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Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

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SCHOOL DISTRICTS HELD LIABLE FOR STUDENT-ON-STUDENT SEXUAL HARASSMENT

On May 24, 1999, the United States Supreme Court issued an opinion that provides a new avenue of litigation against school districts. In *Davis v. Monroe County Board of Education*, No. 97-843, the Court held that a female fifth-grader could proceed with her sexual harassment claims against the school district. That case alleged a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits recipients of federal education funds from discriminating against any participants in the recipient's program based on gender. Her claim was unusual in that it did not allege that anyone employed by the school or school board sexually harassed her, but rather that a classmate did so and the school board failed to take appropriate action. Although the district court and the Eleventh Circuit dismissed her complaint, finding that Title IX did not provide a cause of action for peer harassment, the Supreme Court reversed, holding that a school district violates Title IX when it acts with "deliberate indifference" in the face of known cases of severe sexual harassment.

The *Davis* complaint alleged the following facts. Davis was a fifth-grader who was sexually harassed by a boy in her class on several occasions. That harassment involved attempts to touch her breasts and genitals, statements regarding sexual acts the boy wanted to engage in with her and rubbing up against her in what she considered to be a sexual manner. The boy allegedly continued this behavior over the course of several months and eventually pled guilty to sexual battery. Both the girl and her mother reported the alleged harassment to teachers and administrators, but no disciplinary action was taken against the boy, and it was months before the girl was

allowed to switch her seat so that she did not have to sit next to him. According to the complaint, the same boy had engaged in similar conduct involving other girls. Allegedly as a result of the boy's conduct, Davis's grades fell and she wrote a suicide note.

The Court first determined that money damages are available against a school district for failure to adequately address a peer harassment situation of which it is aware. Under federal law, money damages are available under Title IX only for the recipient of funds' own misconduct and only if it is on notice that it could be liable under the circumstances in question. The Court's majority determined that, although school districts would not expect to be liable for sexual harassment by third parties (such as by one student against another), they should have been on notice that they could be liable for failing to act appropriately when they become aware of such a situation. The Court pointed to its opinion in *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 283 (1998), in which it held that a school district could be held liable for deliberate indifference to acts of sexual harassment by a teacher against a student, as notice to schools of such liability. It also referenced the language of Title IX, which prohibits a program participant from being "subjected to discrimination." According to the Court, a school board subjects a student to discrimination when it is aware of peer harassment but fails to respond to it.

Having found a private cause of action for money damages in the peer harassment context, the Court addressed the "deliberate indifference" standard. It stated that courts should find liability only where the response to the harassment was either nonexistent or "clearly unreasonable in light of the known circumstances." The Court's majority responded to the dissent's criticism that such an ambiguous standard would subject schools to uncontrolled liability by stating that courts could determine on a motion to dismiss, summary judgment or a directed verdict whether the school's response was not clearly unreasonable.

The Court also attempted to provide a remedy for serious harassment while excluding liability for acts such as the minor name-calling to which children are prone. The Court held that, in order to be actionable, harassment must be "*so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the*

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educational opportunities or benefits provided by the school." However, the Court offered no clear test to determine when conduct has risen to that level. As an example of conduct that would qualify, the Court offered a hypothetical in which male students threaten female peers on a daily basis to prevent them from entering athletic facilities or the computer lab. Beyond that, however, the Court simply stated that whether conduct rises to an actionable level depends on "a constellation of surrounding circumstances, expectations and relationships" and admonished that courts must be aware that children engage in behavior that would be unacceptable for adults. Although the Court stated that a decline in grades by itself would not be sufficient to survive a motion to dismiss, it found that the facts before it were sufficient to allow the plaintiff to proceed.

The ambiguity of the Court's opinion leaves many questions unanswered. For example, the Court limited liability to harassment of which a school district has knowledge. However, it failed to define when it will find such knowledge. Would reporting harassment to a classroom teacher be enough, or is a student or parent required to notify the school administration or principal? Furthermore, how extreme must the harassment be for a cause of action to arise? As the Court acknowledged, younger students are still developing socially and are likely to engage in behavior that is unacceptable for adults. Finally, what role is a school required to play in order to be found to have responded adequately to known peer harassment? Must it provide sexual harassment training for even young students? Will detention or reduction in privileges be sufficient action, or is suspension or expulsion required?

Such questions undoubtedly will be clarified through subsequent litigation in lower courts. The one clear message the Court has sent, however, is that schools can be liable for severe or pervasive peer harassment. It is therefore imperative that school districts thoroughly investigate reports of peer harassment and take disciplinary action when appropriate.

If you have questoins about the *Davis* decision, or how to deal with sexual harassment problems in the school context, please call Larry Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

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