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ABSTRACT

Four subjects are the focus of this discussion of school law: sexual harassment, the copyright act, school discipline, and religion and the schools. In cases of sexual harassment of students by school personnel, a criterion for determining whether a school is liable involves the standard of "actual knowledge" in which school officials have knowledge of harassment but are "deliberately indifferent" to complaints (Gebser vs. Lago Vista Independent School District). In January 1999, the Fifth Circuit Court ruled that Title IX does not apply to cases involving peer (student-student) sexual harassment. The Digital Millennium Copyright Act may have a chilling effect on the "fair use" principle that allows teachers, librarians, and other educators to excerpt copyrighted materials in the classroom, and on distance-learning programs. The section on school discipline discusses issues surrounding student searches, the Gun-Free Schools Act, discipline for disabled students, and dangerous students. Topics involving religion and the schools include allowing public-school teachers to teach non-religious subjects to students who qualify for Title I remediation inside private, religious school classrooms; the use of public-school materials in religious schools; and religious activities in public schools.
(RT)

**School Law.
Trends and Issues**

Brad Gorian

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By Brad Goorian

Sexual Harassment

The issue of sexual harassment--of students by school personnel or peers--has been the subject of a growing number of cases. The relevant law for most of these cases is a federal statute known as Title IX of the Education Amendments of 1972. Title IX prohibits sex-based discrimination in any educational program or activity receiving federal funding. Thus, Title IX applies to nearly every school district and college in the nation.

Teacher-Student Sexual Harassment

Lawsuits invoking Title IX protection for sexual harassment of students were rarely litigated until a case made its way to the Supreme Court in 1992. The case, *Franklin v. Gwinnett County Public Schools*, involved sexual harassment of a female student by a male teacher, and the plaintiffs sued their school district. Earlier decisions had established that Title IX applies to entities only, such as school districts, and not to individuals.

The Justices ruled that sexual harassment of students by school personnel constituted discrimination and that monetary damages could be recovered against school districts in such cases. Comparing the teacher/student relationship to that of a supervisor over an employee, the Court noted that "when a supervisor sexually harasses a subordinate because of the subordinate's sex that supervisor discriminates on the basis of sex."

When the Court in *Franklin* implied that students have a right to sue school districts over sexual harassment, the decision created incentives for private litigation. Prior to this ruling, complaints of sexual harassment were handled administratively by the school districts themselves. With the *Franklin* decision, plaintiffs and lawyers alike would be more likely to file sexual harassment grievances with the courts instead. However, the Court did not articulate what the standard of liability would be. In other words, the elements a plaintiff would have to prove to recover money damages from a school district were unknown.

Standards of Liability

Various standards of liability were advanced in the federal courts. A "no fault" or strict liability standard would hold school districts liable without fault every time a school employee molested a student. This standard is similar to a workers' compensation scheme, where a student might file a claim or complaint describing the incident, and the school district or its insurer would have to provide compensation.

Another standard advanced was a "constructive knowledge" standard, which is used in Title VII cases involving employer-employee sexual harassment. This standard says that if a school district knew or should have known of the abuse but failed to take action, it would be liable. For example, the offender in *Franklin* sometimes interrupted a class and requested that the teacher on duty excuse the student, whereupon he sexually abused her in an office on school grounds. Under a constructive knowledge standard, the plaintiff could allege that the offender's behavior was sufficiently suspicious that school officials should have investigated. Therefore, school officials need not have direct knowledge of any particular incident to face liability, so long as the incident took place "under their guard."

The Eleventh Circuit adopted an "actual knowledge" standard. This standard says that a school district cannot be held liable unless it had actual knowledge of the abuse and did nothing to stop it. Therefore, the students themselves, or perhaps a parent or teacher, would be responsible for reporting misconduct to the proper school officials. Following this notice, the school district would have the opportunity to take action, and, failing that, could be held liable for its inaction.

