**Brigham Young University Education and Law Journal**

Volume 2011
Number 2 *Symposium: The Impact of Same-Sex Marriage on Education*
Article 20

Fall 3-2-2011

# Helping Students Who Can't Help Themselves: Special Education and the Deliberate Indifference Standard for Title IX Peer Sexual Harassment

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# HELPING STUDENTS WHO CAN'T HELP THEMSELVES: SPECIAL EDUCATION AND THE DELIBERATE INDIFFERENCE STANDARD FOR TITLE IX PEER SEXUAL HARASSMENT

## I. INTRODUCTION

The Supreme Court has long held that students do not "shed their constitutional rights . . . at the schoolhouse gate."[1] Although that infamous case of the black armbands[2] was referencing student freedom of speech, the same could be said for other student rights, including the right to be free from sexual harassment in the school environment. The courts have struggled long and hard over how to classify the public school arena for a variety of constitutional issues, and have settled on the idea that it is a unique environment with its own set of rights and duties, and its own species of litigation therein. Among those rights and duties are special duties held by school officials and administrators. In exploring the extent of students' Fourth Amendment constitutional rights, the Supreme Court in *Vernonia School District 47J v. Acton* emphasized that the State's power over schoolchildren is "custodial and tutelary."[3] Then, in *T.L.O. v. New Jersey*, the Court went on to say this power requires "close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."[4]

When these "custodial and tutelary" powers are coupled with the gravity of compulsory attendance laws, the role of school administrators and officials takes on added weight. Mandatory education for all children is established through the

1. Tinker v. Des Moines, 393 U.S. 503, 506 (1968).

2. *Id.* at 503 (discussing the case of students who wore black armbands on their sleeves to exhibit their disapproval of the Vietnam War).

3. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

4. T.L.O. v. New Jersey, 469 U.S. 325, 339 (1985).

common law doctrine of *parens patriae*, which holds that the state, through its police power, has the "inherent prerogative to provide for the commonwealth and individual welfare."[5] Intrinsic to this duty is the role of the guardian, with the authority to "protect those who are not legally competent to act in their own behalf."[6] Additionally, the common law doctrine of *in loco parentis* vests school administrators and teachers with "the responsibility of protecting the interests of the child in the school environment."[7] In sum, there exists the expectation that the school, and those who operate the school, will take care for the well-being of each student.

Viewing this concept in the light of peer sexual harassment, it seems the school has a special duty to ensure a student's educational opportunities are not hindered by the threat of unwelcome sexual encounters. The Supreme Court addressed this duty for the first time in 1999 in *Davis v. Monroe*.[8] Although the *Davis* ruling still stands as good law today, it does not specifically address the special education sector of the student population at large. What about the class of students who arguably need extra protection beyond that of their peers? Additionally, what about the class of students who just cannot seem to control their impulses and have a higher propensity for inappropriate peer relations due to their disability? Compared to their peers, students with disabilities run a higher risk of being either the target or the perpetrator of peer sexual harassment.[9] This propensity may be attributed to their "difficulties [in] using appropriate social skills and their lack of insight regarding how their behavior affects interpersonal relationships."[10]

This article will outline the challenges that schools, and their officials, face in providing a safe environment for all students, and specifically for students with disabilities. This

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5. KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 301 (6th ed. 2005).

6. *Id.* at 301.

7. *Id.* at 504.

8. Davis v. Monroe, 526 U.S. 629 (1999).

9. Ellie L. Young et al., *Sexual Harassment among Students with Educational Disabilities: Perspectives of Special Educators*, 29 REMEDIAL & SPECIAL EDUC. 208, 208 (Aug. 2008) (citing A.K. Kavale & S. Forness, *Social Skills Deficits and Learning Disabilities: A Meta-Analysis*, 29 J. LEARNING DISABILITIES 226–37 (1996)).

