plaintiff who brings a private action for a Title IX violation may also seek money damages. The Court reached its decision based on longstanding jurisprudence that "all appropriate remedies [are available] unless Congress has expressly indicated otherwise." [14]

While neither *Cannon* nor *Franklin* addressed peer sexual harassment in schools, those decisions support the position that schools may be held liable for *any* discrimination arising out of Title IX. Moreover, Title IX's legislative

6. 118 S. Ct. 1989 (1998).
7. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999).
8. 441 U.S. 677 (1979).
9. *See id.* at 704.
10. *See id.*
11. *Id.* at 703.
12. *See id.* at 707.
13. 503 U.S. 60 (1992).
14. *Id.* at 66.

history supports the position that the statute is to be liberally construed. For example, Senator Bayh, the statute's sponsor, intended Title IX's impact to be "far reaching." [15] Because the language of the statute contains no specifics regarding Title IX's reach, the Court has given great deference to the legislative history, noting that "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." [16]

Both the legislative history and the Court's deference to it show that in the absence of specific, express limitations the proper approach is to construe the statute in terms that most effectively achieve its purposes. Because Title IX was enacted to prohibit discrimination on the basis of sex in all educational programs receiving federal funds, shielding school districts from liability for peer sexual harassment seemingly frustrates the statute's fundamental purpose. This is not to say that schools will be liable under Title IX for every student complaint; however, student complaints must be acknowledged and addressed. Failure for the school district to affirmatively seek to prevent sex discrimination after receiving notice of such behavior, however, should be grounds for liability under Title IX. The better reasoned opinions that have dealt with peer sexual harassment have turned to Title VII for determinative standards in assessing violations. This is a logical approach to dealing with Title IX claims because both Title VII and Title IX were cut from the same cloth.

II. Application of Title VII Standards

Title VII prohibits discrimination based on sex in the employment setting. It states: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ." [17] Title IX's language is very similar and is intended to achieve the same purpose. Student-victims of harassment are in the same position as employees who are the victims of this unlawful behavior. The Supreme Court has held that a person "may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." [18] Due to the nature of sexual harassment in schools, which tends to create a hostile or abusive education environment, courts should place an affirmative duty on school officials to prevent sexual harassment of whatever

15. *See* 118 CONG. REC. 5808 (1972).
16. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982).
17. 42 U.S.C. § 2000e-2(a)(1)(1994).
18. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

form. Before the Supreme Court's decision addressing peer sexual harassment in schools, some lower courts looked to Title VII standards for guidance.

In *Franklin v. Gwinnett County Public Schools,* [19] the Supreme Court analogized *Meritor* and held that a Title IX remedy is available when a teacher sexually harasses a student, likening the situation to a supervisor who, on the basis of sex, discriminates against a subordinate. Upon closer examination, the degree of coercion a teacher can exert on a student may be greater than that which a supervisor can exert on an employee, simply because an employee has the choice to change jobs, while students generally have no choice in where to attend school. Thus, without a remedy, the student is essentially made to endure the harassment. Therefore, because such behavior is barred in the workplace, it follows that the same standards should apply in the school setting where such conduct is found to occur, taking into account the identity and age of the perpetrator, and realizing that children cannot be expected to behave with the level of maturity expected of adults.

The Ninth Circuit applied Title VII standards to a Title IX claim in *Oona R.-S.- v. McCaffrey.* [20] In that case, the Court analogized Title IX to Title VII, and held that school officials have a duty under Title IX to take reasonable steps to prevent peer sexual harassment. The District Court's record indicates that the plaintiffs brought a Title IX claim when the school failed to take appropriate actions after a boy had repeatedly sexually harassed Oona. The conduct involved vulgar comments of a sexual nature, as well as obscene and derogatory name calling. [21]

Affirming the District Court's ruling holding that Title IX imposed a duty on school officials to prevent peer sexual harassment of its students, the Ninth Circuit reasoned that by citing *Meritor* in the Title IX context, the Supreme Court in *Franklin* [22] analogized the duties of school officials to those of employers to prevent sexual harassment. [23] Accordingly, because sexual harassment that creates an abusive work environment is actionable under Title VII, peer sexual harassment that creates an abusive education environment is similarly actionable under Title IX. [24] Consequently, the court concluded that schools have the duty to take reasonable steps to prevent peer sexual harassment. [25] Indeed, if Title IX's goals are to be achieved, it does not comport with fairness to deny a victim a remedy based on the identity of the person

19. 503 U.S. 60 (1992).

