The courts and the Office of Civil Rights have made it clear that the schools have a legal responsibility to ensure that students are provided a safe environment in which to learn.

STUDENT-TO-STUDENT SEXUAL HARASSMENT: Legal Bases for School District and Individual Liability

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Sexual harassment in the workplace has been much documented and litigated. Sexual harassment in the workplace is defined by the Equal Employment Opportunity Commission (EEOC) as:

> Unwelcome sexual advances, requests for sexual favors, other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (29 C.F.R. Sec. 1604.11(a) 1993)

To a large extent it was the Anita Hill testimony on national television before the Senate Judiciary Committee in the Clarence Thomas hearings that was responsible for bringing the issue of sexual harassment in the workplace to the attention of the American public. The Navy's "Tailhook" scandal and the public allegations against Senator Robert Packwood brought further attention to the issue.

Student-to-student sexual harassment is a newcomer to the sexual harassment spotlight. Yet, peer sexual harassment "is occurring virtually every moment of every day in almost every elementary and secondary school in America" (Shoop & Edwards, 1994, p. 55). According to a major national study by the American Association of University Women (AAUW), *Hostile Hallways*, four out of five students attending public schools has been harassed by a present or former student (AAUW, 1993). About half the students experienced the harassment in the middle school/junior high years. Perhaps more surprising, fully one-third of the students in the AAUW (1993) study reported being harassed before the seventh grade.

Student-to-student sexual harassment is a serious problem for elementary and secondary schools, not only because of the profound impact on victims, or the potential liability it creates for the school district, but because of the consequences if not addressed and remedied. Student-to-student sexual harassment "denies millions of children the educational environment they need to grow into healthy, educated adults" (AAUW, 1993, p. x). Through their failure to aggressively combat peer-to-peer sexual harassment, the schools become the training grounds for domestic violence: girls learn that no one intercedes on their behalf, and that if they do complain they may not be believed or may be blamed for the harassment (Stein, 1993, 1994). In addition, those students who witness the harassment, which is almost always a public event, "may learn the bitter lesson that school is not a safe or just place . . . (and) may begin to worry about when it is going to happen to them, and or that they won't be protected when they become the targets of sexual harassment" (Stein, 1993, p. 1).

Unattended sexual harassment not only has damaging consequences for the victim, but for the harasser. Engaging in sexually harassing behavior may be a warning sign that the harasser himself or herself is a victim of sexual abuse or is at risk for becoming a juvenile sex offender. Research by the National Center for Prevention and Treatment of Child Abuse and Neglect found that 25% of young sex offenders said they began abusing other children before the age of 12 (Strauss, 1994).

The problem of student-to-student sexual harassment has not been sufficiently addressed by most school districts. Historically, school districts and school personnel have not recognized many of the behaviors which can be defined as sexual harassment as such, but have considered them to be just childhood teasing, "roughhousing," flirting, or "boys being boys." The lackadaisical attitude of the school has been compounded by the fact that when the few victims who are able to overcome their fears or self-blame do report the harassment, very often nothing happens (Lawton, 1993; Stein, 1993).

However, in the early 1990s two federal court decisions dealing with sexual harassment in the schools raised the public's awareness of the problem and focused the attention of school districts on both the problem and the consequences for the district and district personnel. The first case, the landmark 9–0 decision of the U. S. Supreme Court in *Franklin v. Gwinnett County Schools* (1992) involved the sexual harassment of a student by a teacher. In *Franklin* the court recognized that sexual harassment can create a hostile environment which may interfere with a student receiving an equal educational opportunity, thereby violating Title IX of the Education Amendments of 1972. The court also held that student victims of sexual harassment can sue for monetary damages under Title IX.

The next year, the *Franklin* decision provided the basis for a case involving student-to-student sexual harassment, *Doe v. Petaluma City School District* (1993). In *Petaluma,* an eighth grade girl was subjected to constant verbal harassment from peers who called her "slut," "hoe," or "hot dog bitch," and taunted her by asking her if she had a "hot dog in her pants" or had sex with "hot dogs." The harassment was perpetrated by both male and female peers. The response of the school counselor, to whom Doe repeatedly reported the harassment, was basically to say that "boys will be boys" and that girls can not sexually harass girls. He also said that he could not stop the taunts of the girls because that would violate their free speech