10. *Id.* at 208 (citing K. L. LANE ET AL., INTERVENTIONS FOR CHILDREN WITH OR AT RISK FOR EMOTIONAL AND BEHAVIORAL DISORDERS 242–58 (2002)).

article will begin by outlining the most recent circuit court decision that follows the *Davis v. Monroe* framework, *Patterson v. Hudson Area Schools*, and will demonstrate how the Sixth Circuit has chosen to apply *Davis* to this area of the law. Then the article will address, in turn, the implications of special education students as targets of peer sexual harassment, special education students as perpetrators of peer sexual harassment, and situations identifying both the target and the perpetrator as students with disabilities. Furthermore, this article seeks to identify when the school will be held liable in cases of student-on-student sexual harassment, and where various courts have drawn the line with respect to the "deliberate indifference" standard for school liability. Lastly the article will address where the Davis standard lies today with regards to same-sex student-on-student sexual harassment.

## II. THE STORY OF A BOY NAMED DP

Everyone knows that the middle and high school years can be rough; adolescence is *not* a walk in the park. But for a boy named DP, those years were perhaps the worst of his life. It all began in 2002 when DP was a sixth-grade student attending Hudson Area Schools (hereinafter "Hudson"). It started with peers of DP calling him names, and pushing and shoving him in the hallways. The name-calling was mostly sexual in nature, with labels such as "queer" and "faggot" used on almost a daily basis. When DP reported some of these instances, he was told "kids will be kids, it's middle school."[11] As a result of this harassment, DP became anxious, distraught and angry, and started receiving psychological treatment.[12] In seventh grade the harassment of DP only escalated: along with "queer" and "faggot," other words such as "man boobs" and "gay" were used on a daily basis, more than 200 times during this school year.[13] Additionally, the term "Mr. Clean" was used by his peers to reference DP's supposed lack of pubic hair.[14] Naturally, DP wanted to quit school not far into his seventh grade year. At this point, the school principal offered to mentor DP; however,

11. Patterson v. Hudson Area Schs., 551 F.3d 438, 439 (6th Cir. 2009).
12. *Id.* at 440.
13. *Id.*
14. *Id.*

these visits were short-lived as they coincided with the visits of problem students at the end of each day and DP feared he would be labeled a "trouble kid" by his peers.[15] DP continued to withdraw socially, eating lunch by himself in the band room to avoid his peers.[16]

DP's parents (hereinafter "the Pattersons") repeatedly reported these incidences, as well as their concerns, to school administrators, counselors, and teachers at various conferences starting in the sixth grade.[17] In December of DP's seventh grade year, the Pattersons met with the principal and discussed DP's suffering grades, as well as DP's desire to not return to school.[18] As the year went on, the Pattersons continued to meet with school administration where school staff repeatedly told the Pattersons that DP was doing nothing wrong to merit this type of harassment from his peers.[19]

After seventh grade, the school counselor had DP evaluated for special education services, which established that DP was emotionally impaired, qualifying him for services under the Individuals with Disabilities Education Act (hereinafter "IDEA").[20] As such, during his eighth grade year, DP was assigned to receive help from a resource teacher for one period each day.[21] The resource teacher was especially effective in teaching DP to cope with his peers and as a result, DP had a successful eighth grade year.[22] However, because the resource teacher was specifically for middle school students, when DP began high school the following year, he was no longer able to receive mentorship from the resource teacher.[23] Although the middle school resource room was housed in the same building as the high school, the principal denied specific requests by the Pattersons for DP to continue meeting with the resource teacher, and DP did not receive any new or additional resource room support during his ninth grade year.[24]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 441.
19. *Id.*
20. 20 U.S.C. §§ 1400–1450 (2005).
21. *Patterson*, 551 F.3d at 441.
22. *Id.*
23. *Id.*
24. *Id.*

