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Running the Gauntlet No More:



Using Title IX to End Student-to-Student Sexual Harassment

by Verna Williams

Elyse, the new fifth grade teacher at ABC Elementary School has a problem. For five months, Frank, ABC's language arts instructor has been pressuring her for dates. Elyse has repeatedly refused Frank, still he persists, becoming cruder in his advances.

Frank has gone so far as to say he wants to have sex with Elyse, attempt to touch her breasts and rub up against her to make his desires known — doing so in the teachers' lounge and when passing Elyse in the school's hallways. Elyse has complained about each one of these

incidents to Principal Jay; other teachers have witnessed Frank's misconduct. But no action was taken against Frank.

When Elyse learned that Frank had subjected other teachers and staff to this misconduct, she tried to organize a meeting with the principal about the climate Frank's actions was creating; however, Principal Jay's secretary said he was unavailable indefinitely. When Elyse finally got the principal's attention, he responded by asking, "Why are you the only one complaining?"

Frustrated by the school's failure to

remedy this situation, Elyse filed a complaint with the Equal Employment Opportunity Commission, alleging that she had been subjected to a sexually hostile environment.

While there is little doubt that the school would be responsible for ignoring the harassment directed at Elyse in this scenario, if she and Frank were students instead of employees, some courts would say the school had no obligation to address the harassment. After many years of litigation developing the case law in Title VII, courts recognize as a matter of course that employers must remedy sexual harassment among peers when they know or should know it is occurring. However, when confronted with student-to-student harassment, many courts have trouble imposing liability on schools that ignore even the most egregious misconduct.

Many litigants seeking relief in these cases find themselves in a position similar to that of the first female plaintiffs in Title VII sexual harassment cases—fighting to persuade the courts that sexual harassment is a form of sex discrimination prohibited under the law and not a "private matter" to be hashed out between the parties. The fact is, as other courts have recognized, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., mandates that schools maintain environments free from sex discrimination. As a result, courts can and should hold schools accountable for allowing sexually hostile environments caused by students to flourish.

Who's Responsible? Different Courts, Different Answers

In this rapidly changing area of the law, determining a school's liability for sexually hostile environments caused by students of which school officials are aware is a challenge. The Supreme Court has been asked to clarify the scope of Title IX's mandate in this regard in *Rowinski v. Bryan Indep. Sch. Dist.* For now, some courts apply the principles that have developed under Title VII, which also prohibits sex discrimination; others reject this approach and attempt to fashion a new standard that in most cases would rarely result in liability for schools in these cases and thus provide no incentive for schools to take the necessary steps to eradicate hostile environments in the first instance.

In *Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir. 1996), vacated reh'g granted (August 1, 1996) the entire panel of judges on the Eleventh Circuit has elected to address this question of school liability for peer

harassment. A district court dismissed this Title IX case, in which a school ignored five months of severe sexual harassment against LaShonda, a ten-year-old fifth-grader, by another ten-year-old. LaShonda and her mother repeatedly complained to teachers and the principal about her classmate's attempts to touch her breasts and vaginal area, statements that he wanted to have sex with her, and his rubbing up against her in the classrooms and hallways of their elementary school. But no action was taken — teachers even refused LaShonda's repeated requests for a new seating assignment, so she would not have to sit next to her harasser.

Having exhausted the remedies she thought were available, LaShonda lost interest in school and wrote a suicide note, evincing her belief that death was the only way out of her predicament. Her mother ultimately filed a criminal complaint against the boy, alleging sexual battery, which he admitted. He subsequently was ordered to write a letter of apology — to date, the only disciplinary action taken against him.

Faced with these facts, the Eleventh Circuit reversed the district court's finding that "the actions of a student are not a program or activity" under Title IX and ruled that schools may be held liable for their knowing failure to address student-to-student sexual harassment under Title IX. *Id.* at 74 F.3d 1186 at 1194-1195. Reasoning that students in the classroom deserve at least the same protection available to adults in the workplace, the court applied Title VII principles to its analysis to find that schools have an obligation to maintain a learning environment that is free from sex discrimination under Title IX, an approach also adopted by the Second and First Circuits in analyzing hostile environment claims. *Murray v. New York University Coll. of Dentistry*, 57 F.3d 243, 248 -50(2d Cir. 1995); *Brown v. Hot, Sexy, and Safer Prod.*, 68 F.3d 525, 540 (1st Cir. 1995).

The Eleventh Circuit has decided to rehear *Davis*, however, doing so just months after the Fifth Circuit ruled in a similar case that Title IX does not cover such misconduct in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), petition for cert. filed (July 2, 1996). The Fifth Circuit held that a school's only obligation in cases of peer harassment is to treat the complaints of boys and girls equally, which means, as a practical matter, that schools that ignore complaints from all students face no liability whatsoever.

