

Case Notes

Hostile Environments or “Childish misconduct” in the “Federal Balance”?: Peer Sexual harassment by school students in U. S. educational settings

Davis v Monroe County Board of Education No 97-843 (1999)
United States Supreme Court, 24 May 1999.

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Bullying, harassment and violence by students at school are a universal cause for concern to educators. The creation of hostile environments for individuals and groups through harassment and violence are inimical to the effective learning which is at the heart of the educators' mission. The law's response to the issues of violence and harassment at school has been largely piecemeal and torpid, and the number of decided cases is scanty. These factors highlight the significance of the United States Supreme Court decision in *Davis v Monroe County Board of Education* No 97-843 (1999) which addresses the issue of peer sexual harassment in schools directly in a superior forum. In a narrow 5-4 decision, the majority of the Supreme Court found in favour of the appellant, Mrs Davis who brought the action on behalf of her school aged daughter, LaShonda. The majority opinion was written by O'Connor J. However, the approach of the majority was subjected to vigorous critique in the dissenting judgment of Kennedy J, in which the Chief Justice, Scalia and Thomas JJ joined. The approaches of the majority and minority are ultimately quite disparate. The judgment of O'Connor J responds to the behaviour experienced by LaShonda Davis, the failure of the school to respond to her complaints about a fellow student and the damage she suffered in terms of falling grades, declining self esteem and emotional trauma. Justice Kennedy perceives the issues in the case quite differently. In his judgment, the primary issue is one of the federal balance and the determination of the extent to which the Constitution of the United States permits the federal government to interfere with an area of state legislative responsibility, namely education. The judgments reflect powerful but highly complex responses to an emerging legal issue. They are the first word by the Supreme Court on the difficult question of liability for peer sexual harassment.

Background

The claim against the Monroe County Board of Education was brought by the mother of LaShonda Davis in response to a prolonged pattern of sexual harassment by a male fifth grade classmate. The action was instituted because the student and her family found no redress within the school system for the wrong they perceived had been done to LaShonda. The pattern of unacceptable behaviour identified in the claim included the following: attempts by the male student to touch LaShonda's breasts and genital area, statements made by the student to LaShonda; 'I want to get in bed with you', and 'I want to touch your boobs'. There were also claims of sexual behaviour during physical education classes, including rubbing his body against LaShonda. LaShonda reported the behaviour to her class teacher and her physical education teacher. She was given an assurance that the school principal had been informed. It was submitted by the appellant that other students in the class were also affected by the behaviour of the male student. However, despite the behaviour continuing, reports to the school and the concern of LaShonda, no disciplinary action was taken against the student.

The lack of action by the school is at the heart of the appellant's complaint. Resort to the courts was the consequence of a failure to respond in circumstances where this was not only appropriate, but necessary to ensure the effective participation by LaShonda in education at the school. The appellant presented evidence that the School Board had not instructed its personnel in how to respond to peer sexual harassment, and had not established a policy on the issue. The failure of the school to address the student's harassing behaviour appears even more acute in the light of subsequent events when the male student pleaded guilty to sexual battery. The appellant claimed that the actions of the male student had caused damage to LaShonda and that such damage should be compensable. The nature of the damage claimed included the fact that LaShonda's previously high grades at school had dropped, that she was unable to concentrate on school work on account of the behaviour of the male student, and that she had suffered emotional trauma to the extent that she had written a suicide note which mentioned the behaviour of the male student.

The action by Mrs Davis on behalf of LaShonda was commenced in the US District Court for the Middle District of Georgia. An appeal against the decision of the District Court was taken to the Court of Appeals for the Eleventh Circuit. Subsequently the US Supreme Court granted certiorari in order to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment. The action was brought under Title IX of the *Education Amendment Acts* of 1972, which provide that:

[n]o 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 USC Sec 1681 (a).

There was no dispute between the parties that the Monroe County Board of Education was a recipient of education funding from the federal government. Further, the respondent board did not advance any argument that student-on-student harassment cannot rise to the level of Adiscrimination≡ for the purposes of Title IX. However, there remained live issues about whether the school board had been provided with requisite notice in Title IX that the recipients of federal educational funds could be liable in damages for harm arising from student-on-student harassment, as legally required. Furthermore the respondents argued that Title IX imposed liability on school boards for their own conduct and not that of third parties, including students. The majority and minority opinions in the case took divergent approaches to the resolution of these issues.

