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# Foreword

Heather Kirlin

Dominique Tauzin

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# Foreword

Each year, the *Hastings Women's Law Journal* hosts a symposium to bring together scholars and practitioners to discuss a timely and provocative development in the law. As part of a long-standing tradition, we devote the first issue of each volume to publications on this topic, giving our subscribers access to discussions on these cutting-edge issues that many law journals either avoid or ignore.

In 2000, the Symposium was entitled "Academic Epidemic: Sexual Harassment in Public Schools after *Davis*."[1] This Symposium focused on the 1999 Supreme Court decision in *Davis v. Monroe County Board of Education*, that held for the first time that school districts could be liable for peer sexual harassment.[2] Specifically, the Court determined that school districts may be liable for damages under Title IX if they fail to stop a student from subjecting another student to known, severe and pervasive sexual harassment.[3]

Although peer sexual harassment in schools is nothing new, this decision is noteworthy because it is now recognized as a problem larger than just "kids being kids."[4] As the last few years have taught us, student-on-student harassment is not something that can be ignored. It is significant that the *Davis* decision came at a time when this country began to witness increased violence on school campuses. The *Davis* decision represents part of a larger trend to take student misconduct seriously. Yet, the significance of the *Davis* decision goes beyond this. It represents the first time the Supreme Court has recognized that peer sexual harassment in schools severely impacts the emotional and physical well-being of young women and girls. If left unaddressed, such sexual harassment limits their educational opportunities and teaches young men and boys that such

1. The Symposium was held on February 9, 2000, at University of California, Hastings College of the Law, in San Francisco. The Symposium would not have been possible without the commitment and dedication of Angelica Castillo, Alysse Emery and Gina Bertollini, the 1999-2000 Symposium Editors. We thank them for all their hard work which has lead to this outstanding issue.

2. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

3. *See id.* at 633.

4. *See, e.g.*, Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 75 (D. N.H. 1997) (superintendent responded to plaintiff's complaints with attitude that "boys will be boys").

behavior is socially acceptable, thereby laying the groundwork for future gender violence. With the *Davis* decision, something that had long been accepted as a simple fact of educational life is now legally actionable.

The symposium was divided into a morning and an afternoon panel. After the keynote address by Dr. Nan Stein,[5] the morning panel discussed the background of the *Davis* decision and Title IX.[6] The moderator, Nan Stein, brought to the discussion her perspective that the *Davis* decision, a "feminist victory," is being co-opted by the "zero tolerance, law and order [crowd] and a certain notion of school safety that really pervades the country." Professor McCarthy followed, who after giving a general overview of Title IX, expressed her agreement with the *Davis* decision but argued that the "actual knowledge" standard adopted by the Supreme Court is too stringent and should be replaced by a "constructive notice" requirement. Professor Schaffner continued by agreeing that the underlying decision of *Davis* was correct, but argued that the majority failed to adequately address the concerns raised by the dissent. Professor Brake followed by exploring the decision in the context of the larger tension in discrimination law between intent and causation as the guiding principle for defining unlawful discrimination. The final speaker of the panel, practitioner John Walsh, gave a California legal perspective explaining what school districts in California must do to comply with the decision.

The afternoon panel focused on same-sex peer sexual harassment.[7] Christine Hwang began the discussion by relating her experiences working with the National Center for Lesbian Rights, which uses litigation and advocacy to ensure that schools are safe and supportive environments for lesbian, gay, bisexual, transgendered and questioning youth (LGBT). As part of her work, she has represented a group of plaintiffs suing the Morgan Hill Unified School District for failure to respond to incidents of discrimination, harassment and violence against LGBT students. She brought with her one of the plaintiffs in this case who gave a personal and emotional recounting of the incidents leading to the lawsuit. Gloria Estolano, a civil rights attorney for the U.S. Department of Education, Office for Civil Rights, discussed how her Department deals with peer sexual harassment. Finally, David Doty completed the discussion with an

5. Senior Research Scientist, Center for Research on Women, Wellesley College.

6. Presenters at the morning panel were: Martha McCarthy, Chancellor Professor, Indiana University; Joan Schaffner, Professor, National Law Center, George Washington University; Deborah Brake, Professor, University of Pittsburgh School of Law; John Walsh, Attorney, Public Law Department, Best, Best & Krieger.

7. This panel included: Christine Hwang, National Center for Lesbian Rights, San Francisco; Alana Flores, named plaintiff, *Flores v. Morgan Hill Unified School District*; Gloria Estolano, Office for Civil Rights, U.S. Department of Education, San Francisco; David Doty, former attorney with the Education Law Group at Kirton & McConkie and current professor at the College of Education, University of South Carolina.

exploration of how non-legal remedies may sometimes be the best way for communities to address tolerance toward gay students.

