6-2016

Sexual Harassment in Schools

Charles J. Russo
University of Dayton, crusso1@udayton.edu

Sexual Harassment in Schools

By Charles J. Russo, J.D., Ed.D.

Sexual harassment in schools continues to be an issue that finds its way to the courts.

Eliminating sexual harassment in schools continues to be a national concern. In fact, the Supreme Court has resolved three major cases on this topic, and lower courts continue to resolve a steady stream of disputes. The litigation has moved beyond teacher–student and peer–peer claims to include disputes over harassment because of actual or perceived sexual orientation.

Sexual Harassment and Title IX

Title IX of the Education Amendments of 1972 (Title IX) was originally enacted to ensure gender equity in intercollegiate sports. Case law interpreting Title IX expanded its scope to include sexual discrimination in educational settings. The first case extending the reach of Title IX was *Cannon v. University of Chicago* (1979). In *Cannon*, a female applicant sued two private medical schools under Title IX claiming that as recipients of federal financial assistance, they unlawfully discriminated against her because of her gender when she was denied admission.

Ruling in favor of the applicant in *Cannon*, the Supreme Court pointed out that as a woman, she was a member of the class protected by Title IX. Accordingly, the Court interpreted Title IX's legislative history as being designed to permit individual claims such as the applicant's, holding that her suit was consistent with Title IX's intent because sex-based discrimination concerned the federal government. Yet more than a decade would pass before the federal judiciary, specifically the Supreme Court, applied Title IX to a sexual harassment claim in a school setting.

Sexual Harassment by Teachers

Franklin v. Gwinnett County Public Schools (1992) involved a high school sophomore in Georgia with whom a male teacher developed a "friendship," such that he had private meetings with her, allowed her to be late for class without repercussions, and, according to the student, engaged her in sexually oriented conversations, forced kissing, and coercive intercourse on school grounds.

During that time, the student's boyfriend notified the school's band director (the teacher's supervisor) about the teacher's conduct, and at least one student informed an assistant principal about it but was admonished for doing so. Other females reported to a teacher and a guidance counselor that the teacher made sexual remarks to them. Shortly after officials began an investigation into the student's complaints, the teacher agreed to resign at the end of the academic year; the band director voluntarily retired.

The student claimed that although teachers and administrators were aware of the harassment, they did nothing to stop it and, in fact, tried to dissuade her from bringing charges against the teacher. She sued for monetary damages under Title IX.

After lower federal courts rejected the student's Title IX claim in *Franklin*, the Supreme Court unanimously reversed in her favor. In so doing, the Court expanded the scope of Title IX by applying it (for the first time) to sexual harassment in a school setting, interpreting the law as implying a private right of action. The Court essentially reasoned that if Title IX were to help prevent sexual misconduct in schools, it had to have remedies, such as the monetary damages imposed on those who violate its provisions.

Gebser v. Lago Vista Independent School District (1998) arose in Texas when a teacher made sexually suggestive comments to a student who joined the book discussion club the teacher sponsored. The teacher later initiated sexual contact with

the student when he visited her home on the pretext of giving her a book, eventually regularly engaging her in sexual relations, always off school property. The student did not complain, she said, because she was uncertain about how to behave, and she wished to continue having the teacher for class.

More than a year later, when parents of other students complained to the principal about the teacher's behavior, he did not notify the superintendent who also served as the district's Title IX coordinator. When a police officer happened to discover the teacher and student engaged in sexual relations, the teacher was arrested.

Unlike in *Franklin*, the board promptly fired the teacher, and his teaching license was revoked. The student and her mother filed suit in federal court, seeking monetary damages under Title IX for the teacher's actions, but were unsuccessful.

On further review, the Supreme Court affirmed that the board was not liable under Title IX for the teacher's misconduct because the superintendent—who, at a minimum, had the authority to institute corrective measures—was not notified of the issue and therefore was not deliberately indifferent to the teacher's behavior. The Court found that insofar as the board promptly and decisively punished the teacher, the student and her mother could not proceed with their claim.

Sexual Harassment by Peers

In *Davis v. Monroe County Board of Education* (1999), a male fifth grader in Georgia repeatedly sexually harassed a female classmate for five months, during which time he tried to touch her inappropriately and made verbal requests for sexual relations.

Although the student and her parents reported the boy's behavior and repeatedly sought intervention, school officials failed to act. The female student's grades suffered because she was unable to concentrate on schoolwork, and her father found a suicide note she wrote. Moreover, there was evidence that the girl was not the only target of the boy's behavior. The harassment did not stop until the boy pled guilty to charges of sexual battery.