In this case, two girls complained that their classmates slapped them on the but-

tocks, groped their breasts and genitals, and asked them sexual questions. As in *Davis*, the school had notice of the misconduct but failed to respond appropriately. The court ruled that Title IX only applies to the actions of schools, rejecting the analysis that has developed under Title VII and the line of cases where the Department of Education has held schools liable for misdeeds by third parties.

In another case, *Seamons v. Snow*, 1996 WL 233483 (10th Cir. 1996), a high school football player was grabbed as he emerged from the shower by his teammates, who taped his nude body

and his genitals, to a towel rack. The boys then brought a girl who the player had dated into the locker room to see their handiwork. Using reasoning similar to the Fifth Circuit's, the court in *Seamons* refused to hold the school responsible because the school's response was not "sexual" or based on sex. *Id.* at *12.

Underlying these decisions, and very likely the Eleventh Circuit's decision to rehear *Davis*, is the belief that schools should not be held liable for students' "teasing" each other — that Title IX should not be used as a means of avenging every playground slight, a proposi-

Sexual Harassment: No Stranger to the Classroom

Far from being an aberration, the experiences of students in these cases mirror those of many girls and young women attending schools across this country. According to a study commissioned by the American Association of University Women Educational Foundation (AAUW), 85 percent of girls surveyed had experienced some form of sexual harassment. By far, most of the harassment occurs at the hands of other students. AAUW found that, of the students reporting harassment, four out of five had been harassed by a fellow student.

For many students, sexual harassment is a daily occurrence, affecting children of all ages. African American girls reported experiencing sexual harassment even before reaching grade six. This misconduct exacts a serious price from its victims, with girls losing interest in school and, as a result, performing below their capabilities in school. Strikingly, however, few girls report harassment to school officials when it occurs: only 14 percent of girls surveyed by AAUW told a teacher they had been harassed, very likely because of schools' reluctance to address this issue.

Unfortunately many schools do nothing in the face of sexual harassment. Despite Title IX's implementing regulations, which require schools to formulate policies to address sex discrimination in all its forms, most schools do not have policies on sexual harassment. Only 8 percent of respondents to a study conducted by the NOW Legal Defense Fund and Wellesley College Center for Women had such policies.

In the absence of a policy, schools are less likely to take action against an alleged harasser: according to the NOW/Wellesley study, schools with policies took action in 84 percent of cases, compared to schools without policies doing so only 52 percent of the time. In the face of such inaction, reporting sexual harassment to school officials must appear to be a futile exercise for students.

The reasons for schools' failure to act are many—a lack of understanding about what constitutes sexual harassment and a school's obligation to address it, reluctance to discipline boys for engaging in what is viewed as "harmless teasing," or adherence to outmoded beliefs concerning the manner in which boys and girls relate to one another.

Irrespective of the underlying rationale, knowing inaction by school officials in the face of such misconduct sends girls and boys the powerful message that sexually abusing girls is acceptable behavior that need not be taken seriously—not the type of lessons schools should be imparting to students. By taking steps to ensure that students treat one another with respect and demonstrating that sexual harassment will not be tolerated under any circumstances, schools could prevent hostile environments from developing in the first place, and, in so doing, fulfill their obligations to carry out Title IX's broad mandate against sex discrimination in education.

—Verna Williams

The Court noted that creating a sexually hostile environment constituted intentional discrimination for which compensatory damages were appropriate.

tion with which no one disagrees. However, rigid adherence to this rationale not only ignores the painful reality of the pervasiveness of serious sexual misconduct in our schools today but also the clearly established responsibility schools have under Title IX to ensure that students are provided with an environment conducive to learning — a duty similar to that imposed upon employers in the context of Title VII.

Title IX's Directive to Schools

Title IX has been associated with efforts for girls and young women to attain equality in educational athletics programs; however, by its own terms, Title IX means much more for girls and young women in schools. The law broadly prohibits sex discrimination in any federally funded education program or activity:

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.

20 U.S.C. § 1681(a).

Title IX's purpose, as indicated by its expansive terms, is to eliminate the barriers to educational opportunity for women and young girls. Thus, the statute applies to inequalities not only in the area of athletics programming, but in all areas where impediments to educational opportunity for women and girls arise, such as standardized testing, course offerings and extra-curricular activities, as well as applying to inequities in programs for pregnant and parenting teens, and, of course, sexual harassment.

Congress passed Title IX in 1972 to address discrimination against women in education for which there was no remedy. At that time, exclusion of women

from public and private universities, quotas limiting the enrollment of women in other educational institutions, admissions policies requiring women to have stronger qualifications than men, and practices steering women away from math and science programs, for example, were commonplace. These practices were permissible because Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and ethnicity in all federally funded programs, does not include sex as a protected class and because Title VII of the Civil Rights Act, specifically excluded education programs from coverage.

