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WHEN CONFLICTING RIGHTS COLLIDE: DEALING WITH SEXUALLY AGGRESSIVE STUDENTS WITH DISABILITIES

P. TYSON BENNETT*

“More and more frequently we are faced with cases in which two fundamental constitutional rights appear to be at odds.”1 Although this quote from the United States Court of Appeals for the Ninth Circuit referred to a conflict between free speech rights of students under the First Amendment and their right to be free from a racially hostile environment, a similar conflict arises as schools attempt to deal appropriately with students with disabilities and sexually offensive behaviors. This paper will explore the genesis of these conflicting rights.

I. STUDENTS WITH DISABILITIES

The federal requirements for services to students with disabilities2 are found in the Individuals with Disabilities Education Act (IDEA).3 That law, substantially rewritten in 1997 when reauthorized by Congress, traces its origins to Public Law 94-142, the first comprehensive federal special education law, which was enacted in 1975.4 Under the IDEA, state and local education agencies are required to provide students with disabilities appropriate special education and related services. Special education means “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability . . . .”5 Related services are those specialized services that “may be required to assist a child with a disability to benefit from special

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1. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1024 (9th Cir. 1998).
3. Id. § 1400(a).
4. Id. §1400 et seq. The implementing federal regulations are found at 34 C.F.R. § 300 et seq. (2002).
These related services include speech pathology, psychological services, occupational therapy, counseling, and other similar services.

In addition, public schools are also required to provide a Free Appropriate Public Education (FAPE) to students with disabilities. A FAPE provides special education and related services “at public expense, under public supervision and direction, and without charge . . . .” These services must meet standards established by the state and must be provided pursuant to a written plan, known as an Individualized Education Program (IEP). These services must also be provided in a setting known as the Least Restrictive Environment (LRE). In creating LREs, school systems must ensure that:

to the maximum extent appropriate, children with disabilities . . . are educated with children who are non-disabled . . . [and] . . . special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

In 1982, the United States Supreme Court decided the seminal special education case, Board of Education v. Rowley. In that case, the Supreme Court delineated the standards for determining when a public school system has complied with its obligations under the IDEA:

Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

6. Id. § 1401(22).
7. Id.
8. Id. § 1400(d)(1)(A).
9. Id. § 1401(8)(A).
12. Id.
14. Id. at 203-04.
Thus, the Supreme Court set a basic floor of educational opportunity, designed to open the door to public education for students with disabilities but not to maximize the potential of those students. School systems, therefore, must provide personalized instruction that includes sufficient support services to permit the child to benefit educationally from the instruction, and the instruction must be reasonably calculated to enable the child to progress. If a school system abdicates its responsibility to provide a FAPE to a student, the parents may place the child in a private school and obtain reimbursement of the tuition and related costs.\textsuperscript{15} Reimbursement of private educational costs, however, may only be obtained if the school system has not offered an appropriate educational program for the student.\textsuperscript{16}

A school system also must comply with the procedural guarantees contained in the IDEA. In\textit{Rowley}, the Supreme Court held that an action brought under the federal law must be analyzed in a two step process:

\begin{enumerate}
\item First, has the State complied with the procedures set forth in the act? And
\item second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.\textsuperscript{17}
\end{enumerate}

\section*{II. SEXUAL HARASSMENT}

According to the Office for Civil Rights (OCR), students have the right to be free from sexual harassment in their schools that is so severe, pervasive, and objectively offensive that it deprives them of access to educational opportunity or benefit.\textsuperscript{18} The OCR has identified two types of sexual harassment: \textit{Quid Pro Quo} Harassment and Hostile Environment Harassment.\textsuperscript{19} \textit{Quid Pro Quo} Harassment occurs when a “school employee explicitly or implicitly conditions a student’s participation in an education program or activity or bases an educational decision on the student’s submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.”\textsuperscript{20} The OCR defines Hostile Environment Harassment as “(c)onduct that is sufficiently severe, persistent, or pervasive to

\begin{footnotes}
\item [16] \textit{Florence County}, 510 U.S. at 15; \textit{Burlington Sch. Comm.}, 471 U.S. at 369-70.
\item [17] \textit{Rowley}, 458 U.S. at 206-07.
\item [19] Id. at 12038.
\item [20] Id.
\end{footnotes}
limit a student’s ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive educational environment. 21

Beyond the mere definition of hostile environment harassment, the OCR has outlined a number of factors which must be taken into consideration in determining the existence of “severe, persistent or pervasive” conduct.22 These factors include:

1. The Degree to Which the Conduct Affected One or More Students.23 To what extent did the conduct limit the ability of the student or students to participate in or benefit from the educational program? To what extent did the conduct alter the environment in which the students were being educated?

