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ABSTRACT

This paper provides legal information about the role of physical conduct in student-teacher, teacher-teacher, and administrator-teacher roles. The two legal theories that pertain to physical conduct in the schools are found in Title IX of the Education Amendment of 1972 and 42 U.S.C. (1983) for violations of due process and equal protection clauses. The bases for liability for physical conduct include: (1) there must be an actual or a de facto policy; (2) deliberate indifference may suffice to create liability; (3) school districts must adopt policies that pass constitutional muster; and (4) simple negligence does not constitute violation of 1983 constitutional law. Possible targets of a suit include the school district, the individual employee, or the private individual. Although student conduct is not state action, there are other types of liability. Guidelines are offered for protecting the rights of students and employees regarding the forms of physical conduct for consideration, implementation of board policy, remedial action, investigation, complaint system, procedures, and policy implementation. Common sources of liability facilitated by school officials' actions are also identified. Most involve failure to take action or concealment of the problem despite having knowledge. (LMI)

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NO-TOUCH POLICIES IN THE PUBLIC SCHOOL SETTING

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"Respecting others equally simply on the basis of their membership in the human race and their status as colleagues doesn't seem a norm of any school culture."

Pat Hinchey, "The Roots of Teaching-Bashing"

Goal: To provoke thoughtful dialogue about the role of physical conduct in the student-teacher, teacher-teacher, and administrator-teacher roles.

I. LEGAL THEORIES PERTAINING TO PHYSICAL CONDUCT

(A) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and/or

(B) 42 U.S.C. § 1983 for violations of the due process and equal protection clauses of the U.S. Constitution.

A. STATUTORY CLAIMS UNDER TITLE IX: Sex discrimination by schools that receive federal monies is prohibited under "Title IX":

"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 . . ."

1. A monetary damage remedy is available.

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When a male teacher sexually harasses and abuses a female student, the student has a "money damages remedy" available against the district when an intentional violation of Title IX is proven. Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992).

B. § 1983 CONSTITUTIONAL CLAIMS: A person may sue a school district, its employees and its school board members for damages flowing from a violation of United States Constitutional rights.

1. "Section 1983"

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. Substantive due process rights: a federal constitutional claim under the due process clause of the 14th Amendment to the U.S. Constitution can be raised by students and others in the school setting. The claim is essentially that the abuse deprived the student of a constitutional right (1) to "bodily integrity," (2) to be free from physical abuse at school, (3) to be protected from physical abuse at school, and/or (4) to a safe school environment. Doe v. Taylor ISD, 987 F.2d 231 (5th Cir. 1993) (granting rehearing en banc).

3. Equal protection: a federal constitutional claim under the 14th amendment's provision for equal protection can be raised by students and others in the school setting.

II. BASES FOR LIABILITY FOR PHYSICAL CONDUCT

A. There must be an actual or a de facto policy

Official board policy must have been the cause of the violation of the individual's constitutional rights. "Official policy can be established when the district makes a decision, adopts a policy, or tolerates a custom or common practice that results in a violation of the individual's constitutional rights. Jett v. Dallas ISD, 7 F.3d 1241 (5th Cir. 1993)

1. A legal action based on custom must prove:

"(1) The existence of a *continuing, persistent widespread practice of unconstitutional misconduct* by the school district's employees;

(2) Deliberate indifference to or tacit approval of such misconduct by the school district's policymaking officials (board) *after notice* to the officials of that particular misconduct; and

(3) That the [student] was *injured* by virtue of the unconstitutional acts pursuant to the board's custom and that the *custom was the moving force* behind the unconstitutional acts." Gates v. Unified School Dist. No. 449, 996 F.2d 1035, 1041 (10th Cir. 1993).

B. Deliberate indifference, in the absence of overt policy may suffice to create liability.

The school district has liability for board policies and actions that are either (1) unconstitutional on their face, or (2) "inadequate" if the inadequate policies and decisions "are enacted or made with deliberate indifference to their possible unconstitutional consequences." Gonzalez v. Ysleta ISD, 996 F.2d 745, 759 (5th Cir. 1993).

Deliberate indifference includes, but is not limited to conduct, actions, or failures to act that amount to condonation, toleration, or encouragement of sexual abuse by teachers. Gonzalez v. Ysleta ISD, *supra* AT 762.

A student's claim of sexual abuse could go forward against a principal who had received and concealed at least five complaints of sexual assaults on female students by teachers and other staff members, and who attempted to intimidate students to prevent them from complaining, even where the student herself had not initiated any of the earlier complaints, since she was aware of the principal's indifference. Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990).