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rights. After two years of harassment the student transferred to another school but the harassment followed. She eventually withdrew from the public schools and enrolled in a private girls school. The federal district court, in reviewing *Petaluma,* compared the sexual harassment of a student by a student in this case to the sexual harassment of a student by a teacher in *Franklin* (1992), and said that hostile environment sexual harassment claims involving student-to-student sexual harassment may be brought under Title IX. Nonetheless, the court denied any Title IX damages because, it reasoned, damages can not be awarded absent a showing that a school district or employee intentionally discriminated on the basis of sex, not just that the district or the employee knew or should have known about the harassment and failed to take appropriate action to end it. However, the court did allow a claim under 42 U.S.C. Section 1983 against the counselor as an individual to proceed. [In *Petaluma II* (1995), the court granted the counselor qualified immunity against this claim.]

In April 1993, just weeks after the *Petaluma* decision, the U. S. Department of Education's Office of Civil Rights (OCR), in another groundbreaking case involving student peer sexual harassment, and the first case involving elementary students, found that the Eden Prairie (MN) School District had violated Title IX by failing to take timely and effective action to stop the sexual harassment of a six year old female student. The student had been subjected to a pattern of incidents which included, among other things, offensive sexual references, unwelcome touching, physical intimidation, taunting, vulgar gestures, sexual propositions, and suggestions she perform oral sex on her father (Eden Prairie Schools, 1993).

The *Petaluma* and Eden Prairie cases are but two of what has become a growing number of cases involving student-to-student sexual harassment filed in the courts and with the Office of Civil Rights. Student victims in these cases have alleged a variety of legal theories in an attempt to hold school districts and school personnel responsible and liable for the harassment. These have included: denial of benefits or sex discrimination in educational programs in violation of Title IX; Section 1983 of the Civil Rights Act of 1871; violation of equal protection and/or substantive due process rights under the 14th Amendment, and; various state tort claims, including negligence. Title VII of the Civil Rights Act of 1964, which has been the predominant vehicle for claims related to workplace sexual harassment, has not been used in student peer harassment claims. However, the definition of sexual harassment, particularly the definition of hostile environment as defined by the EEOC, the agency charged with enforcing Title VII, has been relied upon in student peer sexual harassment claims under Title IX.

Title IX of the Education Amendments of 1972

One of the major legal theories advanced by students in student peer harassment cases has been violation of Title IX. Title IX states that: "No 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" (20 U.S.C., Sec. 1681(a), 1988). The present interpretation of the courts is that liability under Title IX applies only to educational programs or activities receiving federal money, and that individuals may not be held personally liable for discrimination under Title IX (see, e.g., *Petaluma,* 1993). Claims of peer sexual harassment in the public schools have used this Title IX since the *Franklin v. Gwinnett* (1992) decision and are based on the rationale developed in that case: that hostile environment sexual harassment violates Title IX by denying students the benefits of, or by subjecting them to discrimination under an educational program or activity receiving federal funds. Some federal courts espouse claims under Title IX should be interpreted in the same way as Title VII since claims of sexual harassment have a distinctive body of case law and the legal theory of sexual harassment has been developed under Title VII (see, e.g., *Davis v. Monroe County Board of Education*, 1996; *Patricia v. Berkeley v. Unified School District,* 1993). Other courts (e.g., *Seamons v. Snow*, 1994; *Bosley v. Kearney R-1 School District,* 1995) have considered it inappropriate to apply Title VII hostile environment law to peer harassment, reasoning that Title IX was adopted pursuant to Congress' spending power and was patterned after Title VI, which prohibits race-based discrimination and was also a spending bill, and that the courts have ruled that legislation adopted pursuant to Congress' spending power allow compensatory relief only when discriminatory intent can be shown, discriminatory impact is not enough (see, *Guardians Ass'n v. Civil Service Commission,* 1983 and *Doe v. Petaluma,* 1993, 1995; see, also, *Rowinsky v. Bryan Independent School District,* 1996, which held that the school district would be liable for sex discrimination in a peer sexual harassment case only if the district responded to claims differently based on sex).

Applying the above rationale, no court to date has found any school district liable under Title IX for peer sexual harassment. However, since the court in *Franklin* (1992) did not indicate whether the door it had opened regarding school district liability under Title IX applied only to intentional discrimination, as was the case presented in *Franklin,* or whether liability can be found absent a showing of intentional discrimination, this rationale continues to be challenged in the lower federal courts. And, in fact, the Eleventh Circuit Court of Appeals in *Davis v. Monroe County Board of Education* (1996) recently reached a different conclusion as to the conditions for finding school board liability.