After lower federal courts rejected the claims of the student and her parents—citing that school boards cannot be held liable for sexual harassment under Title IX because the school board employees did not harass the student—the Supreme Court reversed in the student's favor. The Court pointed out that the school board, as a recipient of federal financial assistance, was held liable because, as in *Gebser*, it applies "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs" (*Davis* 1999, p. 646).

The *Davis* Court remarked that whereas boards may be liable only if officials are deliberately indifferent, they cannot avoid liability simply by eliminating peer-harassment claims or imposing disciplinary measures. Instead, the Court emphasized that educators must take proactive, positive steps to create safe learning environments.

Later Developments

Litigation involving sexual harassment in schools, whether by educators or students, continues unabated. Courts award damages to students under Title IX for misbehavior by employees and peers when school officials could have stopped, but failed to prevent, sexual harassment. However, when officials can prove that they had sound policies in place and took proactive steps to prevent harassment, courts refuse to subject them to liability.

In light of issues arising over the sexual harassment of students, the remainder of this section briefly reviews representative cases on emerging disputes addressing sexual orientation, because these claims are typically litigated under Title IX and rely on the major Supreme Court cases discussed earlier.

The first reported case involving sexual orientation harassment in a school arose in Wisconsin, in *Nabozny v. Podlesny* (1996). The Seventh Circuit ruled that a student who was gay could proceed with his equal protection claims against education officials in middle and high school because they failed to protect him from harassment by peers on the basis of his sexual preference.

In a high-profile dispute from California, former students who were, or were perceived as being, lesbian, gay, or bisexual, sued school officials, alleging that they were harmed by educators' failure to respond to complaints of peer-on-peer homosexual harassment. Affirming the denial of the officials' motion for summary judgment that would have essentially dismissed the suit, the Ninth Circuit observed that when the alleged incidents occurred, the students' rights to be free from intentional discrimination because of sexual orientation were clearly established (*Flores v. Morgan Hill Unified School District* 2003).

A federal trial court in New York rejected a school board's motion for summary judgment in a student's Title IX suit (*Pratt v. Indian River Central School District* 2011). The court determined that his claim could proceed, because the student's lawyers presented sufficient evidence documenting deliberate indifference by officials to the severe and pervasive harassment he and his sister experienced because of his sexual orientation that caused him to withdraw from school.

Conversely, the federal trial court in Connecticut granted a school board's motion for summary judgment when the parents of a nine-year-old filed suit under Title IX and other laws, alleging that officials failed to respond adequately after peers called him "gay" for asking

a classmate if he loved him and expressing his love for the other child (*Levarge v. Preston Board of Education* 2008). The court rejected the parental claims that their son was subjected to a sexually hostile educational environment and was treated differently from peers because of his perceived sexual orientation, given evidence of how officials intervened on his behalf to punish students who harassed the boy.

An emerging issue concerns transgender students. In the only case litigated on the merits of a claim to date, the Maine Supreme Court decided that under state law, school officials discriminated against a transgender student, who was born biologically male, based on her sexual orientation (*Doe v. Regional School Unit 26* 2014). In a dispute that began during the 2006/7 school year when the student was in fourth grade, the court ruled that educators violated her rights by directing her to use the unisex staff restroom rather that the girls' communal bathroom.

Recommendations for Practice

Keeping in mind that addressing sexual harassment requires vigilance, this section offers suggestions for education leaders to consider when reviewing their existing policies.