Recognizing the nexus between education and future earning power and the impediment sex discrimination posed to each, Congress passed Title IX, intending that it be "a strong and comprehensive measure . . . to provide women with solid legal protection as they seek education and training for later careers."

Title IX's enforcement mechanism is similar to that of its legislative antecedent, Title VI. Specifically, federal agencies that fund educational programs or activities may withhold monies from institutions they determine discriminate on the basis of sex. However, such a defunding proceeding can only be used with appropriate notice given to the institution in question and with the approval of congressional lawmakers.

To date, no agency has used this powerful weapon. Persons who have been discriminated against under Title IX also can file complaints with the agency that funds a particular program, such as the Office of Civil Rights (OCR) at the Department of Education, which handles many such cases. OCR investigates complaints filed and works to resolve the problems and bring institutions into compliance with Title IX. Until the Supreme Court's ruling in *Franklin v. Gwinnett County Public Schools*, 530 U.S. 60 (1992), that aggrieved persons are entitled to compensatory damages under Title IX, which is discussed below, parties relied primarily on the administrative procedure or sought relief in federal court under Section 1983. The Court's ruling in *Franklin*, in addition to other decisions supporting a broad view of Title IX, has opened the door for increased reliance on Title IX as a means of achieving equity in education for girls and young women.

Franklin, a unanimous decision, is third in a line of Supreme Court cases supporting an expansive reading of Title IX and its mandate against sex discrimination. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court

held that Title IX contains an implied private right of action to permit individual enforcement of the statute's proscription against sex discrimination in federally funded education programs. Similarly, in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), the Court found that Title IX applies to cases of employment discrimination in the education context, despite the statute's silence as to whether employment practices are covered, stating that Title IX "must be given a sweep as broad as its language" in order to fulfill the statute's mandate. *Id.* at 521. Relying on its reasoning in *Cannon*, the Court in *Franklin* found that persons seeking relief for intentional discrimination under Title IX are entitled to compensatory damages.

The Court noted that creating a sexually hostile environment constituted intentional discrimination for which compensatory damages were appropriate. In this case, Christine Franklin, a high school student, alleged that one of her teachers had "engaged her in sexually-oriented conversations. . . forcibly kissed her on the mouth. . . and took her to a private office where he subjected her to coercive intercourse." *Franklin*, 530 U.S. at 63. School authorities were aware of the misconduct directed at Franklin, but they attempted to dissuade her from pursuing her claim rather than take action to stop the harassment. In finding that the school system had violated Title IX, the Court ruled as follows:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.

Id. at 1037 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

Significantly, the Court cited the case that first recognized hostile environment sexual harassment as a cause of action under Title VII, and in so doing, signalled that students in the classroom have the same rights available to employees in the workplace — namely a discrimination-free environment.

As the Court recognized in *Meritor*, it is this right to be free from discrimination based on race, color, religion sex or national origin at work that is the basis for assigning liability to employers in the context of hostile environment sexual harassment. *Meritor*, 477 U.S. at 68. The Court further held that, where workers have been subjected to hostile envi-

ronments — in this case, on the basis of sex — that courts should use agency principles to determine whether the employer should be held liable. *Id.* at 72. Use of such principles does not mean, however, that employers only face liability for the actions of their agents.

As many courts have long recognized, knowingly allowing a sexually hostile environment to flourish violates Title VII, regardless of whether it is perpetrated by a co-worker, or a student, or even a stranger. E.g., *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982). To rule otherwise enables employers to circumvent their duties to eradicate discrimination in the workplace under Title VII.

By accepting federal dollars, schools have a duty to ensure that Title IX's mandate against sex discrimination, is fulfilled. As the *Franklin* court noted, "Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to prescribe." *Franklin*, 503 U.S. at 75. In this regard, schools must provide students with an atmosphere in which they can learn. Allowing a sexually hostile environment is at odds with that duty.

Discrimination-Free Education: Key to the Development of Children

Schools have a special mission to educate children and are entrusted with shaping not only their academic development, but their emotional growth as well. A "nondiscriminatory environment is essential to" ensuring that students develop to their full potential. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-3 (N.D. Cal. 1993). In this connection, students are as much in need of, and indeed entitled to, a nondiscriminatory atmosphere in the classroom as are employees in the workplace. No other result can be possible in light of the grave impact sexual harassment has on its victims.

In the workplace, the courts have recognized that a sexually hostile environment "injects the most demeaning sexual stereotypes in the general work environment and . . . always represents an intentional assault on an individual's innermost privacy." *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981). This assault is no less severe for children seeking an education.