The court in *Davis* laid out the elements necessary for a victim of student-to-student sexual harassment to be successful in a liability claim against a school district under Title IX. According to the court, the victim must show:

1. That the victim is a member of a protected class;
2. That the victim was subjected to unwelcome sexual harassment;
3. That the harassment was based on sex;
4. That the harassment was sufficiently severe or pervasive so as to alter the conditions or benefits of the student's education and create an abusive or hostile educational environment; and
5. That some basis for institutional liability has been established.

Satisfying the first three requirements is usually easily established by the facts of the case. In determining whether the plaintiff has met the fourth requirement and shown that an environment is hostile or abusive, the courts will consider the age of the victim, frequency and duration of the harassment, severity and scope of the acts and the nature and context of the incidents. As the court in *Davis* (1996) explained: "a hostile environment in an educational setting is not created by simple childish behavior or by an offensive utterance, comment, or vulgarity. Rather, Title IX is violated 'when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment" (p. 1186).

In regard to the last requirement, the victim can provide a basis for institutional liability by showing that the district knew or should have known of the harassment and failed to take action to stop it. Knowledge on the part of the district can be established by showing: (1) that a complaint was made to an official of the district, or (2) "the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge" (*Davis*, 1996, p. 1186).

The appellate court in *Davis* reversed the district court's dismissal of the Title IX claim against the school board and remanded the case for further proceedings in light of its findings. If the lower court proceedings concur with the evidentiary

findings as reviewed by the appeals court in its opinion (i.e., finding that a prima facie claim under Title IX had been established), then school district liability may be found, and monetary damages awarded, for the first time by a federal court in a student peer sexual harassment case.

The question of individual liability under Title IX in regard to student peer sexual harassment also seems open to challenge. As previously noted, to date the courts have not interpreted Title IX as providing the basis for individual liability. At the same time, the courts seemingly have left the door open for individual liability if the facts of the case can document either intentional discrimination or deliberate indifference to peer harassment, and it seems only a matter of time before individual liability is found. For example, while granting a teacher qualified immunity from liability in a claim of violation of Title IX, a federal district court in Connecticut held that the teacher was a proper defendant in the action as he was the school authority in control of the classroom at the time that at least some of the alleged student-to-student sexual harassment violations occurred. According to the court:

> The plain language of the statute (Title IX) broadly refers to discrimination occurring "under any education program or activity." This language does not restrict the potential class of defendants based on their nature of identity (i.e. individual, institution, etc.). It does, however, restrict them based on their function or role in a program or activity. Logically, the language of Title IX demands that a defendant must exercise some level of control over the program or activity that the discrimination occurs under.

Thus, the plain language of the statute sets forth a functional restriction that does not preclude individual defendants, as long as they exercise a sufficient level of control. (*Mennone v. Gordon*, 1995, p. 56)

Fourteenth Amendment

In other student-to-student sexual harassment cases (e.g., *Seamons v. Snow*, 1994, 1996) students have brought procedural due process claims against school officials under the Fourteenth Amendment alleging that as a result of the harassment, they were effectively deprived of their property interest to a public education without due process. Still others have brought Fourteenth Amendment substantive due process claims based on an alleged violation of their liberty interest in their bodily integrity (see, *Spivey v. Elliott*, 1994; *Seamons v. Snow*, 1994, 1996).

Generally, the courts have held that plaintiffs must prove a "special relationship" existed related to the school district (i.e., duty to protect, creating a constitutional right to care and safety) in order to sustain this type of substantive due process claim. Without this special relationship, "(the) State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" (*DeShaney v. Winnebago County Dept. of Social Services*, 1989, p. 1004). And, while special duty or special relationship has been alleged in a few cases involving student peer sexual harassment, the courts have been reluctant to find the existence of a special relationship where the harm is inflicted by a peer. For example, in *Petaluma* (1993) the court held that no special relationship existed between school officials and public school students that required the officials to protect students from the acts of other students. And in a related case the next year, *Graham v. Independent Sch. Dist. No. I-89*, which involved student-on-student violence, the Tenth Circuit Court of Appeals concluded that "mandatory school attendance does not create the kind of custodial relationship that gives school officials the duty to take affirmative action to protect students from a violation of the Fourteenth Amendment—even where school officials knew of a danger" (*Seamons v. Snow*, 1994, p. 1120).

