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TEACHER-STUDENT SEXUAL RELATIONS: LIABILITY ISSUES**Overview**

Over the past decade reported incidents involving public school teachers engaged in improper sexual relationships with their students have escalated. Needless to say these reports are very disturbing. In community after community such shocking incidents are causing many parents to ask probing questions of school officials regarding the recruitment, screening, hiring, supervision, and retention of bus drivers, coaches, classroom teachers, and other employees who have direct contact with the children.

Employee-on-Student Sexual Harassment. As used in this commentary, sexual harassment of students is defined as a form of sexual discrimination. It includes any conduct of a sexual nature that is unwelcome, severe, and persistent and interferes with a student's ability to learn, study, or participate in school activities. In addition to criminal charges (e.g., assault, battery, statutory rape) being filed against public school teachers and other school system employees, and because such matters are technically categorized as a form of sexual (i.e., gender) discrimination and harassment, many of these employee-on-student sexual incidents also have found their way into civil court (federal and state) where student victims (by and through their parents) seek remedy in the form of money damages. Vacca (2006)

Potential Liability Issues. How do deviant predators get hired and placed in jobs where they have direct access to and contact with our children? Has someone in a position of authority been negligent in hiring and supervising of employees? Can public school officials be held liable for improper sexual relationships between school system employees and students? The answers to these questions have major implications for school system policies and procedures.

The Supreme Court and Title IX Liability. For more than a decade the law has been clear that public school officials may be held liable "for their deliberate indifference to reported behavior on the part of employees where students were sexually, physically, or verbally abused." Vacca and Boshier (2008) As the United States Supreme Court has held, under Title IX (which prohibits discrimination based on sex in educational institutions), money damages are possible in employee-on-student sexual harassment cases where school officials failed to act on reports of an employee's sexual harassment and abuse of students. Franklin v. Gwinnett County Public

Schools (1992) Legal experts remind us that in Franklin, a teacher-on student sexual harassment case, "...the Court held that there was a private right of action under Title IX, which was enacted to provide the federal government with a tool to fight gender-based discrimination." Russo (2004) And, when hooked with 42 U.S.C. 1983 (as an Equal Protection Clause claim) monetary damages against public school officials are possible. Vacca and Bosher (2008)

Post-Franklin era courts consistently have stressed the importance of school officials taking immediate and appropriate action when they have direct knowledge (i.e., receive actual notice) of inappropriate sexual conduct between employees and students. Shaul v. Cherry Valley-Springfield School District (2nd Cir. 2004) The Supreme Court itself has held that even a teacher's making "sexually suggestive comments" to students or having "inappropriate sexually suggestive conversations" with students can be classified as sexual harassment. Gerbser v. Lago Vista I.S.D. (1998) And, because parents expect that their children will be kept safe while at school, a deliberate indifference to such conduct and a failure to immediately remedy this situation will place school officials in jeopardy of liability under Title IX. Craig v. Lima City School Board (N.D. 2005)

Hansen v. Board of Trustees (7th Circuit 2008)

Recently I came across an interesting decision on point from the United States Court of Appeals for the Seventh Circuit. In Hansen v. Board of Trustees (7th Cir. 2008), the parents of a public high school student brought a Title IX and Section 1983 action against a school district's board of trustees (local school board) and a teacher. In their initial law suit plaintiff parents claimed that the teacher had engaged in improper sexual relations with their daughter. In their prayer for relief they also asserted state law claims against school officials including allegations of "negligent hiring" of the teacher and "negligent supervision" of students.

The Facts: During the 2000-2001 school year a teacher had sexual contact with one of his students on multiple occasions at a public high school. The sexual contacts took place in the school's band room, music practice rooms, and the band office. In exchange for sex the teacher gave the student passing grades. The student did not disclose the sexual relationship with the teacher to her parents, school officials, or to her boyfriend. In 2002, the student quit the band and ended the sexual relationship.

In January of 2004, the student was hospitalized, by her parents, for substance abuse treatment. In a session with her therapist she admitted having the sexual relationship with her teacher. Subsequently her parents were notified and, at the same time, a criminal investigation by the police was initiated. The police notified the school officials of the investigation—which was the first time that school officials had heard anything about the matter. School officials immediately suspended the teacher and he ultimately resigned after pleading guilty to sexual battery.

It was during an investigation of the situation that it was discovered that this same teacher had engaged in two prior relationships with former students. One relationship started after the student had graduated from a high school different from the one where the teacher currently worked. He ultimately married that student. The second situation also occurred when he worked at another high school. While this relationship did begin when the young woman was his student, the couple never had intercourse until after she graduated. No one at the former high school or at his current work place knew of these two prior relationships.

