

Attorneys at Law

A.F. Ringold
Coleman L. Robison
J. Douglas Mann
John G. Moyer, Jr.
John E. Howland
Jerry L. Zimmerman
Frederick J. Hegenbart
Eric P. Nelson
Karen L. Long
John E. Priddy
Bryan K. Drummond
Kent "Bo" Rainey
Eric D. Wade
Matthew J. Ballard
Samanthia S. Marshall
Cheryl A. Dixon
Kelsey K. Bardwell

Of Counsel

Jerry A. Richardson
Catharine M. Bashaw
Staci L. Roberds

C.H. Rosenstein
(1893-1990)

Henry L. Fist
(1893-1976)

David L. Fist
(1931-2008)

In this issue:

1 Sexual Harassment
under Title IX:
What School Districts
Need to Know

4



Sexual Harassment Under Title IX: What School Districts Need to Know

by Staci L. Roberds

School Districts face a myriad of lawsuits under 42 U.S.C. § 1983 for alleged violations of students' constitutional rights. Although not as commonplace as Section 1983 claims, claims under Title IX of the Education Amendments of 1972 may be brought if sexual harassment is involved. There are many facets to a Title IX claim, and this article will address the application of such a claim in the school setting, what the United States Supreme Court has found to be actionable conduct under Title IX, and the steps a school district may take to avoid liability on a sexual harassment claim under Title IX.

Title IX Application in the School Setting

Title IX provides in pertinent part that "[n]o person ... 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." The United States Department of Education's Office of Civil Rights de-

finer sexual harassment as conduct that is sexual in nature, unwelcome, and denies or limits a student's ability to participate or benefit from a school's education programs. Such conduct occurs in different forms, can be carried out by school employees, other students, and third parties, and can occur on school property or at school-related activities. Title IX prohibits harassment if it is based on sex, regardless of whether the harassment is perpetrated by individuals of the same or opposite sex of the victim of the harassment.

Actionable Sexual Harassment Under Title IX

The Supreme Court illustrated the characteristics of an actionable Title IX claim in the cases of *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), wherein it identified two instances of sexual harassment in an educational setting—teacher-student and peer-on-peer sexual harassment—and de-

terminated that Title IX liability applied in these situations under certain circumstances.

Teacher-Student Harassment

In *Gebser*, the parents of a high school student brought suit against the school district under Title IX for sexual harassment of their daughter by her teacher. The complained of harassment included sexually suggestive comments to students and direct sexual contact with the daughter. Although neither the student nor her parents ever reported the sexual harassment to school officials and the direct sexual contact occurred off school property, other students had reported to the principal that the teacher made inappropriate comments during class. The principal never informed the superintendent of the complaints nor did he notify the school district's Title IX coordinator. The school district did not have a grievance procedure in place for sexual harassment complaints, and it had not adopted a formal anti-harassment policy.

In addressing the student's allegations, the Court determined that an educational institution may be liable for the sexual harassment of a student by a teacher only if (i) the school district had actual notice of the harassment and (ii) then acted with deliberate indifference when responding to a complaint. It imposed an actual notice requirement because "Congress [had not] contemplated unlimited recovery in damages against a funding recipient where the recipient [was] unaware of discrimination in its programs." The Court limited the notice requirement even further by requiring that actual notice be provided to an "appropriate person." At a minimum, the school employee receiving actual notice has to have "authority to address the alleged discrimination and to institute cor-

rective measures on the [school district's] behalf[.]" It determined that even if an "appropriate person" had actual notice of sexual harassment, in order to be actionable under Title IX, that person's response to the harassment "must amount to deliberate indifference[.]"

no person . . . 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.

Applying the requirements of actual notice and deliberative indifference to the facts in *Gebser*, the Court held that the report by other parents to the principal that the teacher was making inappropriate comments in class did not amount to actual notice that the teacher was engaged in a sexual relationship with a student.

The Court further held that even if there were administrative requirements for an official grievance policy for sexual harassment or the adoption of a formal anti-harassment policy, and the school district lacked such policies, the requirements did not allow for the recovery of damages under Title IX.

Peer-on-Peer Harassment

In *Davis*, which was decided by the Supreme Court less than one year after the decision in *Gebser*, the Court took up the issue of sexual harassment under Title IX in regard to peer-on-peer sexual harassment. *Davis* involved a fifth grade student who allegedly was being sexually harassed by one of her classmates on a prolonged basis. The harassment included vulgar statements of a sexually explicit nature and offensive touching by the classmate. The child reported her classmate's conduct to her mother and classroom teacher, who in turn notified the school's principal. The behavior continued for several months, and the child and her parent continued to report the inappropriate conduct to school officials, who

failed to take any disciplinary action against the classmate or separate the students until several months later. The classmate allegedly engaged in similar conduct with other female students.