Legal issues

The legal question for the Supreme Court in *Davis* was whether a private damages action might lie against a school board in cases of student-on-student harassment in its programs or activities. The majority in answering this question concluded that it may, but only in circumstances where the school board as a recipient of federal funds acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, the majority held that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an education opportunity or benefit. In contrast, Justice Kennedy states plainly, 'This case is about federalism ... Preserving our federal system is a legitimate end in itself'. The question for the minority was framed in terms of the extent to which the federal government might intrude upon the state=s area of legislative competence in education.

Significantly, both minority and majority opinions in *Davis* are united in the view that the role of the courts is not to interfere in educational decision making and day-to-day discipline. Justice O'Connor expresses the view of the majority in the statement: 'Courts should refrain from second guessing the disciplinary decisions made by school administrators'. Justice Kennedy confirms the consistent policy of the Supreme Court in refusing to second guess disciplinary decisions. From this meagre common ground, the judgments take divergent paths to the resolution of the core issues, with the minority opinion serving as a firm and direct rebuttal of majority arguments. The court reviews the authority of *Gebser v Lago Vista Independent School District* 524 US 274 (1998), and determines whether *Gebser* principles can be extended from teacher-student to peer student harassment.

Whilst none of the Supreme Court judges in the *Davis* decision see a role for the courts in regulating the internal functioning of schools and administrative decision making, there are numerous significant comments in the judgments which point to firmly held views about the role and function of schools and schooling which clearly have informed judicial reasoning in the case. This is most apparent in the dissenting judgment of Kennedy J in which he identifies schools as ‘the primary locus of most children’s social development ...’ He continues his rebuttal of the majority position on school liability with the observation that:

[t]he majority seems oblivious to (sic) the fact that almost every child at some point has trouble in school because he or she is being teased by his or her peers. The girl who wants to skip recess because she is being teased by the boys is no different from the overweight child who skips gym class because the other children tease her about her size in the locker room; or the child who risks flunking out because he refuses to wear glasses to avoid the taunts of Afour-eyes≡; or the child who refuses to go to school because the school bully calls him a ‘scaredy-cat’ at recess. Most children respond to teasing in ways that detract from their ability to learn ...

In this example of school life presented by Kennedy J there is no acknowledgment of the sexual nature of the behaviour experienced by LaShonda Davis. He prefers to characterise such actions as Ateasing≡ and Achildish misconduct≡. In the peroration of his dissenting judgment he does make a passing reference to issues of sex when he states: ‘The delicacy and immense significance of teaching children about sexuality should cause the Court to act with great restraint before it displaces state and local governments ...’ The demands of federalism are paramount here, and he never articulates clearly why state and local governments are inherently more competent to regulate this area. Whilst it is possible to take issue with Justice Kennedy’s picture of school life, what is legally significant is his clear distinction between adult and child behaviour. What can be unlawful when done by an adult, is characterised as a form of excusable behaviour (Aromantic overtures≡) when carried out by a child in an educational setting. Kennedy J states:

Analogies to Title VII hostile environment (sexual) harassment are inapposite, because schools are not workplaces and children are not adults ... A teacher’s sexual overtures toward a student are always inappropriate; a teenager’s romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.

In view of the strength of these views expressed in the minority judgment, some comment is needful. It is strongly arguable that part of a child's socialisation must include the ability to distinguish acceptable and unacceptable social behaviour. If the argument is accepted then contrary to the depiction presented by Kennedy J, harassing behaviour cannot become a 'romantic overture' merely because of the age of the actor. This contrary view is perhaps closer to the approach of O'Connor J, who indicates in the majority judgment that whether conduct amounts to actionable harassment depends on 'a constellation of surrounding circumstances, expectations and relationships ... Courts must bear in mind that schools are unlike the adult workplace, and that children may regularly interact in a manner that would be unacceptable among adults'. O'Connor J posits a multi-factored balancing test to determine whether student behaviour towards peers amounts to harassment which is contrary to Title IX.

Majority reasoning

The majority judgment in *Davis* is significant in the cautious approach it takes to the extension of liability of school districts to peer sexual harassment. The test adopted by the majority requires a sensitive balancing of the interests of the parties, and the assessment of reasonable conduct by them in the education context. The majority, whilst analysing the requirements of the federal Spending clause, make few overt references to issues of the federal balance in determining the outcome. More effort is expended in the enunciation and application of the 'deliberate indifference' standard to the acts and omissions of the school district.