20. *See* Oona R.-S.- v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997), *cert. denied,* 119 S. Ct. 2039 (1999).

21. *See* Oona R.-S.- v. Santa Rosa City Schs., 890 F. Supp. 1452, 1457 (N.D. Cal. 1995), *aff'd sub nom. Oona, R.-S.- v. McCaffrey,* 122 F.3d 1207 (9th Cir. 1997), *and cert. denied,* 119 S. Ct. 2039 (1999).

22. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).

23. *See Oona R.-S.-,* 122 F.3d 1207.

24. *See id.* at 1211.

25. *See id.*

responsible for the discriminatory conduct. Yet that is precisely the distinction made by the Eleventh Circuit in holding that schools are not liable under Title IX for peer sexual harassment. [26]

The *Davis* court based its decision on the absence of express mention of peer sexual harassment in the language of the statute itself and in its legislative history. [27] The court reasoned that Title IX applied only to *recipients* of federal funding; in other words, the receipt of financial assistance under Title IX is a voluntary undertaking in which *recipients* agree to refrain from engaging in discriminatory conduct as a condition to receiving the assistance. [28] By distinguishing sexual harassment caused by a teacher or other school officials, which is clearly a Title IX violation under *Gebser* and *Franklin,* from that caused by students, the court concluded that the school district did not have unambiguous notice that it could be held liable for the sexually discriminatory acts of third parties (i.e., the students). [29] Absent such notice as a condition of receipt of federal financial assistance, peer sexual harassment was not actionable under Title IX.

In reaching this result, the court interpreted Title IX as an exercise of Congress' spending power, in which Congress essentially forms a contract with potential recipients. Relying on *Pennhurst State School & Hospital v. Halderman,* [30] the court noted that "the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding." [31] In the present case, the court reasoned, "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." [32] The court reasoned that since "nothing in the language or history of Title IX suggests that Title IX imposes liability for student-student sexual harassment," [33] and because extending Title IX liability to cover such forms of discrimination would "alter materially the terms of the contract between Congress and recipients of federal funding," [34] peer sexual harassment is not actionable under Title IX.

The Eleventh Circuit's narrow interpretation of Title IX in *Davis* did not comport with the Supreme Court's deference to Senator Bayh's intention that

26. *See* Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997), *rev'd,* 119 S. Ct. 1661 (1999).

27. *Id.* at 1397.

28. *See id.* at 1397-99.

29. *See id.* at 1401.

30. 451 U.S. 1 (1981).

31. *Davis,* 120 F.3d at 1399 (quoting *Pennhurst,* 451 U.S. at 17).

32. *Davis,* 120 F.3d at 1399 (quoting Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398 (5th Cir. 1996), *cert. denied,* 117 S. Ct. 2434 (1997)).

33. *Id.* at 1401.

34. *See id.*

the statute be liberally construed. [35] In effect the Eleventh Circuit's approach frustrates Title IX's purpose of providing individual citizens effective protection against sexual discrimination. The absence of express language in the statute or its history dealing with peer sexual harassment is immaterial in light of the Supreme Court's holding in *Cannon* that if a remedy is "necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." [36]

Title IX was enacted to prevent sex discrimination in educational programs that receive federal funding, and to hold that teachers or other school officials may not sexually harass students as such, but that students who engage in sexually harassing conduct are beyond the scope of the statute severely handicaps Title IX's effectiveness. If Title IX means anything, it means that discrimination on the basis of sex is prohibited in schools who accept federal funding.

