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TEACHER-STUDENT RELATIONSHIPS: LEGAL AND POLICY ISSUES**Overview**

Situations involving public school teachers and other employees (both full and part-time) having inappropriate sexual contact with their students have once again popped up and found their way into the news of the day. While such situations remain few in number their seriousness cannot be overemphasized.

When parents send their children off to school each day, or sign them up for a team, or grant permission for their child to go on a field trip, they expect that their children will not fall prey to a sexual predator. (Vacca, 2009) At the same time, the potential for liability of local school boards and school officials cannot be extricated from such matters—especially as more courts are recognizing negligent hiring, negligent retention, and negligent supervision as viable theories applied in student injury cases. Hansen v. Board of Education (7th Cir. 2008)

The *Franklin* and *Gerbser* Decisions

When the United States Supreme Court handed down Franklin v. Gwinnett County Public Schools (1992) the potential for students to win monetary damages in situations where school officials were shown to be “deliberately indifferent” (i.e., failed to take immediate and appropriate action) to reports of sexually harassing behavior (which includes acts of physical, emotional, verbal, and sexual nature) by teachers and other school system employees was firmly established. This point of law was further validated when the Supreme Court’s ruling was consistently applied by lower courts over the past two decades. See, e.g., Craig v. Lima City School Board (N.D. Ohio, 2005)

In 1998, the United States Supreme Court decided Gerbser v. Lago Vista I.S.D., a case involving a male public school teacher’s sexual harassment of a female student. Here the student claimed that the teacher had repeatedly abused her and that school administrators and teachers knew about the harassment but failed to do anything about it. In Gerbser the following issue was before the Court: When may a school district be held liable in damages (for the sexual harassment of a student by one of its employees) in an implied right of action under Title IX of the Education Amendments of 1972? In answer to this question the Court held, in an opinion written

by Justice O'Connor, that "damages may not be recovered in those circumstances unless an official of the school district who at a minimum has the authority to institute corrective measures on the district's behalf has actual notice of, and is *deliberately indifferent* to, the teacher's misconduct." (My emphasis added) Gerbser (1998)

As my colleague Professor Boshier and I have emphasized based on our research, the case law "forewarns school officials to treat all reports of alleged harassment as serious and to promptly investigate them, to have a formal policy in place that specifically deals with sexual harassment (both for employees and for students), and to follow a formalized procedure to deal with incidents when they are reported." In other words, and simply put, be alert. If and when such situations come to your attention do something. (Vacca and Boshier, 2012)

Deliberate Indifference and Gross Negligence

A concise definition of *deliberate indifference* is as follows: where a school official knows about, or willfully avoids knowing about, the possibility of harm to a student, fails to take appropriate action and the student is harmed. The United States Supreme Court expanded this definition of *deliberate indifference* when in a student-on-student peer sexual harassment case it opined that school officials may be held liable where: (1) a special relationship or duty exists to protect students from harm, (2) the harassment suffered was severe and pervasive, (3) school officials knew (had actual notice) of the situation, (4) failed to take corrective action, and (5) injury was suffered by the student victim. Davis v. Monroe Cty. (1999) In my view, while *deliberate indifference* and *gross negligence* are different concepts they are, under certain circumstances, similar in nature.

Gross Negligence. Negligence is an interesting and broad based concept usually categorized into distinct types. For example, *ordinary negligence* (lack of diligence, failure to exercise ordinary care), *passive negligence* (a failure or omission in acting), *slight negligence* (lack of great diligence), and *gross negligence* (reckless disregard of a legal duty) (BLACK'S, 1999) are most often applied in court cases where students have been injured and parents are seeking damages. (Vacca and Boshier, 2012)

The key element in establishing negligence is *foreseeability* and liability does not attach where "sudden and unforeseen events" were the proximate cause of the injury. Swann v. Town of Brookhaven (N.Y. 2006) While risks do occur and accidents (*unforeseeable* events) do happen in schools and at school sponsored events, and school officials and employees can only be expected to act as reasonably prudent persons when faced with the same circumstances, it is *gross negligence* (established by the evidence presented) that most often fixes fault on school officials and employees. (Vacca and Boshier, 2012) To put it another way, did school officials know (have actual notice) of a potentially harmful situation (did it become obvious to them) involving a student or students, and was their *failure* (disregard) to do something the *proximate cause* of injury? In my view this is more than passive or ordinary negligence—it is where *gross negligence* morphs into *deliberate indifference*.

Kelly, et al. v. Board of Education of City of Yonkers (N.Y. App. Div. 2012)

Recently I came across a case where a student and her parents filed suit (derivatively) to recover damages for what they alleged was negligence and sexual harassment. Plaintiffs contended that the student was the victim of sexual misconduct and harassment by teacher. They further contended that the school board failed to provide adequate supervision of the students in the board's care, and that the board negligently retained the teacher.