In determining whether a school district's failure to respond to student-on-student harassment in its schools could support a private suit for money damages, the majority relied upon the recent authority of *Gebser v Lago Vista Independent School District* 524 US 274 (1998) in which the Supreme Court held that a recipient of federal education funding intentionally violated Title IX, and was subject to a private damages action, where the recipient was deliberately indifferent to known acts of teacher-student discrimination. The appellant had asked the Court to accept that the case of peer student harassment was analogous to the *Gebser* case and liability to the school district should result. In determining this issue, the Court was constrained by previous authority on the spending clause in the federal Constitution. In particular, the majority observed: '[b]ecause we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause ..., private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. Much of the balance of the majority judgment addressed issues of agency and the requirements of notice to the school district.

The respondents in *Davis* argued that Title IX provides no notice that the recipients of federal educational funds could be liable in damages for harm arising from

student-on-student harassment. In particular, they argued that the statute only proscribes misconduct by grant recipients and not third parties. The latter argument was accepted by the majority. However, in Justice O'Connor's judgment, the majority did not accept the respondent's assertion that the appellant sought to hold the Board liable for the actions of the student, instead of its own. Justice O'Connor made clear that the appellant sought to hold the Board liable for Aits own decision to remain idle in the face of known student-on-student harassment in its schools[≡]. The majority relied upon the authority of *Gebser* in rejecting the applicability of agency principles and stating that there was no bar to liability for a school district where it intentionally violated the terms of the Title IX statute. The standard to be adopted from *Gebser* was that of 'deliberate indifference' to acts of harassment of which the school had actual knowledge.

In addressing the issue of 'notice' to the school district of the potential liability for failure to respond to peer sexual harassment between students, the majority drew on a number of sources which supported the adequacy of notice to the school district. These included: the regulatory scheme surrounding Title IX which provides funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents; the common law which had put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties; documentation from National School Boards Association; and, policy guidelines adopted by Department of Education's Office of Civil Rights. The majority concluded on this basis that the school district had received adequate notice as required by Spending clause jurisprudence.

Applying the 'deliberate indifference' standard and interpreting the language of Title IX, the majority argued that the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients was narrowly circumscribed. This argument was vehemently rejected in Justice Kennedy's judgment. In contrast, he argued that the 'deliberate indifference' standard opened the 'floodgates' to liability for schools. However, the majority in further elaboration of the 'deliberate indifference' test, indicated that in order to attract liability a school district in receipt of federal funds must have some control over the alleged harassment. The majority stated that if a school did not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s] its students to harassment'. Moreover, in order to be liable the harassment must take place in a context subject to the school district's control. The combination of these factors was held to limit a school district's damages to circumstances where it exercised substantial control over both the harasser and the context in which the known harassment occurred. The majority held on the facts in *Davis* that as the misconduct occurred during school hours and on school grounds, it took place 'under' an 'operation' of the funding recipient as required by the statute. Finally, the majority offered the opinion that the Adeliberate indifference[≡] test

would not compromise school administrators As long as recipients [of federal education funding] respond to known peer harassment in a manner that is not clearly unreasonable.

The majority relied upon *Gebser* and *Franklin v Gwinnett County Public Schools* (503 US 60) to confirm that sexual harassment was discrimination within the school context under Title IX. It then concluded that school districts are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. The onus is on a plaintiff to establish that sexual harassment of students is so severe, pervasive, and objectively offensive, and it so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.

On the issue of causation and damage claimed by the appellant, the majority accepted that LaShonda's falling grades at school provided necessary evidence of a potential link between her education and the male student's misconduct. However, it also pointed to the alleged persistence and severity of the boy's actions, and the School Board's alleged knowledge and deliberate indifference as equally significant factors in the appellant's case. Justice O'Connor concluded that a correct balance between the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behaviour had been reached in the statement and application of the test. In upholding the appeal she concluded with the pragmatic observation that the relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits.

Dissenting judgment

The dissenting judgment represents a strongly negative rejoinder to the reasoning and arguments of O'Connor J. Justice Kennedy's response to the majority decision, as intimated earlier, was to posit the opening of floodgates to legal liability for school districts. Whilst the majority opinion claims as a focus the interests of individual students in accessing the educational system without harassment and discrimination together with the responsibilities of schools in promoting non-hostile educational environments, Justice Kennedy perceives the sole legal issue to pertain to federal interference in areas of State responsibility. For him, the petition in *Davis* is first and foremost a question of the federal balance. Under the Kennedy analysis, education is a state responsibility and the influence of the federal government is limited by the constitution. The difficult issue for the court is to resolve the question of the extent to which the federal government through grants of financial assistance to the states, can influence the policies of the latter. The resolution of the question turns upon the interpretation of the language of Title IX. The clarion

concerns of Justice Kennedy in response to the majority decision cover two related issues. Firstly what he perceives as the excessively broad scope of liability he believes is the natural consequence of the ‘deliberate indifference’ test: ‘[t]he prospect of unlimited Title IX liability will, in all likelihood, breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment’. Secondly Justice Kennedy is opposed to the interference by the federal government in state affairs. He states: ‘[t]he Court (sc majority decision) clears the way for the federal government to claim center stage in America’s classrooms.’