2. The Observable Impact on the Students.24 Did the grades of the affected students change? Did their attendance suffer? Did they complain of physical or emotional injuries or distress? Has a student, for instance, reported to the school nurse’s office during the same class period on a regular basis? Does it appear as though the student is trying to avoid a certain class, a certain teacher, or certain other students?

3. The Impact on Other Students.25 Although only one student may be the intended target of the alleged harassment, have other students been affected? Are there other students who have seen and been bothered by offensive conduct or behavior?

4. The Type, Frequency, and Duration of the Conduct.26 Was the conduct brief and insubstantial, or was it sustained and severe? In the view of the OCR, the more severe the conduct, the fewer times it needed to occur in order for remedial action to be taken.27

5. The Identity of and Relationship Between the Harasser and the Target.28 Is the alleged harasser a school employee, and is the target a student? Or are both the harasser and the target students? If the former, issues involving power and authority come immediately to the forefront. If the latter, the students may be on more equal terms.

6. The Number of Harassers.29 The number of individuals who have been involved in the alleged harassment may implicate directly the target’s

21. Id.
22. Id. at 12041.
24. See id.
25. Id.
26. Id.
27. Id.
29. Id. at 12041-42.
willingness to step forward and seek help.30 This can be true particularly in the case of middle school and high school students.

7. The Relative Ages of the Harasser and the Target.31 Here, again, questions of power and authority may arise. This is true if the alleged harasser is an adult and the target is a child, but it can be true also with an older harassing student targeting a younger student.

8. The Size of the School and the Location of the Incident.32 A single incident between students that occurred in a far hallway of a large comprehensive high school may not have the same impact on the school environment as multiple incidents occurring in a more public area; such as a cafeteria, a playground, or the school bus.

9. Other Incidents, Including Non-Sexual.33 Has the same target been subjected to physical assaults or threats that are not of a sexual nature? Most commonly, these types of threats occur after the initial report has been made to school officials and the alleged harasser attempts to retaliate.

As with the law dealing with students with disabilities, the United States Supreme Court has issued opinions addressing sexual harassment in the school setting. In Franklin v. Gwinnett County Public Schools, the Supreme Court held that Title IX may be used as a vehicle to sue schools and school officials as a result of sexual harassment of students.34 In Gebser v. Lago Vista Independent School District, the Supreme Court concluded that a school district may be liable for monetary damages under Title IX in the case of an adult who sexually harasses a student.35 Furthermore, the Court determined that incidents of sexual harassment may expose school districts to liability and potentially large monetary damage awards when a staff member sexually harasses a student, when there was actual knowledge of the harassment by a school official in a position to act to stop the harassment, and when the official failed to act because of deliberate indifference.36

During the same year that the Supreme Court issued the Gebser decision, the Court clarified that federal law also prohibits harassment by an individual of the same sex, in like manner to harassment by an individual of the opposite sex.37 In the case of Oncale v. Sundowner Offshore Services, a male worker on an oil platform had been subjected to foul language, taunts, and assaults by

30. See id. at 12041; NAAN STEIN, CLASSROOMS & COURTROOMS: FACING SEXUAL HARASSMENT IN K-12 SCHOOLS 20-21 (1999).
32. Id.
33. Id.
36. Id.
other male employees.\textsuperscript{38} The Supreme Court held that federal law, in this instance Title VII, prohibits sexual discrimination regardless of the relative genders of the individuals involved.\textsuperscript{39} Finally, in 1999, the Supreme Court expanded the \textit{Gebser} standard, holding that it also applies in cases of sexual harassment by one student toward another student and that a school’s failure to respond to student harassment may result in liability and monetary damages.\textsuperscript{40}

Thus, we know that school district officials must act promptly and decisively when allegations of sexual harassment are brought to their attention. The fact that the alleged harasser is a student with disabilities cannot deter school authorities from acting. Federal court decisions have provided guidance for school authorities in dealing with a special education student who may also be involved in sexually inappropriate behavior that could rise to the level of sexual harassment.