Section 1983 of the Civil Rights Act of 1871

Students in peer sexual harassment cases also have stated causes of action under 42 U.S.C. Section 1983. The purpose of Section 1983 is to provide a right of action in federal court against state and local government officials who deprive individuals of their federally guaranteed rights by failing to enforce the law or by subjecting them to unequal treatment under the law. Thus, if a case alleges a Fourteenth Amendment violation, or Title IX violation, recovery may be sought under Section 1983 (*Lillard v. Shelby County Bd. of Ed.*, 1996; *Seamons v. Snow*, 1996). For example, in *Oona R.–S v. Santa Rosa Schools* (1995), the court allowed Section 1983 claims to go forward against a teacher, principal, and director of elementary education for failure to supervise a harassing student teacher and for failure to take appropriate steps to counter the student peer harassment which was occurring in the same classroom.

State Tort Laws

State civil law related to torts such as intentional infliction of emotional distress and assault and battery, while seemingly accurately describing many sexual harassment experiences, actually have been used in only a limited number of student peer sexual harassment cases. The major reason these grounds have not been used more extensively is that they are difficult to prove. To prove assault and/or battery the harassing behavior would have to be in the form of a threatened or accomplished physical attack. To prove intentional infliction of emotional distress the victim would have to show "extreme and outrageous conduct" by the harasser which caused severe emotional distress to the victim. Extreme and outrageous conduct, in turn, is defined as is that which goes "beyond all possible bounds of decency"—a difficult thing to prove (Sherer, 1995).

The tort theory most relied upon by student victims of peer sexual harassment is negligence. The alleged negligence may be on the part of the school district or its employees. Where the liability of the school district is predicated on the alleged negligence of administrators, teachers, or other employees of the district, it is generally recognized that the liability of the district may be established under the common law principle of agency. This principle says that the school district may be liable for the acts of an agent (an employee) who represents and acts under the authority of the principal.

The particular form of negligence being alleged in most cases is negligent supervision. In order to be successful in a suit alleging negligent supervision, the student victim must prove that at the time of the harassment there was a relationship between the student and the school district that gave rise to a legal duty to protect, that there was a breach of this duty, and that the breach was the proximate cause of the harassment. Absent a showing of each of these elements, negligence will not be found. For example, in a case where a female student working after school on a science project was sexually assaulted by three male students leaving the building at the end of a detention period, the court said that the school did not have a duty to escort the students from the building at the end of the detention period and that the incident was not foreseeable (*Williams v. Columbus Board of Education*, 1992).

On the other hand, in a case where a third grade student was sexually assaulted in the bathroom by two other female students, one of whom had previously physically threatened the victim, the court found that the school district and the teacher had breached their duty to supervise. The victim had been sent unsupervised out of the classroom to a bathroom down the hall, even though there was a bathroom in the classroom which the teacher preferred students not use during class, and even though the school had a safety plan which provided that students were never to be left unsupervised or sent to stand or sit in the hall. In addition, the student had been sent

out of the classroom at the same time that the two attackers were apparently wandering the school premises unattended. The award of $350,000 to the student victim was upheld by the New York Court of Appeals (*Shante D. v. City of New York Board of Education*, 1994).

As the above case indicates, a successful negligence suit can potentially provide the victim substantial financial compensation. The amount of recovery will depend on whether there is a ceiling on monetary damages under state tort claims acts, or whether state law permits a jury to determine how much the prevailing claimant should be paid. In practice, few sexual harassment complaints actually go to court. Most cases are resolved within the district or settled out of court, due in part to the recognition of tort liability as a viable claim against school districts in states not having statutory immunity for districts and their employees.

Conclusion

The courts and the Office of Civil Rights have made it clear that the schools have a legal responsibility to ensure that students are provided a safe environment in which to learn. However, the responsibility of the schools to provide students a safe and supportive environment in which to learn is more than a legal obligation, it is an ethical one. Sexual harassment is not something students need to learn to accept. School districts must demonstrate by their policies and their actions that sexual harassment is unacceptable and will not be tolerated. Rather than being seen as the training grounds for domestic violence, the schools should be seen as the model for the behaviors a society desires for itself.

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