In June 1998, the Supreme Court put the issue to rest in *Gebser v. Lago Vista Independent School District*. The case involved sexual abuse of a female student by a male teacher. Some incidents took place during class time in which the student was the sole pupil of the teacher in an advanced-placement course. The plaintiff, assisted by the U.S. Department of Education, utilized the Court's prior reasoning that sexual harassment at school was akin to harassment at work, and argued for the constructive-knowledge standard.

The plaintiffs' argument stressed that even if school officials had no knowledge of the affair, they should have discovered it through ordinary vigilance. Therefore, the school district should be held liable as if they had had actual knowledge of the affair.

The Court, in a 5-4 decision, disagreed and opted for the "actual knowledge" standard. To recover monetary damages under this standard, a plaintiff must now prove that he or she gave notice of the harassment to a proper school official, and that the official was "deliberately indifferent" to their complaints. An "appropriate official," to paraphrase Justice Sandra Day O'Connor, is one who has sufficient authority to take corrective action on behalf of the school district. This might mean a principal or superintendent, but probably not a teacher.

The Court observed that Congress's intent in enacting Title IX was to discourage sex-based discrimination in schools. As a remedy for such discrimination, a school district might lose its federal funding, but not until the school district had a chance to rectify the problem on its own. Justice O'Connor noted that damages in even one sexual harassment suit could exceed the amount of money a school district receives from the federal government every year. Therefore, she reasoned, a school district must receive actual notice of any misconduct by its employees and be given a chance to

solve the problem administratively before facing a potentially expensive lawsuit. In *Gebser*, the student never complained to any school official about the sexual abuse, and it didn't come to light until a police officer happened by chance to discover the teacher-student affair.

The *Gebser* decision was widely seen as a kind of victory for school districts. The "actual knowledge" standard appears to limit the liability of school districts by ensuring they will have notice of any misconduct and a chance to respond before facing the threat of litigation. Justice John Paul Stevens, in a written dissent, said that few Title IX plaintiffs who allege sexual discrimination "will be able to recover damages under this exceedingly high standard."

U.S. Secretary of Education Richard W. Riley was quick to point out that the Department of Education will continue vigorous enforcement of federal law prohibiting sex discrimination in schools. "A school district ... is still responsible for taking reasonable steps to prevent and eliminate that kind of misconduct." School district officials in this case noted that they had no knowledge of the affair, and once it was discovered, the teacher was fired. School districts may still face liability for the misconduct of their employees under other federal laws, such as Title VII, and also under state civil and criminal statutes.

Peer Sexual Harassment

Peer sexual harassment was the subject of a widely anticipated case heard by the Supreme Court in January 1999. At issue in *Davis v. Monroe County Board of Education* is whether a school district discriminates against a student by failing to adequately respond to complaints of student-to-student sexual harassment.

Davis involved a fifth-grade girl who was teased, groped, and otherwise sexually harassed by a male classmate in her Georgia school. The student and her mother complained to at least two different teachers and the principal after various incidents. The offender's seat was reassigned away from the plaintiff, and the principal threatened the offender with disciplinary action. The boy was even arrested, apparently at the behest of the girl's mother, and plead guilty to a count of sexual battery.

The plaintiffs filed suit in U.S. District Court under Title IX, alleging that school district officials failed to prevent the harassment after being notified of several incidents. This failure to respond, in their view, created a hostile environment that prevented the student from learning. In turn, attorney Verna Davis argued, if a child cannot learn, he or she is being discriminated against. The original suit in District Court asked for \$500,000 in damages against the school district.

The Fifth Circuit ultimately ruled against the plaintiffs. The court held that Title IX does not apply to cases of peer sexual harassment. The National School Boards Association supported the Georgia school district in the Supreme Court hearing and urged the justices to dismiss the suit. They argued that a victory for the plaintiffs could result in a litigation explosion. Attorney W. Warren Plowden cited a survey that 75 percent of high school girls and 66 percent of all boys report at least one instance of sexual harassment.

The plaintiffs' attorney Davis, of the National Women's Law Center, countered that not "every teasing would be sexual harassment." The distinction, as she stated, would be whether school officials knew of improper behavior and did nothing to stop it. The decision of the Court is expected in summer 1999.