Federal District Court Decision: Subsequently, parent plaintiffs were not successful when summary judgment was granted to the board of trustees on all claims. Hansen v. Board of Trustees (S.D. Ind. 2008) Parents then appealed the decision to the United States Court of Appeals for the Seventh Circuit.

Seventh Circuit Court Rationale: Decided on December 23, 2008, the appellate court first addressed Title IX liability. Citing Cannon v. University of Chicago (1979), Franklin v. Gwinnett County Public Schools (1992), and Gerbser v. Lago Vista I.S.D. (1998), the Seventh Circuit Court made it clear that (1) there is an implied right of action in Title IX for a victim of illegal sex discrimination, and (2) a victim may recover monetary damages under Title IX. However, the Court emphatically stated that while the purpose of this statute is to hold educational institutions liable for their own actions is not to hold them liable for misconduct of their employees. The Court went on to say that in situations where a plaintiff claims that a teacher employee's sexual harassment of a student renders the school district liable for sex discrimination under Title IX and must pay damages, plaintiff must prove that an official of the school district, an official who at a minimum had authority to institute corrective measures, "had actual notice of, and was deliberately indifferent to, the teacher's misconduct." In the Court's opinion because the standard of "constructive notice" is not applicable in such situations, the Hansen plaintiffs' evidence "fell short" and could not carry this burden.

The Court also pointed out two other vital factors in its rationale. First, in this case a theory of "vicarious liability" was ineffective. While the teacher's sexual misconduct with the student did occur on school property, it nonetheless fell outside the scope of his employment. Second, plaintiffs' Section 1983 claim was precluded because it could not be shown that the school district had a custom or policy favoring sexual abuse or discrimination of its students.

The Seventh Circuit Court next addressed the "negligent hiring," "negligent supervision" claims. Citing the Restatement (Second) of Torts, at Section 317, as well as Indiana law, the Court opined that the standard to apply in an action against an employer for negligent hiring, supervision, or retention is "whether the employer exercised reasonable care in hiring, supervising, and retaining an employee." In Hansen, where the plaintiffs' action is based on post-hiring misconduct, no evidence was produced to establish that school officials either knew or should have known of this teacher's past improper sexual relationships with students at the time he was hired. No information concerning misconduct was received by the employer during the hiring process. More specifically, there was no showing that anyone either at the previous school or the hiring school knew or should have known of this teacher's past sexual relationships with students.

Decision. Parents produced no evidence that school officials failed to exercise reasonable care in hiring this teacher or that they knew or should have known of any negative employment information when he was hired. The two prior relationships with other students at other schools do not establish that the hiring school officials knew or should have known of any misconduct. And, there was no additional evidence that school officials believed he "presented a risk of harm to students after he began his employment." In addition, said the Court, the fact that he was immediately suspended upon learning of the misconduct present in this case establishes no issue of material fact as to whether the current employer "negligently hired, supervised, or retained this employee." The Seventh Circuit affirmed the decision of the district court.

Policy Implications

Suffice it to say, reports in the mass media lead one to believe that teacher-on-student sexual behavior is a growing problem. It therefore behooves local school officials to draft and implement policies aimed at keeping such activities from becoming an issue in their school system. The purpose of this commentary is to present information to local school system policy-makers as they proactively move both to prevent such employee behavior and, where it exists, to take immediate disciplinary action.

Recognizing that the Seventh Circuit's decision in Hansen v. Board of Trustees (2008) is only binding on states located in that judicial circuit, the issues and the Court's rationale in that case are nonetheless very instructive and have important implications for educational policy makers across the country. Local school system policies must make it clear that:

- Inappropriate and/or illegal conduct and relationships of any kind between school system employees and students will not be tolerated.
- Employees who engage in inappropriate and/or illegal conduct and relationships of any kind with students will be immediately suspended from employment and subject to dismissal from employment in the school system.
- All reports of inappropriate and/or illegal conduct and relationships between employees and students will be immediately investigated and appropriate employment action will be taken including, where appropriate, the notification of law enforcement agencies.
- All applicants to employment positions (both professional and support) in the school system will be (1) subject to appropriate and legally required background checks, and (2) carefully screened to determine suitability for employment in the school system.
- All school system controlled, sponsored, and sanctioned activities (curricular and extra-curricular), on- and-off-school grounds, will be appropriately supervised.
- All school system employees will be required to attend and participate in staff development activities dealing with sexual discrimination and harassment.

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Note: The views expressed in this commentary are those of the author.