III. Limitations to Title IX Liability Under the Supreme Court's Analysis

Students who are sexually harassed by their peers are entitled to the same level of protection as that given to students who are harassed by their teachers. The Supreme Court's decision in *Gebser* set forth judicial standards to determine when a school district may be liable for a teacher's sexual harassment of a student in a Title IX claim. [37] The *Gebser* standards seem to be the foundation for the Court's decision in *Davis v. Monroe County Board of Education.* [38] By slightly modifying the analysis to determine liability, the Court has outlined fairly clear guidelines to enable school districts to avoid liability for peer sexual harassment in a manner that will not unduly burden districts' efforts to provide a quality education.

Gebser requires that a school official with authority to address the alleged discrimination and to institute corrective measures on the school's behalf must have actual knowledge of the discrimination and fail adequately to respond. [39] Moreover, liability will not be imposed unless school officials respond to the alleged discrimination with deliberate indifference. [40]

The new *Davis* standard essentially mirrors *Gebser* in terms of the notice or knowledge requirement. Moreover, the deliberate indifference standard re-

35. *See supra* notes 15-16 and accompanying text.
36. Cannon v. University of Chicago, 441 U.S. 677, 703 (1979).
37. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998).
38. 119 S. Ct. 1661 (1999).
39. *See Gebser*, 118 S. Ct. at 1999.
40. *See id.* at 1999-2000.

mains intact, and the identity of the aggressor is a key consideration in determining whether a school district can be held liable for peer sexual harassment. [41] Whether peer sexual harassment has occurred depends on factors "including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." [42] Clearly the Court does not intend to hold elementary school children to adult standards, and recognizes that "children may regularly interact in a manner that would be unacceptable among adults." [43] In short, if the school district reacts with deliberate indifference to acts of sexual harassment by students over whom the district exercises control, the district may be held liable. Thus, by exercising control over the harasser and the environment in which the harassment occurs, a school district essentially subjects its students to harassment when it responds with deliberate indifference. [44] Consequently, such deliberate indifference to known acts of sexual harassment forms the basis of a Title IX action.

The Court's decision will not lessen the ability of school districts to provide quality education. To the contrary, adhering to the Court's standards will better ensure that all students will have the opportunity to fully participate in the educational experience. Moreover, the Court reemphasized its reluctance to second guess the disciplinary decisions made by school administrators. [45] To avoid liability, school districts "must merely respond to known peer harassment in a manner that is not clearly unreasonable." [46] Thus, the Court contemplates a flexible standard to accommodate school districts' disciplinary concerns. [47]

Extension of the *Gebser* standards to instances of peer sexual harassment will give greater protection to students while setting criteria that are well within school districts' capacity to meet. Spurious complaints will not subject the school to an endless number of claims, because school districts need only to make a legitimate effort to inspect the complaint, and take corrective measures. On the other hand, legitimate complaints can and will be addressed promptly and effectively by imposition of these standards. Only when the school responds with deliberate indifference after receiving actual knowledge, which is difficult to imagine, will it have violated Title IX.

41. *See Davis*, 119 S. Ct. at 1672.
42. *Id.* at 1675.
43. *Id.*
44. *See id.* at 1673.
45. *See id.* at 1674.
46. *Id.*
47. *Id.*

IV. Conclusion

School age children and teenagers spend a significant amount of time away from home when they are in school. It follows that school should be a home away from home, a place where children learn not only the school's curriculum, but vitally important social skills as well. Therefore, schools owe an immense responsibility to society by guiding and molding these impressionable people who some day will be expected to assume different stations in life for a sustained and useful contribution to the good of society. It is imperative that schools create and foster a learning environment that will provide all students the opportunity to reap the greatest rewards of the prescribed curriculum and social skill building.

Because of the inevitable tendency of some people to exhibit disruptive and harmful behavior, however, the primary gatekeepers bear the responsibility for maintaining control of the very environment away from home in which children learn how to become interdependent, productive citizens for society's benefit. When a school system fails to live up to this responsibility, there must be in place proper measures of accountability. Therefore, requiring recipients of Title IX funding to affirmatively seek the achievement of the statute's purpose of eradicating sex discrimination *of any kind* in their programs, and to be held accountable for failure to do so, is entirely appropriate.

MICHAEL W. MCCLAIN