A jury should decide, as a question of fact, whether school officials demonstrated deliberate indifference to a teacher's actions and to the constitutional rights of a student where special education students claimed that school officials knew of and took no action about a teacher's sexual, physical, and verbal abuse of students, in spite of repeated complaints received by teachers and other staff members. C.M. v. Southeast Delco School Dist., 828 F.Supp. 1179 (E.D. Pa. 1993) and K.L. v. Southeast Delco School Dist., 828 F.Supp. 1192 (E.D. Pa. 1993).

Caveat: The evidence must establish *notice of a pattern* of unconstitutional acts or deliberate indifference. Gates v. Unified School Dist. No. 449, 996 F.2d 1035 (10th Cir. 1993).

Trautvetter v. Quick 916 F.2d 1140 (7th Cir. 1990) - no liability for school board where relationship between teacher and principal appeared to be consensual.

C. Adopting policies that pass Constitutional muster is imperative.

"The repetition of [the individual's] injury was not caused by school board policy: the school board had perfectly reasonable policy for dealing with reported instances of sexual abuse. Instead the injury was caused by the failure of an employee properly to exercise the discretion granted him by the policy of [the school district]." Spann v. Tyler ISD, 876 F.2d 437 (5th Cir. 1989), cert. denied, 110 S.Ct. 847 (1990).

D. Simple negligence will not make a 1983 case

1. "[L]iability must be predicted upon a showing of 'fault,' not merely 'responsibility.'" Gonzalez v. Ysleta ISD, 996 F.2d 745, 757 (5th Cir. 1993). Section 1983 cannot be the basis for liability for either the district or its employees solely because a person for whom they are responsible later was discovered to have engaged in prohibited conduct with a student. The claimant must show that the district or the employee was personally at fault for permitting the offense against the student.

2. See also Gonzales v. Ysleta ISD, supra, at 761; Gates v. Unified School Dist. No. 449, 996 F.2d 1035, 1041, n. 1 (10th Cir. 1993); accord, Jane Doe v. Special School Dist. of St. Louis County, 901 F.2d 642, 646-47 (8th Cir. 1990).

3. The employer's conduct must be demonstrated to be "deliberately indifferent" to the violation of students' rights, or to be engaged in with "knowledge of the likely consequences." Gonzalez, at 762. "In order to establish deliberate indifference on the part of the defendant, something more culpable must be shown than a negligent failure to recognize a high risk of harm to the student." Black v. Indiana Area School District, 985 F.2d 707, 712-13 (3rd Cir. 1993).

III. WHO WOULD BE THE TARGET OF SUCH A SUIT?

A. The school district

"Actions for damages against a party in his official capacity are, in essence, actions against the governmental entity of which the officer is an agent." Familias Unidas v. Brisco, 619 F.2d 391, 403 (5th Cir. 1980).

B. The individual employee/agent

When a public official performs a discretionary act, he is entitled to the defense of qualified immunity from suit in his individual capacity if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 (1987). This broad definition protects all "but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 106 S.Ct. 1092, 1096 (1986). The immunity shields the individual from personal liability for damages.

C. The private individual

Where it has been shown that an administrator or supervisor engaged in a certain course of conduct, that individual can be held liable individually:

- (1) If the individual received notice of a pattern of unconstitutional acts committed by those s/he supervises;
- (2) If the individual deliberately ignored or tacitly authorized offensive conduct;
- (3) If the individual did not take satisfactory remedial action; and
- (4) The individual's failure to act as set forth above "proximately caused injury" to the claimant. Jane Doe A. v. Special School Dist. of St. Louis County, 901 F.2d 642, 645 (8th Cir. 1990).

IV. CAN DISTRICTS BE FOUND LIABLE FOR STUDENT CONDUCT TOWARD OTHER STUDENTS?

A. Student conduct is not state action:

1. In D.R. v. Middlebucks Area Vocational School, 972 F.2d 1364 (3rd Cir. 1992) (en banc), cert. denied, 113 S.Ct. 1045 (1993), sexual abuse of a student by other students was not action under color of state law. Sexual molestation of a student by a teacher as a state actor was distinguishable from molestation committed by other students as private actors. Accord, Hunter v. Carbondale Area School District, 829 F.Supp. 714 (M.D. Pa. 1993) (assault against student and subsequent chase off school property by other students who were private actors).