Copyright Act

The Digital Millennium Copyright Act, passed on October 28, 1998, may have an impact on the "fair-use" principle that allows teachers, librarians, and other educators to excerpt copyrighted materials in the classroom. The law, which stems from an international treaty to protect copyrighted materials over the Internet, makes it a crime to penetrate digital "shrinkwraps," such as encryption and encoding, that protect such material.

Congress has indicated that it will extend the fair-use principle to digital media. However, teachers and librarians fear that they will not have the same access to Internet materials as they do for nondigital media, such as books or television. For example, educators would like to be able to browse works online, without purchasing them, as they would a book or a journal. Internet publishers, on the other hand, envision packaging their multimedia works on computer servers, available only to subscribers. Mark Traphagen, from the

Software Publishers Association in Washington, D.C., stated, "What we keep hearing about is [advocates claiming] there is a right of access to copyright works; we strongly disagree with that."

That attitude is troublesome to librarians and school people. Leslie Harris, a lawyer who lobbied Congress on behalf of school groups, stated that digital shrinkwraps and penalties for circumventing them will have an "overall chilling effect" on using digital content in ways that fair use makes legal.

The librarian of Congress has been authorized to study the fair-use principle over the next two years. The librarian is empowered to waive anticircumvention penalties for educators and school districts should digital shrinkwraps prove to have adverse effects on their use of Internet materials.

Distance Learning

The new copyright law may also affect distance-learning programs. Current copyright law allows educators to display pages of a book or other material via analog media such as television, without fees. Increasingly, educators and schools are making use of the Internet to broadcast and receive distance-learning programs. Rural schools, for example, often use distance learning to import courses in specialized subjects, such as Advanced Placement courses, that they otherwise could not offer. Educators want the fee exemption to apply to digital media as well. Publishers, who forecast explosive growth in distance-learning programs, especially in higher education, support the idea of licensing fees for any and all uses of their content.

Congress has granted the U.S. Copyright Office six months to study the issue of paying license fees to display copyrighted materials over the Internet. Rick Lane, cofounder of the Modern Educational Technology Center in Rockville, Maryland, fears that educators might not realize the importance of the Copyright Office study and may fail to participate actively. "If [the study] is dominated by the publishers, then the cost of incorporating distance education in the classroom may become too expensive and defeat the purpose of what distance education is about."

Publishers counter that schools should ask the taxpayers for more money to cover licensing fees for distance learning--just as they do to cover supplies for science labs. But some critics believe that the publishers' ultimate goal is for schools to pay them each and every time anyone uses their material online. Peter A. Jaszi, law professor and cofounder of the Digital Future Coalition, stated, "Some school systems are going to be well-funded and digging deep and paying the license fees, [and] some will forgo the technology. There will be a kind of schism."

The U.S. Copyright Office report is due in Congress on April 28, 1999. For more information see their website at <http://lcweb.loc.gov/copyright/disted>

School Discipline

Student Searches

Student searches are generally permissible to the extent they conform to the Fourth Amendment's prohibition on unreasonable searches and seizures. The Supreme Court, in *New Jersey v. T.L.O.*, stated that searches are permissible provided that school administrators can justify the search at inception and establish that the search was reasonable in its scope. It added that a search is ordinarily justified at its start when school officials have reasonable grounds for suspecting a search of a student will uncover evidence that the student has violated school rules or the law.

This "reasonable suspicion" test is relatively subjective, but courts across the nation have tended to uphold most student searches. Application of the test varies according to the nature of reasonable suspicion and reasonable scope, areas searched, and search measures. Generally, the more invasive the search, the greater the need for its justification. Strip searches, for example, have been upheld where students were suspected of concealing drugs or money. However, strip searches for money or property have generally not been upheld, and several states have passed laws forbidding strip searches of public school students.

Administrative searches, using such means as metal detectors or urinalysis, are aimed at large groups of

students rather than an individual student who has come under suspicion. As these administrative-search methods have become more commonplace, they have increasingly become subjects of litigation. In upholding these searches, courts from Oregon to New York have stressed that the safety concerns of school districts can outweigh the privacy concerns of students, especially where the searches are minimally invasive. In one New York case, the school district's highly detailed metal-detector policy was cited by the court as a key factor in upholding its constitutionality.