\section*{III. TRENDS IN THE COURTS (PRE-\textit{GEBSER})}

In \textit{Oberti v. Board of Education of Borough of Clementon School District}, a student with Down’s Syndrome was placed in a kindergarten class with regular education peers.\textsuperscript{41} He hit, choked, and spit at other students. He hit the teacher and the classroom aide. He had temper tantrums, hid under furniture, threw books, and ran away. Because of his behavior, the school placed the student in a special class, where his behavior improved. After the parents objected to the new placement, a hearing officer held that the student’s behavior prevented him from receiving appropriate educational benefits.\textsuperscript{42} On appeal, however, the United States Court of Appeals for the Third Circuit held that the school had not taken sufficient steps to integrate the child into the regular education setting.\textsuperscript{43} In fact, the court speculated that the school’s failure to provide appropriate services may have contributed to the child’s disruptive behavior.\textsuperscript{44} The student was ordered returned to the regular education setting.\textsuperscript{45}

In \textit{Clyde K. v. Puyallup School District No. 3}, a 15 year old student with Tourette Syndrome and Attention Deficit Disorder was disruptive and uncontrollable – hitting, kicking, using profanity, and making explicit sexual comments.\textsuperscript{46} The school removed him from his placement and placed him in a

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} at 77.
\item \textsuperscript{39} \textit{Id.} at 82.
\item \textsuperscript{40} Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1992).
\item \textsuperscript{41} Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1206-07 (3d Cir. 1993) (all facts are taken from pages 1206-13 of the court’s opinion).
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 1223.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994).
\end{itemize}
self-contained program. The court held that the student’s behavior was so disruptive that his presence in the classroom was inappropriate; his new placement constituted the least restrictive environment in which he could obtain educational benefit. Moreover, the court noted that “school teachers and administrators have a duty under Title IX to take steps to curb peer sexual harassment.”

In a post-Franklin but pre-Gebser decision, the United States District Court for the Northern District of California held in 1995 that Title IX created a cause of action for students who complained of sexual harassment by teachers and other students. In this case, Oona R. – S. by Kate S. v. Santa Rosa City Schools, an 11-year-old female student had allegedly been sexually harassed by both other students and staff.

In Coplin v. Conejo Valley Unified School District, a high school student was expelled for sexually harassing female students. The expelled student sued the school, claiming a variety of civil rights violations. In granting the school district’s request for summary judgment, the district court noted that the school’s interest in protecting the female students was “particularly strong . . . where there are allegations of sexual harassment.”

IV. TRENDS IN THE COURTS (POST-GEBSER)

In Stenger v. Stanwood School District, two school employees sued the school district because of injuries they sustained while working with a special education student. The suit initially was dismissed under the Industrial Insurance Act when the trial court determined that the school district did not intend to cause the injuries and was, therefore, protected from suit under the Act. The state appellate court, however, found that the student was prone to violent outbursts and was aggressive. The court also found that the school believed that it was required to maintain the student’s placement even though it carried a high risk of injury to staff. Concluding that a jury could determine

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47. Id.
48. Id. at 1401-02 (noting that “school officials might reasonably be concerned about” Title IX liability “for failing to remedy peer sexual harassment”).
49. Id.
51. Id. at 1455-56.
53. Id.
54. Id. at 1383.
56. Id. The Industrial Insurance Act, WASH. REV. CODE § 51.04.010, generally bars civil suits by employees for injuries sustained in employment.
58. Id. at 666.
that the school had actual knowledge that an injury was certain to occur but willfully disregarded that knowledge, the appellate court sent the case back for trial.\textsuperscript{59}

In \textit{Parent v. Osceola County School Board}, a learning disabled high school student with a history of behavioral problems cut another student with a box cutter.\textsuperscript{60} After determining that the student’s behavior was not a manifestation of his learning disability, the school reassigned the student to an alternative program.\textsuperscript{61} The parent appealed and claimed, among other things, that the alternative setting was not the least restrictive environment.\textsuperscript{62} The court rejected the parent’s claims, finding that a least restrictive environment determination can include consideration of “the negative effects the student’s presence may have on the teacher and other students . . . .”\textsuperscript{63}

In \textit{Reed v. Lincoln-Way Community High School District No. 210}, an emotionally disturbed high school student exhibited numerous behavioral problems, including the use of profanity, indecent exposure, and assaulting staff members.\textsuperscript{64} After several day placements were unsuccessful, resulting in danger to others and preventing the student from receiving a FAPE, the school proposed to place the student in a residential treatment center.\textsuperscript{65} The parent contended that the residential treatment center was not the least restrictive environment for the child, but the court found that the student was not making any progress in the day program and determined that the residential treatment center constituted a FAPE for the child.\textsuperscript{66}