As strong as the arguments are for ensuring that students are afforded the same protections at school as are available to their parents at work, this statement by the court makes clear that there are differences between the two settings that actually support greater

protections for children.

Given the severe and dire implications for the children subjected to sexual harassment and the pervasiveness of this misconduct, schools must take action to prevent harassment by students before it creates a hostile environment. Students "should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education." *Davis*, 74 F.3d at 1194. Holding

schools accountable for fulfilling this obligation, therefore, is a necessary and critical piece in the ongoing battle to achieve educational equity. Anything less is at odds with Title IX and is a disservice to our daughters and sons.

Verna Williams is with the National Women's Law Center in Washington, D.C.

Overheard at the 1996 ABA Annual Meeting

Racial justice remains the great unfinished agenda in our country. "If there was a commitment, it is being worn away."

—Anthony Lewis,
New York Times columnist,
delivering the keynote address
at the Thurgood Marshall Award dinner.

"The application of the death penalty is a misapplication of justice."

—Anthony Lewis, same speech.

"The recent developments of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent."

—Justice John Paul Stevens,
in his opening assembly address.

"The IR&R Section is responsible for "everything that has been decent in the ABA."

—Jack Greenberg,
professor of law,
Columbia University,
and the 1996 Thurgood Marshall
award recipient.

"The most valuable reward of a Juris Doctor isn't necessarily a six-figure salary or a precise knowledge of the tax code. Rather, it's the power to serve others in our community, to help those who have no voice, who do not have the means or the skills to seek justice for themselves and for their families."

—Hillary Rodham Clinton
on accepting an award from
the Fellows of the ABA
Young Lawyers Division.

"The effort to undermine legal services hasn't just hurt thousands of poor Americans with legal troubles or the hundreds of dedicated lawyers who have lost jobs they loved. It has harmed our society's fundamental commitment to justice, to law, and to progress."

—Hillary Rodham Clinton,
same speech.

IR&R Section News

Section Sets Fall, Winter Meeting Dates

The Council of the Section of Individual Rights & Responsibilities will hold its fall meeting on Friday and Saturday, Nov. 8 and 9, in Washington, D.C. Friday's council meeting will include an afternoon program, followed by a reception. All Section members are welcome to attend. For more information, see the fall issue of the Section newsletter or contact the Section office (202/662-1030).

The Council's winter meeting will take place during the ABA's Midyear Meeting in San Antonio, Texas. The business sessions are scheduled for Friday and Saturday, Jan. 31 and Feb. 1, 1997, at the Hilton Palacio del Rio Hotel. Contact the Section office (202/662-1030) or check the Section's publications winter issue for more information.

Get Involved In the Work of the IR&R Section

If you're interested in joining one of the many IR&R Section committees, please contact our Section staff at 202/662-1030, or call one of the committee chairs directly. Their phone numbers appear in the back of every issue of *Human Rights* magazine.

Leslie Harris Elected 1996-1997 Section Chair

James Sliven, 1995-1996 Section Chair-elect, announced at the Section meeting that, to avoid any potential conflict with his new responsibilities as a federal magistrate in San Diego, effective Aug. 1, he must withdraw his candidacy for 1996-1997 Section Chair. The membership approved the Nominating Committee's revised slate of candidates for each available officer and council member position, in which each prior officer nominee was moved up one position and Michael Greco was added to the slate.

As a result, Leslie A. Harris of Washington, D.C., is the 1996-1997 Section Chair. Others elected as officers and Council members for the current year are the following:

Chair-elect, Muriel Morisey Spence; Vice-Chair, Walter H. White, Jr.; Secretary, James E. Coleman, Jr.; Recording Secretary, Michael S. Greco; Section Delegate, Estelle H. Rogers;

Council Members (terms ending 1999) Mark D. Agrast, Barry Sullivan, James F. Sliven, Claudia A. Withers; Council Members (terms ending 1998) Joan E. Kessler; Kathi J. Pugh.

ABA House of Delegates Approves AIDS Committee Resolution on Compassionate Release

In an effort to focus attention on the growing crisis in the American prison population of prisoners with HIV/AIDS, the Section successfully sponsored a House of Delegates resolution drafted by the AIDS Coordinating Committee that calls for compassionate release of terminally ill prisoners. As approved by the ABA House of Delegates at the 1996 Annual Meeting in August, the resolution also endorses the adoption of administrative and judicial procedures for compassionate release consistent with the "Administrative Model for Compassionate Release." The policy supports alternatives to sentencing for non-violent terminally ill offenders in instances where it is determined that a defendant is suffering from a terminal condition and presents no danger to society, with the consent of the defense and prosecuting attorneys. For more information about the resolution, contact the AIDS Coordination Project at 202/662-1025.