School districts have increasingly turned to police forces to assist with searches. Police forces are held to a strict standard of "probable cause" when searching suspects, students or not, while educators are held to the lesser "reasonable suspicion" standard. The law is as yet unclear on the standard needed for joint searches, but the rule of thumb appears to be that if educators initiate the search, then reasonable suspicion applies even if the police assist.

Gun-Free Schools Act

The federal Gun-Free Schools Act of 1994 required states to pass zero-tolerance laws on weapons at school or risk losing federal funds. Every state has complied with the law and now requires districts to expel students for at least a year if they bring weapons to school.

For the most part, the zero-tolerance policies are doing what they were intended to do. However, some districts have expelled or suspended children over seemingly minor offenses such as bringing a G.I. Joe doll's one-inch plastic gun to school. Schools are allowed to adjust the mandatory one-year expulsion as circumstances warrant.

Discipline for Disabled Students

The 1997 amendments to the Individuals with Disabilities Education Act (IDEA) clarified and codified much of the existing case law regarding discipline of disabled students.

Prior to the IDEA amendments, there had been considerable litigation over discipline of students with disabilities. Two of the main issues were whether

disabled students could be lawfully removed from their schools by suspending or expelling them, and if so, whether their rights to a "free appropriate public education" were violated when these students were expelled. A principle known as the "manifestation of disability doctrine" emerged from the courts. This doctrine stated that a disabled student could not be suspended or expelled for misbehavior that was a manifestation of that student's disability, but could be expelled if there was no relationship between the misbehavior and the disability. Courts were split on whether or not a disabled student who had been properly expelled would have to be provided educational services during the expulsion period.

Under the 1997 IDEA amendments, a set of procedures are required to determine whether misconduct is related to the student's disability. The team that developed the student's individualized education program (IEP) will be responsible to make this determination, employing all the evaluation data and behavioral history available to it. If evaluation data are not current, new assessments should be conducted. If the team determines that the student's misbehavior was not a manifestation of his or her disability, the student may be disciplined in the same manner as nondisabled students. The student's parents may appeal the determination via an expedited hearing. If a hearing is requested, school officials bear the burden of proving that their determination is correct.

If a student is suspended or expelled under the IDEA, the law makes it clear that a free appropriate public education must be provided during the expulsion period. In addition, a behavioral assessment must be conducted with the goal of preventing any further misconduct.

Dangerous Students

The IDEA enhances school officials' authority to discipline "dangerous" students, those students caught with weapons or drugs. Such students may be transferred to an interim alternative setting for up to forty-five days. The team that developed the student's IEP is required to conduct a functional behavioral assessment within ten days of the alternative placement and implement a behavioral intervention plan for the student.

The interim placement must be one in which the student

can continue to participate in the general curriculum and educational goals of his or her IEP. At the conclusion of the interim placement, the student is to return to his or her former school, unless the school district and parent have agreed to a new placement. In the past, a student's placement could not be changed over the objections of the parent, even for dangerous behavior, unless the school district obtained a court order. Under the current law, if a disagreement occurs, an expedited hearing may be requested.

If a hearing is requested, school districts have the burden of proving that maintaining the student in his or her current educational placement is substantially likely to result in an injury to the student or others. School administrators must also show that they had taken reasonable measures to minimize that risk in the student's current placement. Hearing officers are limited to ordering alternative placements for no more than forty-five days.

Religion and the Schools

Public School Teachers in Religious Schools

The U.S. Supreme Court ended its 1996-97 term with a surprising reversal on providing public-school services in religious schools. The practical effect of *Agostini v. Felton* is to allow public school teachers to teach nonreligious subjects to students who qualify for Title I remediation inside the classrooms of private, religious schools. Prior to the ruling, Title I services could not be provided inside the premises of religious schools, resulting in the use of mobile classrooms, parked near the school grounds.