In \textit{Randy M. v. Texas City Independent School District}, a learning disabled 13-year-old student, acting with a friend, ripped the pants off of a female student.\textsuperscript{67} After the school determined that the behavior was not a manifestation of the student’s learning disability, the student was placed in the same alternative program to which his regular education peer was assigned.\textsuperscript{68} The parents objected and sought an injunction from the federal court.\textsuperscript{69} The court found that the school’s actions were appropriate and noted that “the District could well have been liable to the female victim had the District failed to take appropriately aggressive disciplinary action.”\textsuperscript{70}

\begin{itemize}
\item\textsuperscript{59} \textit{Id.} at 668.
\item\textsuperscript{60} \textit{Parent v. Osceola County Sch. Bd.}, 59 F. Supp. 2d 1243, 1246 (M.D. Fla. 1999).
\item\textsuperscript{61} \textit{Id.} (citing Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994)).
\item\textsuperscript{62} \textit{Parent}, 59 F. Supp. 2d at 1246.
\item\textsuperscript{63} \textit{Id.} at 1249.
\item\textsuperscript{65} \textit{Id.} at *3.
\item\textsuperscript{66} \textit{Id.} at *6.
\item\textsuperscript{67} \textit{Randy M. v. Texas City Indep. Sch. Dist.}, 93 F. Supp. 2d 1310, 1310 (S.D. Tex. 2000).
\item\textsuperscript{68} \textit{Id.}
\item\textsuperscript{69} \textit{Id.}
\item\textsuperscript{70} \textit{Id.} at 1311.
\end{itemize}
V. U.S. DEPARTMENT OF EDUCATION GUIDANCE

The United States Department of Education’s Office for Civil Rights (OCR) issued written guidance on the issue of sexual harassment in schools in 1997. This Sexual Harassment Guidance pre-dated the Supreme Court’s Gebser and Davis decisions. The OCR determined that a school would be liable for sexual harassment when (a) a hostile environment existed, (b) the school knew or should have known, and (c) the school failed to take immediate and appropriate action. While this standard was different from the one later announced by the Supreme Court, OCR initially stated its intention to stand by its position.

After much consideration, the OCR issued its long-awaited revised guidance in November 2000. Little was changed however, and the OCR continued to insist that it would apply a different standard from that articulated by the Supreme Court in deciding if a school was subject to a Title IX enforcement action. Immediately upon taking office in January 2001, President George W. Bush suspended the operation of the new OCR guidance. It remains in limbo. Thus, schools are in the awkward position of knowing that the OCR has stated that a school violates Title IX and will be in danger of losing federal funds when a hostile environment exists, the school knows or should have known about it, and the school fails to act. At the same time, the United States Supreme Court states that a school system is liable for monetary damages when an official of the school, who had authority to correct the situation, had actual knowledge of the sexual misconduct, and was deliberately indifferent to it.

VI. SO WHERE DOES THIS LEAVE US?

The difficulty that school officials face as they try to balance the rights of students with disabilities to receive a free appropriate public education in the least restrictive environment, with the rights of students to be free from sexual harassment, has been stated most succinctly by Professor Anne Proffitt Dupre of the University of Georgia Law School:

Title IX and IDEA together place schools in an impossibly difficult situation. School officials who attempt to comply with Title IX by removing an abusive disabled student to an alternative setting will run up against the disciplinary

72. See id. at 12039.
73. See Martha McCarty, Students as Targets and Perpetrators of Sexual Harassment: Title IX and Beyond, 12 HASTINGS WOMEN’S L.J. 177, 205 (2001).
75. Id. at 66092-93.
restrictions of IDEA. A “student’s demand for a harassment-free classroom will conflict with the alleged harasser’s claim to a mainstream placement under [IDEA].”

Fortunately, based on the current state of the law and court decisions, there is practical advice for school officials:

1. All school districts should have a clear and comprehensive sexual harassment policy. Parents, employees, and students should be notified of the policy. The policy must include a process for resolving complaints and must protect the targets of harassment against retaliation.

2. Take all reports of sexual harassment seriously. The old saying that “boys will be boys” will not stand up to legal scrutiny. Similarly, school officials cannot afford to ignore a complaint of sexual harassment against an employee merely because they know the employee and find the allegations hard to believe or unpleasant to pursue.