Ninth grade brought back all of the same problems that DP experienced during his sixth and seventh grade years, including pushing, shoving and name-calling with words such as "faggot," "queer," and again, "Mr. Clean."[25] After reporting those incidences, those particular name-calling students did not bother DP again; however, other students found new ways to harass DP. A fellow student wrote "[DP] is a fag" on the back of DP's presentations note cards so that the entire class could read it.[26] Another student defaced DP's planner with phrases such as "I like it in the Ass," "I [heart] penis," "I'm a mamma's boy/I suck on her nipple" and drawings of buttocks and a penis.[27] Additionally, students hung a "Mr. Clean" poster on DP's locker.[28] All students involved in these incidences received only a verbal reprimand by either the school counselor or principal, with the exception of one student who was suspended for one day, as he had previously violated an unrelated school rule.[29] All students involved never bothered DP again to the knowledge of school administration.[30]

However, there continued to be incidences of harassment where the school could not identify the student perpetrator. A student broke into DP's gym locker, threw his shoes in the toilet, urinated on his clothes, and used shaving cream to spell out sexually oriented words on the locker.[31] A few months later, unknown students vandalized DP's locker on both the inside and outside with words such as "faggot," "gay," "queer," "suck your mother's tits," and "you suck dicks," illustrated by pictures of a penis being inserted into a rectum.[32] Although Hudson reports conducting an investigation, it never identified or held any student responsible for these acts.[33]

In May of his ninth grade year, DP was the victim of sexual assault when a fellow teammate took off his clothes and cornered DP in the locker room after baseball practice.[34] This

25. *Id.* at 442.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

teammate rubbed his genitals on DP's neck and face while another teammate blocked the exit to the locker room, preventing DP's escape.[35] The Pattersons informed the principal of this incident the next day during a double-header baseball game, in which both DP and the perpetrator were participating.[36] The following Monday Hudson began investigating the incident, and the student perpetrator was suspended for the eight remaining days of the school year.[37] A few weeks later this student perpetrator was charged with assault with the intent to commit a felony and criminal sexual conduct in the second degree.[38] Eventually this student was expelled from Hudson after pleading guilty to disorderly conduct.[39] The second student, who blocked the exit during the incident, received only a verbal reprimand.[40]

The outrageous nature of this incident did not stop with the actions of the student athlete. Although Hudson took action by suspending the student perpetrator, the school still allowed this student to participate in the end-of-year sports banquet, held one week after the incident.[41] Even more alarming were the actions of the baseball team coach who, after hearing word of the incident, held a baseball team meeting where he told his players, in the presence of DP, to "not joke around with guys who can't take a man joke."[42] As a result of all this harassment, DP was psychologically unable to return to the Hudson campus, and so for his tenth grade year DP received instructional services from Hudson via the campus of a nearby Catholic elementary school.[43] Although teachers visited DP occasionally, they were largely unavailable and as a result, DP was not academically successful that year.[44] Eventually DP was able to take classes at the local college, facilitating his early graduation.[45]

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35. *Id.*
36. *Id.*
37. *Id.* at 443.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

After years of harassment by his peers, DP's parents filed suit under Title IX, claiming that Hudson Area Schools violated Title IX by allowing their son to be harassed. After the district court granted summary judgment in favor of the school district, the Pattersons appealed.[46] The Sixth Circuit Court of Appeals found there to be a genuine issue of material fact as to whether the school district was deliberately indifferent to student-on-student sexual harassment, and so the case was reversed and remanded. The Hudson Area School District petitioned for a rehearing as well as a rehearing en banc, but both were denied on May 1, 2009.[47] Certiorari was also denied by the Supreme Court of the United States in October 2009.

## III. ONE MORE LOOK AT THE FACTS

If the facts are taken as true, DP had any number of horrific experiences created by his ruthless and unfeeling peers. But were the school staff and administration ruthless and unfeeling as well? Is it fair to say the school should be held accountable for failing to prevent every incident of student-on-student peer harassment? One more look at the facts surrounding this case may reveal a different side.