The dissenting judgment features a broad range of counter arguments to the majority. These range from points of difference in the interpretation of authority in *Gebser*, particularly in respect of the agency issue, to counter interpretations of the language of Title IX. Kennedy J claims a preference for the most natural interpretation of the language of Title IX, which he does not see as a mark of the majority’s approach. He expresses concern over the involvement of the Court in making assessments about the operation of schools and characterises the majority’s ‘deliberate indifference’ test as an exercise in arbitrary line drawing and lacking in clarity. Further, he stresses the practical limitations on a public school’s power to control students including limitations on the power to discipline, for example the complex legal issues raised by the requirements of the *Individuals with Disabilities Education Act*. He identifies the ‘practical obstacles’ faced by schools in ensuring that thousands of immature students conform their conduct to acceptable norms as potentially more significant than the legal obstacles. He concludes that ‘the limited resources of our schools must be conserved for basic educational services’.

The dissenting judgment identifies the majority approach as flawed on the question of ‘notice’ required by the Spending Clause. In rejecting what he identifies as the ‘sweeping legal duty’ derived by the majority from *Gebser*, Kennedy J concludes that Title IX gives schools neither notice that the conduct of the male student was gender discrimination within the meaning of the Act nor any guidance in distinguishing in individual cases between actionable discrimination and the immature behavior of children and adolescents. He finds no grounds for labelling ‘immature, or childish behaviour’ as sexual harassment, characterising the appellant’s claim as an attempt to create out of whole cloth a cause of action by labeling childish misconduct as sexual harassment, to stigmatize children as sexual harassers, and have the federal court system take on the additional burden of second guessing the disciplinary actions taken by school administrators in addressing misconduct. In order to be successful in a claim under Title IX, Kennedy J suggests that a plaintiff must prove a clear pattern of discriminatory enforcement of school rules which may raise an inference that the school itself is discriminating. Nothing less will result in liability in his judgment.

In rejecting the appellant's claim Justice Kennedy notes that in most egregious cases the student will have state law remedies available to her, once again identifying the issue of the federal balance as central to his determination.

Some Australian comparisons

Whilst the appellant in *Davis* was successful, there is room for caution as the victory was a narrow one and the dissent was vigorous. There are, however, some lessons for Australia in the Supreme Court's decision in *Davis* despite the fact that the constitutional and legislative frameworks of the two jurisdictions differ significantly. In Australia the constitutional question of financial assistance and federal influence was resolved early when the High Court interpreted the words of section 96 in favour of the Commonwealth in the Federal Aid Roads case (*Victoria v Commonwealth* (1926) 38 CLR 399) in 1926. As a result in Australia, the Commonwealth may have considerable influence upon state policies through the grant of financial assistance upon condition. However, the federal balance issues associated with grants of federal financial assistance to the States in the United States are alive and well as the Kennedy dissent illustrates explicitly.

State and Territory anti-discrimination laws directly address the issue of sexual harassment by students at school. The Commonwealth *Sex Discrimination Act* 1984 provides inter alia for liability of a student for peer sexual harassment of another student where the students are adult students (s 28F). Other state statutes, such as the *Anti-Discrimination Act* 1977 (NSW) also make unlawful sexual harassment by adult students in educational institutions. However, the New South Wales statute does not contain the Commonwealth constraint that the object of the harassment must be an adult student (s 22E). The concept of adult student is defined in the statute to include students over 16 years of age (s 28F(3) Cth; s 22E(4) NSW). This provision would not have assisted LaShonda to achieve legal redress of the harassment if the behaviour complained of had taken place in an Australian school. However, the provisions of State and Commonwealth laws which make unlawful discrimination against a student by an educational authority on the ground of sex (s 21 Cth, s 31A NSW) may have been of greater aid. Sexual harassment has been accepted by the Courts as a form of sex discrimination (see *O'Callaghan v Loder* [1983] 3 NSWLR 89; *Aldridge v Booth* (1988) 80 ALR 1) and the educational authority may have been liable in circumstances where LaShonda suffered detriment as outlined in *Davis*.