Public School Materials in Religious Schools

A ruling by a Fifth Circuit panel in New Orleans has struck down part of a federal education law that allows public school districts to lend library books, computers, VCRs, and other instructional equipment to religious schools. The federal law, commonly known as Chapter 2, provides block grants to states for education

programs. The law also mandates that nonpublic schools that wish to participate in the programs receive aid.

The court said that the loan of material that could be converted to religious uses violates the First Amendment's prohibition against government establishment of religion. Attorney Steven Winnick, for the U.S. Department of Education, stated, "We're unhappy about the ruling. It held flat-out that it is unconstitutional to lend equipment and books other than secular textbooks" to religious schools. The Department is weighing whether to pursue an appeal of the ruling to the Supreme Court.

Religious Activities in Public Schools

Religious activities in public elementary and secondary schools have become one of the signature legal issues of the 1990s. Prior to 1990, the Establishment Clause of the U.S. Constitution, as interpreted by the Supreme Court in *Lemon v. Kurtzman*, was thought to doom most attempts to integrate religious activities into public schools to failure. The *Lemon* test said that religious activities in public schools must have a secular purpose, must neither advance nor inhibit religion, and must not result in an excessive entanglement between government and religion.

During the 1990s three strands of legal development emerged to challenge the *Lemon* test and affect access of religious activity in public schools. The best known strand was the Equal Access Act (EAA), passed by Congress in 1984 and upheld by the Supreme Court in 1990 in *Board of Education of Westside Community Schools v. Mergens*. The EAA created a statutory right of access to school facilities for noncurriculum student-led religious activities during noninstructional school time. The EAA has been interpreted by courts to apply to periods before and after school, lunchtime, and activity periods. Schools are free under the act to prohibit religious clubs or other student-led religious activities provided that the school prohibits all other noncurriculum-based clubs as well.

A second strand in the development of religious access to schools emerged from the 1993 Supreme Court case

of *Lamb's Chapel v. Center Moriches Union Free School District*. The facts of the case concerned the use of public school facilities after school hours by a religious group. In essence, the unanimous decision declared that religious speech was a fully protected subset of free speech. The key concept in the Court's decision was that public school districts could not discriminate on the basis of expressing a viewpoint. So, for example, a 1994 case held that a public school that permitted a Boy Scout troop to use its premises after school could not prohibit a parent-led religious group from also using the school premises at the same time, because both were involved with the viewpoint of moral development (*Good News/Good Sports Club v. School District of the City of Ladue*).

Similar to the idea of free-speech rights in *Lamb's Chapel* is the concept of forum analysis. The principle is that free-speech rights attach to any public forum. A higher education case in 1981, *Widmar v. Vincent*, determined that once a University opened its campus to student groups, the campus shifted from a nonpublic forum to a public forum, and the University could not prohibit meetings for religious purposes.

The general legal assumption is that public elementary and secondary schools are nonpublic forums. However, if, for example, a school permits the distribution of nonreligious materials in a particular hallway, it may be held that the school has created a limited public forum in that hallway, and free-speech rights will attach to it. Therefore, the school could not prohibit the distribution of religious materials in that hallway. This was the result in a Seventh Circuit case in 1993 (*Hedges v. Wauconda Community School District*).

The new principles that emerged in the 1990s should not be viewed as displacing or eliminating concerns over the Establishment Clause. The law is far from settled on the issue of religion in schools. Following are some guidelines suggested by the U.S. Department of Education and various commentators:

1. The school's harassment policy should include protection from religious harassment.
2. Teachers and administrators should not support or participate in forms of student religious activities such as flagpole meetings or group prayer

sessions.

3. Free speech is not an absolute right; governments can to some degree control time, place, and manner of expression, and school officials may want to designate certain locations in a building for forms of student expression such as distribution of literature.
4. Individual students can pray or read a religious text alone.
5. Schools may teach *about* religion, or its role in art, history, philosophy, music, and so forth.
6. School officials should include religion in their diversity statement to ensure that all religions and religious beliefs will be given equal protection and recognition.

For more information, see www.ed.gov/Speeches/08-1995/religion.html

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