1. School boards should ensure that they have clearly written, up-to-date policies in place prohibiting sexual harassment while taking proactive steps to prevent it from occurring.
2. Boards should ensure that their sexual harassment policies are aligned with other policies, such as codes of conduct in faculty, staff, and student handbooks.
3. Policies should prohibit all forms of sexual harassment so that everyone in schools knows what is expected of them. Policies should do the following:
   - Clearly and unambiguously prohibit inappropriate sexual conduct, whether verbal, physical, or electronic, such as inappropriate photographs; T-shirts with offensive messages; sexually offensive notes or letters, whether hard copy or electronic; and sexual graffiti on school property, between and among faculty, staff, and students;
   - Declare that protection from sexual harassment extends to harassment whether it is based on the actions of teachers, peers, someone of the same sex, or someone of the opposite sex, or on actual or perceived sexual orientations; and
   - Spell out sanctions for offenders up to and including termination of employment or expulsion, consistent with procedures from disciplinary policies, with provision for progressive sanctions, depending on the nature of the harassment.
4. Policies should include procedures by which students, faculty, and staff can make and resolve sexual harassment complaints. Procedures should do the following:
   - Include clear, specific language on how and with whom individuals can file complaints;
   - Identify multiple individuals with whom complaints can be lodged to ensure that the accused is not the party with whom a complaint must be filed; and
   - Ensure that all parties receive procedural due process with the presumption of innocence for the accused.
5. Policies must ensure that administrative actions addressing and resolving complaints are completed promptly while respecting both their seriousness and the due process rights of all parties. Policies should do the following:
   - Establish time frames with regard to the number of days for filing complaints and conducting hearings compatible with procedures in faculty, staff, and student handbooks;
   - Provide details about the investigatory process, such as rights of access to documents and witnesses, again compatible with handbook provisions for other kinds of alleged misconduct;
   - Identify procedures for hearings, such as who chairs and serves on review panels, who has the right to call and cross-examine witnesses, and who can present evidence;
   - Explain the appeals procedures compatible with those from hearings provided in faculty, staff, and student handbooks; and
   - Include assurances safeguarding the privacy rights of both the accused and accuser.
6. Policies should call for professional development for teachers and other staff members to make them more aware of how to address incidents of sexual harassment.
7. Policies should mandate age-appropriate anti-sexual-harassment instruction for all students to make them aware of the need to avoid such unacceptable behavior.

As with other policies, anti-harassment policies should be reviewed regularly to ensure that they are up-to-date with the latest developments in federal and state law.

Eliminating sexual harassment in schools requires vigilance by all education personnel. To that end, the more carefully education leaders make staff and students aware of their policies, the more likely they will be able to have safe schools in which children are free to learn without distraction and to avoid potentially costly sexual harassment litigation.

References

Cannon v. University of Chicago, 441 U.S. 677 (1979).

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), *on remand*, 206 F.3d 1377 (11th Cir. 2000).

(Continued on page 39)

Saving Energy and Money

Consider New London Public Schools. Now that the district's 2,600 computers automatically shut down at 6:00 p.m. every weekday, the district is paying nearly $100,000 less for electricity every year. The solution the district deployed provides New London's IT administrator with an easy way to configure each computer to save energy, no matter what platform it runs on (e.g., Microsoft, Apple, or Chrome). It's also easy to exclude computers that need to stay on overnight for remote access or for other reasons.

One phone call with an EPA tech expert typically transforms an energy-saving idea into a concrete implementation plan in less than an hour.

For cash-strapped schools, that's meaningful savings. For students, it's meaningful in other ways, because saving energy also means reducing pollution. Thanks to the leadership of Business Manager Maria Z. Whalen and Chief Information Officer Tim Wheeler, New London Public Schools are eliminating 362 metric tons of carbon dioxide emissions annually by giving their computers a little extra rest.

Visit the EPA ENERGY STAR website (www.energystar.gov/lowcarbonit) for more information.

Steve Ryan is a program manager with the EPA. Email: ryan.steven@epa.gov

Mike Walker is president and founder of AlterAction Consulting. Email: mwalker@alteractionconsulting.com

New London Public Schools' 2,600 computers automatically shut down at 6:00 p.m. every weekday.

Legal and Legislative Issues

continued from page 35

Doe v. Regional School Unit 26, 86 A.2d 600 (Me. 2014).

Flores v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003).

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1998), *on remand*, 969 F.2d 1022 (11th Cir. 1992).

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).

Levarge v. Preston Board of Education, 552 F. Supp.2d 248 (D. Conn. 2008).

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

Pratt v. Indian River Central School District, 803 F. Supp. 2d 135 (N.D.N.Y. 2011).

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Charles J. Russo, J.D., Ed.D., is Joseph Panzer Chair of Education in the School of Education and Health Sciences (SEHS), director of SEHS's Ph.D. program in educational leadership, and adjunct professor in the School of Law at the University of Dayton, Ohio. Email: crusso1@udayton.edu

State Funding for Education

continued from page 37

Fund was created to provide a separate accounting for money generated by riverboat gaming for funding public schools. That money does not represent additional state aid; it only separates out the portion of aid derived from gaming. All Missouri school districts receive their state aid and Classroom Trust Fund money from the Department of Elementary and Secondary Education through ACH directly into their depository accounts around the 21st of each month. Those payments are affected only by data changes made by the individual districts through the DESE core data system or by the state's changing proration factor based on the available appropriation.

Cindy Reilmann, CPA, is director of finance, Francis Howell R-III School District, St. Charles, Missouri. Email: cindy.reilmann@fhsdschools.org