In the short time that has followed since the Symposium, there have been numerous legal developments dealing with peer sexual harassment in schools. First, the *Davis* case settled in January 2001 for an undisclosed amount.[8] LaShonda Davis, now an eighteen-year-old freshman at Macon State College, stated that she is "very pleased with the settlement" and "just happy it's over." Her mother, however, expressed anger that the Monroe County school officials "acted like nothing ever existed," and stated she is "just glad [she will] never have another child go through that school system."[9] In another case that was pending when the *Davis* decision was announced, the Tenth Circuit reversed a district court's holding that Title IX provides no cause of action for a school's failure to prevent student-on-student harassment and that a school district has no constitutional duty to protect a student from assaults by other students.[10] This is just one example of how *Davis* has provided a remedy for incidents of peer sexual harassment which may have previously gone unaddressed. Outside of the courtroom, different legislatures are making changes in school policy and curriculum to discourage discrimination based on sexual orientation in schools. In California, a taskforce of educators, parents and community

8. *See* Bill Rankin, *Case Settled in Harassment of Girl, 10*, ATLANTA J. & CONST., Jan. 9, 2001, at 4B.

9. *Id.*

10. *See* Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1252 (10th Cir. 1999). The facts involved in *Murrell* were particularly egregious. Penelope Jones, a developmentally and physically disabled student, was sexually assaulted by another developmentally disabled child on multiple occasions. *See id.* at 1244. Although Penelope Jones was enrolled in special education classes at a high school, she functioned at the level of a first-grader. *See id.* at 1243. Her mother previously withdrew her from another school after she was sexually molested by two boys on a school bus. *See* Julia Jargon, *After Her Retarded Daughter was Sexually Assaulted, a Mother Decided to Teach DPS a Lesson*, DENVER WESTWORD, Oct. 19, 2000. When Penelope's mother re-enrolled her in a different school, she warned the principal and teachers of the prior incident and was assured that Penelope would be properly supervised. *See id.* Despite these assurances, Penelope was taken off to a secluded area by another student who sexually assaulted her. Penelope bled and vomited during the course of the assault and battery. A janitor discovered Penelope and the assailant and told them to clean up the mess before returning them to class. *See id.* Although the janitor informed Penelope's teachers of what happened, the teachers did not inform Penelope's mother. *See* 186 F.3d at 1243-44. When Penelope informed her teachers that she had been sexually assaulted and battered by the same student on another occasion, they told her not to tell her mother about the incident and "encouraged her to forget it had happened at all." *Id.* at 1244.

Concerned when Penelope became self-destructive and suicidal, her mother admitted her to a psychiatric hospital and only then did she learn that Penelope had been sexually assaulted. When Penelope's mother contacted her teachers, the teachers denied that the assaults occurred. When Penelope's mother was finally able to meet with the teachers and principal, they were hostile towards her and Penelope. *See id.* The principal suggested that the sexual contact may have been consensual, and then suspended Penelope, but not the assailant, for "behavior which is detrimental to the welfare, safety, or morals of other pupils or school personnel." *Id.*

representatives have recommended that schools integrate recognition of gay, lesbian, bisexual and transgender historical figures into their curriculum.[11]

Despite all these developments, there are still flaws in the *Davis* decision. Because of the majority's failure to address the First Amendment in its opinion, it has created the possibility that school policies aimed at policing sexual harassment will be challenged on First Amendment grounds. Another criticism of the decision is that by adopting an "actual knowledge" standard instead of a "constructive notice" standard, it sets the bar higher for student-plaintiffs than for adults in the workplace, affording more protection to adults than children. As can be seen, the *Davis* decision was a victory, but the battles are not over.

*Heather Kirlin & Dominique Tauzin*
Co-Editors-in-Chief, 2000-2001
*Tianna McClure*
Managing Editor, 2001

11. *See Group Backs Anti-Harrasment Program*, L.A. TIMES, Apr. 13, 2001, at B2. Santa Fe, New Mexico considered a similar anti-homophobia curriculum. *See* Diana Heil, *Moratorium Declared on School Tolerance Curriculum*, ALBEQUERQUE J., Apr. 7, 2001, at 1. After two months of public debate that polarized the community, the Sante Fe Public Schools Superintendent ordered a moratorium on the project. *See id.* A group of teachers will review tolerance education models and write a broader curriculum this summer. *See id.*