Facts. In 2006, while the plaintiff student was enrolled in a public high school, she was the victim of sexual misconduct and harassment by a music teacher. Specifically, plaintiffs alleged that the teacher made several

lewd and inappropriate sexual remarks at the student and inappropriately touched her in a sexual manner. The trial court granted summary judgment to defendants dismissing the complaint. Plaintiffs appealed.

Supreme Court of New York Appellate Division Rational and Decision. Focusing on plaintiffs' second cause of action (*i.e.*, alleging that the school board failed to provide adequate supervision to students in its care and negligently retained and supervised the teacher), the court opined that although under the circumstances of this case the school board cannot be held vicariously liable for its employee teacher's torts, it can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision. However, citing several New York State court decisions on point the appellate court said that a "necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for conduct which caused the injury."

In addition, said the court, "a school owes a duty to adequately supervise the students in its care, and may be held liable for foreseen injuries proximately related to the absence of adequate supervision." Applying New York State case law the court iterated the standard to apply in determining whether the school has breached its duty of care. A comparison must be made between the school's supervision and protection and "that of a parent of ordinary prudence placed in the same situation and armed with the same information."

The plaintiffs also raised an issue of fact as to whether the teacher's propensity to engage in sexual misconduct with students was known to the school board or should have been known to it before the incidents occurred. To support their position plaintiffs submitted evidence that the school board had previously commenced an administrative disciplinary proceeding against the teacher based on similar complaints by female students in another school where he was teaching at the time. Certain of these allegations were sustained and the board concluded that he had engaged in "unacceptable and inappropriate conduct," resulting in the board suspending him without pay for one school term. Accordingly, said the appellate court, the trial court erred in granting summary judgment dismissing plaintiffs' claims of negligent supervision.

Policy Implications

The intent of including and discussing Kelly, et al. v. Board of Education of City of Yonkers (N.Y. App. 2Dept. 2012) was not to offer the decision as trend setting, but rather to demonstrate the rationale employed by the court when treating issues involved in a matter of employee-student sexual misconduct. In my view the value of the decision can be found in the court's application and linking of *deliberate indifference* to allegations of *negligent retention* and *supervision* in determining whether the school board is liable (vicarious liability) for acts committed by an employee. As such, the New York court's rationale is consistent with that employed by courts in other jurisdictions and contains important implications for local school system policies.

Local school board policies must make it clear that:

- All applicants for employment (professional, support, part-time, and full-time positions) shall be (1) subject to legally required background checks, and (2) carefully screened to determine their qualifications, experience, and suitability for working with students.
- Employees (professional, support, part-time and full-time staff) are expected to maintain appropriate, job-related relationships with students (on school property, at school sponsored and/or school sanctioned activities [curricular and non-curricular], outside school time and/or off-school property, and through electronic media).

- All reports of inappropriate relationships and/or illegal conduct between employees and students shall be immediately investigated and reported to parents.
- Any school system employee who engages in inappropriate relationships and/or illegal conduct with students shall be immediately suspended from employment pending the results of the school-system initiated internal investigation.
- Where a school system employee is found to be or has been engaged in an inappropriate and/or illegal relationship with a student he/she shall be subject to immediate dismissal from employment in the school system.
- Social services, child services, and/or law enforcement agencies shall be notified of situations where results of school system initiated internal investigations require such reporting.

Final Comment: In addition to carefully screening all applicants and implementing on-the-job employee evaluation procedures, due diligence (commensurate with the circumstances) coupled with proper supervision of all employees, especially those whose jobs place them in close contact with students, are keys to success in providing, monitoring, and sustaining a safe and secure school environment for all students.

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Resources Cited

Craig v. Lima City School District, 384 F.Supp.2d 1136 (N.D. Ohio 2005)

Davis v. Monroe Cty., 119 S.Ct. 1661 (1999)

Franklin v. Gwinnett County, 503 U.S. 60 (1992)

Garner, Bryan A., Editor, BLACK' S LAW DICTIONARY, Seventh Edition (West Group, 1999)

Gerbser v. Lago Vista I.S.D., 524 U.S. 274 (1998)

Hansen v. Board of Education, 551 F.3d 599 (7th Cir. 2008)

Kelly G., et al. v. Board of Education of Yonkers City, 952 N.Y.S.2d 229 (A.D. 2Dept. 2012)

Swann v. Town of Brookhaven, 821 N.Y.S.2d 265 (A.D. 2Dept. 2006)

Vacca, Richard S., *Teacher-Student Sexual Relations: Liability Issues*, 7 CEPI EDUC. LAW NEWSLETTER 1 (March, 2009)

Vacca, Richard S. and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Eighth Edition (LexisNexis, 2012)

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