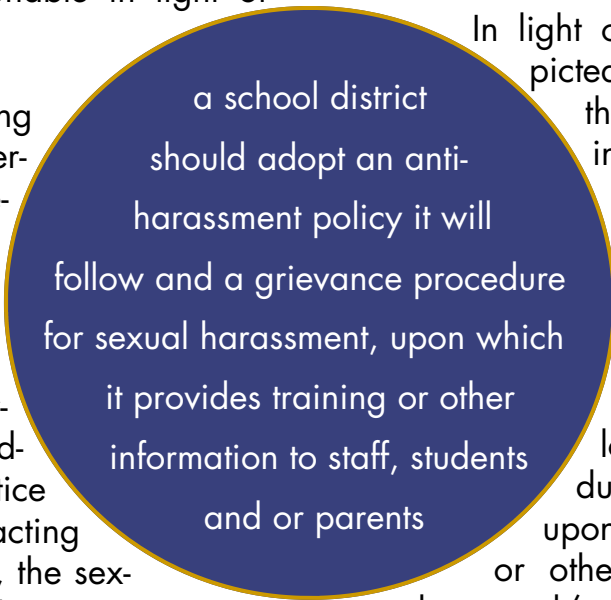
In *Davis*, the Court adopted the requirements of actual notice and deliberate indifference for peer-on-peer harassment as it did for teacher-student harassment in *Gebser*, but it further limited both requirements. With regard to actual notice, the Court determined that “a recipient of federal funds may be liable in damages under Title IX only for its own misconduct.” It limited the requirement of deliberate indifference in two respects. First, it limited damages under Title IX to circumstances where the school district exercised “substantial control over both the harasser and the context in which the known harassment occur[ed].” As an example of the degree of control required, the Court referenced misconduct that occurred during school hours on school grounds. Second, the Court determined that a school district would not be found deliberately indifferent to misconduct unless its response to the harassment was “clearly unreasonable in light of the known circumstances.”

In addition to further limiting the actual notice and deliberate indifference requirements established by *Gebser*, the Court in *Davis* determined two additional elements were necessary to establish peer-on-peer harassment under Title IX. In addition to having actual notice of the harassment and acting with deliberate indifference, the sexual harassment must be (i) “so severe, pervasive, and objectively offensive” that (ii) it resulted in the student being excluded from participation in or denied the benefits of an education program or activity provided by the

school. However, the Court qualified the additional requirements by noting that in a school setting, “students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting” but that such conduct does not result in damages against the school district under Title IX. It further noted that declining grades alone may not be enough to satisfy the requirement that a student was deprived of access to school resources.

Applying all the elements for peer-on-peer sexual harassment, the Court in *Davis* determined that the student’s parents stated a claim for sexual harassment under Title IX, as their daughter was subjected to continuing harassment of which the school district had actual notice and acted with deliberate indifference, and the misconduct was severe and pervasive enough that it could have caused a negative effect the student’s ability to receive an education.

Suggestions for School Districts to Avoid Liability Under Title IX



a school district should adopt an anti-harassment policy it will follow and a grievance procedure for sexual harassment, upon which it provides training or other information to staff, students and or parents

In light of the factual scenarios depicted by *Gebser* and *Davis* and the Supreme Court’s decisions in these cases, there are several actions that a school district may take to avoid liability under Title IX. Foremost, a school district should adopt an anti-harassment policy it will follow and a grievance procedure for sexual harassment, upon which it provides training or other information to staff, students and/or parents to ensure an adequate understanding of the policy and procedure. A school district also should designate a Title IX coordinator to assure an appropriate response to any allegations of sexual harass-

ment, including a prompt and impartial investigation. When conducting an investigation into allegations of sexual harassment, a school district must take the necessary steps to resolve the reported situation, and if the student reporting the alleged harassment requests confidentiality, a school district should attempt to honor the request while weighing its responsibility to provide a safe environment for all students. Moreover, a school district should not treat claims of sexual harassment from male and female students differently. Perhaps most importantly, a school district must document its investigation of all sexual harassment complaints. If a Title IX lawsuit is brought against a school district, the documentation will help establish the details of the investigation into the allegations and the ultimate response taken by the school district to the alleged harassment.

We Are Paperless!

Sign up for FREE at:

<http://www.rfrlaw.com/resources/sign-up>



2014 Rosenstein, Fist & Ringold Best Lawyers®:

Bankruptcy and Creditor Debtor Rights /
Insolvency and Reorganization Law:

John E. Howland

Education Law:

Karen L. Long

J. Douglas Mann

John G. Moyer, Jr.

Eric P. Nelson

Employee Benefits (ERISA) Law:

Karen L. Long

Employment Law—Management:

Karen L. Long

Health Care Law:

A. F. Ringold

Litigation—ERISA:

Karen L. Long

Litigation - Labor and Employment:

Karen L. Long

Real Estate Law:

Eric P. Nelson

Coleman L. Robison

Trusts and Estates:

Jerry Zimmerman

Tulsa Office:
525 S. Main, Suite 700
Tulsa, Oklahoma 74103
Phone: 918.585.9211
Fax: 918.583.5617
Toll Free: 800.767.5291



ROSENSTEIN FIST & RINGOLD

Oklahoma City Office:
3030 NW Expressway
Suite 200
Oklahoma City, OK 73112
Phone: 405.521.0202

Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

Please use the form on www.rfrlaw.com (located on the Resources page) to add or change *Chalkboard* e-mail addresses.

©2013 Rosenstein, Fist & Ringold, Inc.