2. However, some student-on-student abuse may state a claim under Section 1983 as a result of deliberate indifference.

Where a mentally retarded boy raped another child in the shower at school amidst allegations that the district and administrators were aware of the boy's history of violent and sexually assaultive behavior and where the perpetrator and the victim were unsupervised in the showers, action did not lie under § 1983. The court

reasoned that the school had no constitutional duty to protect the student from *private acts of violence by other students*. Importantly, the court observed that its ruling might have been different if the complaint had alleged facts indicating that school officials had undertaken affirmative action to create or enhance the danger for the student. For example, in Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993)

3. Other types of liability:

a. foreseeable risk of injury from adverse weather condition. Lichtier v. County of Orange, 813 F.Supp. 1054, 1056 (S.D.N.Y. 1993)

b. duty to protect and to provide safe environment Horton v. Goose Creek ISD, 690 F.2d 470, 480 (5th Cir. 1982), cert. denied, 103 S.Ct. 3536 (1983)

c. no duty to protect Grubbs v. Aldine ISD, 709 F.Supp. 127, 130 (S.D. Tex. 1989) Voorhies v. Conroe ISD, 610 F.Supp. 868 (S.D. Tex. 1985); VonDrehle v. Houston ISD, No. H-88-539 (S.D. Tex. 1989) (unpublished decision); Moore v. Port Arthur ISD, 751 F.Supp. 671, 673-74, n. 2 (E.D. Tex. 1990)

d. student beaten unconscious by other students on school bus Lopez v. Houston ISD, 817 F.2d 351, 356 (5th Cir. 1987)

IV. HOW TO PROTECT THE RIGHTS OF STUDENTS AND EMPLOYEES

A. Forms of physical conduct to consider for inclusion in official board policy:

1. corporal punishment
2. hazing rituals
3. expressions of affection
4. assaults
5. acts of harassment and intimidation
 - a. solicitation for dating, intimate relationship or sex
 - b. sexual horseplay
 - c. distinguish consensual from unwelcome

B. Implementation of board policy

1. education
2. monitoring
3. complaint procedure

C. Remedial action

1. promptness
2. reasonably calculated to prevent the misconduct from recurring
3. type of remediation: a reasonableness standard
 - a. nature of harassment
 - b. degree of notice
 - c. available resources
 - d. effectiveness
 - 1) anticipated
 - 2) achieved

D. Investigation

1. prompt
2. confidentiality
3. protect sources from retaliation
4. confront alleged harasser
5. draw credibility judgments

E. Complaint system

1. announce policy and system or process covering any form of inappropriate behavior
2. state that no individual has been authorized to use his or her position in a sexually harassing way
3. state that the mission of the school is never served by sexual harassment
4. distinguish unwelcome advances from purely voluntary relationships but urge caution about how relationships might appear or change over time
5. indicate that severe discipline may be imposed against any individual against whom good faith allegations have been made

F. Procedure

1. Perceived victim must have the ability to file a complaint against perpetrator outside of the disciplinary structure of the school
2. Confidentiality must be preserved; consider allowing anonymous complaints
3. Adopt informal rather than confrontational method, beginning with good faith allegations (not requiring actual proof) and proceeding to discussions, not hearings
4. Establishing strict timetables for investigation and action to maintain promptness
5. Provide notice of appeal rights in the written response
6. Include significant penalties, in correlation to student disciplinary code and

provisions of collective bargaining agreement where applicable

G. Implementation

1. Focus on policy and procedure in orientation and in-service training
2. Educate students, staff, and faculty about avoiding any aspect of sexual harassment, including joking, graffiti, profanity, and open discussion of sexuality.
3. Include in student evaluations a factor for responsible behavior, and for faculty, enforcement of the policy.
4. Screen new hires by considering whether they have ever been charged with sexual harassment and inquire of references whether such charges were ever brought against the applicant
5. Review earlier employment history for taint of sexual harassment, particularly when a student or fellow employee of the opposite sex is involved, and the applicant has an otherwise solid paper record.

H. Characteristic sources of liability are where school officials have

1. tried to keep the teacher's behavior quiet,
2. failed to contact the students' parents about the complaints,
3. failed to directly confront or reprimand the teacher based upon the reports of his misconduct,
4. failed to remove a complaining student from his class,
5. been ineffective in handling the one student who did complain about the teacher's behavior,
6. knew of many instances of sexual misconduct and sexual abuse by the teacher against other female students,
7. despite their knowledge, took no action against the teacher,
8. failed to report the teacher's conduct or suspected conduct as required by law,
9. failed to initiate any other investigation or action by law enforcement authorities,
10. concealed the teacher's past sexual misconduct from another student-victim,
11. failed to train teachers, counselors and other school personnel to report suspected sexual abuse,
12. maintained the practice not to report instances of sexual abuse, and
13. the school board acquiesced in this practice.