3. Respond to reports of sexual harassment in a thorough manner. Discuss the incident with the complainant. Gather the facts, and defer to a trained investigator if appropriate. Do not insist that the complainant put his or her allegations in a signed or written statement before you will pursue the complaint. Describe your policy and the procedures that you will follow. Give the complainant a copy of the school system’s sexual harassment policy. Notify the student’s parents, and discuss the incident with them. Investigate the matter promptly; do not wait for the next month’s school board meeting before you act. If you need help, ask for it - the superintendent’s office or the school district’s human resources department are the traditional resources. Consider taking interim measures during the investigation. If the allegation is made by a student against a teacher, the school may consider offering the student a transfer to another class. If the allegation is made against another student, the school may decide to transfer the alleged harasser to another class. Take care in transferring the target of the harassment; without that student’s agreement, this could be seen as retaliation. If the harassing student’s behavior is persistent, the school may consider assigning an instructional assistant or aide to the offending student. Consider a referral to law enforcement officials if appropriate. Did the harassing student’s behavior constitute a crime? Was it an assault? Was it a sexual offense? Seek legal advice on this issue as needed. Take reasonable, timely, age-appropriate, and effective corrective measures. Depending on the nature and severity of the behavior, standard progressive discipline may be called for. This progressive discipline can begin with counseling, progress to a warning or reprimand, then to a suspension, and finally to an expulsion. When dealing with a student with disabilities, however, the school IEP team will need to become involved before a

77. Anne Proffitt Dupre, A Study in Double Standards, Discipline, and the Disabled Student, 75 WASH. L. REV. 1, 53 (2000) (quoting Davis, 526 U.S. at 682 (Kennedy, J., dissenting)).
suspension of more than ten days during any school year or an expulsion occurs and before a change in placement is initiated. Minimize the burden on the target of the harassment. Avoid creating even more pain or embarrassment for a student who has already been subjected to inappropriate treatment. Finally, act to prevent retaliation against the student. Forms of retaliation may be subtle – for example, the “silent treatment” in the cafeteria; other teachers who may be upset about a student’s allegations against a colleague may stop calling on the student in class or may grade her work more harshly.

4. If a student with disabilities is the harasser, consider the possibility of a change in placement, remembering that LRE determinations can involve “the negative effects the student’s presence may have on the teacher and other students.”

5. Do not expect the parents of a student with disabilities to be supportive of what appears to be a more restrictive setting. However, do not allow the parents’ opposition to deter the IEP team’s implementation of a necessary and appropriate change in placement or assignment to an alternative setting.

6. When necessary because the parents will not consent to the change in placement, consider seeking a hearing officer’s order for a change in placement to a 45-day interim alternative educational setting, if the school believes that maintaining the current placement is substantially likely to result in injury to the student or to others.

7. If more immediate action is required, consider seeking a court injunction to remove a student with a disability from the current school program or to change the current educational placement.

VII. CONCLUSION

More than a decade ago, male elementary school students subjected female elementary school students on the bus to obscene remarks, taunting, unwanted touching, and physical intimidation. The school responded by placing some of the students on detention and suspending two of them, but the behavior continued. Instead of treating the incident as a sexual harassment episode, school officials considered it to be an incident of use of bad language.

79. See Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1401 (9th Cir. 1994).
82. DAVID KYSILKO, NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, Sexual Harassment in Schools: A Case in Point, in SEXUAL HARASSMENT IN SCHOOLS: WHAT IT IS, WHAT TO DO 15-16 (1998).
83. Id. at 15.
84. See Karen Schneider, Sexual Harassment – No Kidding, CHI. TRIB., June 4, 1993, at 8.
After the parents of a first-grader complained to the OCR, a Title IX investigation took place. The OCR’s letter of findings concluded that the female students had been subjected to multiple acts of sexual harassment that created a sexually hostile environment. The OCR also found that the school had failed to take appropriate remedial steps against some of the harassers because they were students with disabilities who were identified as emotionally disturbed. Rejecting the school district’s position that it had been required to discipline the special education students differently than their general education peers, the OCR said that “the rights of students with disabilities may not operate as a defense of behavior which singles out students, because of their sex, for adverse consequences . . . .”

Dealing with sexual misconduct committed by students with disabilities can be a daunting task. Educators are trained to use every ounce of skill and judgment they have to remediate a student’s behavior and to pursue the student’s academic achievement. But there comes a time, as when a student with disabilities engages in sexual misconduct, when “the negative effects the student’s presence may have on the teacher and other students” require a school to act. When the behavior of a student with disabilities impedes his or her learning or the learning of others, the school IEP team will need to consider positive behavioral interventions, strategies, and supports to address the student’s behavior. If the school determines that maintaining the student’s current educational placement is substantially likely to result in injury either to the student or to others, the school may move forward to seek a hearing officer’s approval of placement in a 45-day interim alternative educational setting.

Yet these actions cannot be taken lightly or without substantial justification. For as we have seen, they will invariably create a collision between the rights of students with disabilities to obtain a free appropriate public education in the least restrictive environment and the rights of their peers to be free from a sexually hostile learning environment.

85. KYSILKO, supra note 82, at 15.
86. Id.
87. Id. at 17.
90. 34 C.F.R. § 300.346(a)(2) (2003).
91. Id. § 300.521.