The busy principal was encumbered by delinquent students and endless discipline tasks inherent to a public middle school, yet he volunteered to take time each day to mentor DP. Should the principal be labeled as "indifferent" when he was absent from his office on some of the days DP came to meet with him? Was he "deliberate" when he asked to see DP at the end of the day when he also happened to check in with problem students?[48] It was DP's choice to stop meeting with the principal, not the unavailability of the principal, which ended these mentoring sessions.[49]

Not all the incidents involving DP were reported, but each time an incident was reported, the school took action when an individual offender could be identified. Although many times the offending student received only a verbal reprimand, this form of disciplinary action was effective in the sense that there

46. *Id.* at 438.
47. *Id.*
48. *Id.* at 440.
49. *Id.* at 453 (Vinson, J., dissenting).

were never repeat offenders.[50] In the case of other reported incidences, DP could not furnish a name of the offending student, nor could the school discover who it was, despite their investigations. To what lengths should a school go in order to discipline one student and to deter all other students from engaging in the same misconduct?

In an effort to educate students about peer harassment and bullying, Hudson implemented programs such as "Bang, Bang, You're Dead" and "Flirting and Hurting."[51] The Pattersons brought evidence that these types of programs were not effective, nor were they always taught to every single student. The dissenting opinion, however, points out that the school did have policies and procedures for harassment in place, and the failure to make every single student understand their significance was more of a negligence argument rather than deliberate indifference on the part of the school.[52]

The school counselor regularly invited DP to attend both individual and group counseling sessions for students experiencing peer relationship struggles. DP also received preferential classroom seating, extra time to take tests, and counseling sessions with a social worker.[53] Over the summer, when most school staff was on vacation, the school psychologist and social worker evaluated DP and assisted him in qualifying for special services, including an Individualized Education Plan (hereinafter "IEP").[54] This allowed DP to become eligible for supporting services, including access to a resource teacher.[55]

The resource teacher who acted as a mentor for DP during his eighth grade year was actually the science teacher, and the resource room was nothing more than a study hall for DP.[56] It was not the access to a resource room or program, but rather it was the mentor relationship of the science teacher that allowed

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50. *Id.* at 442 (majority opinion) (stating an account of all incidences of harassment experienced by DP where when offending student was identified and disciplined, the record states that so and so "never bothered DP again").

51. *Id.* at 450 n.10.

52. *Id.* at 454–55 (Vinson, J., dissenting).

53. *Id.* at 453.

54. *Id.* at 441 (majority opinion).

55. *Id.*

56. *Id.* at 454 n.6 (Vinson, J., dissenting) (DP himself testified that the "resource room" was actually a study hall, where he would do his homework. When questioned about what actually caused the positive turnaround during his eighth grade year, DP said "I have no clue.").

DP to have a successful school year. When DP matriculated to ninth grade, this science teacher generously offered to continue to mentor DP for 25 to 30 minutes each week and the principal consented to this opportunity.[57] Should the high school be held liable for not providing DP with another study hall and adult mentor?

The locker room incident from DP's ninth grade year resulted in the permanent expulsion of the offender from Hudson schools and criminal prosecution. After his tenth grade year, DP had the opportunity to take college courses, paid for entirely by Hudson, allowing him to take advanced classes, become fluent in Japanese, and graduate from high school early with As and Bs.[58] Although his education took on a nontraditional form, DP was not denied access to educational opportunities despite the harassment by other students. Instead, the school provided a creative solution that allowed DP to successfully finish high school.

## IV. TITLE IX: THE PATTERSONS' CLAIM AGAINST HUDSON AREA SCHOOLS

The Pattersons' complaint against Hudson alleged that Hudson violated DP's equal protection rights as well as Title IX of the Education Amendments of 1972.[59] Additionally, the Pattersons filed suit against the superintendent of Hudson, claiming that she failed to properly train staff regarding harassment issues and ensure compliance with federal law and Hudson policies.[60] In analyzing the Title IX claim, the district court relied on the three-part test from *Davis v. Monroe County Board of Education*, and granted summary judgment in favor of Hudson. The court determined specifically that the third prong "deliberate indifference" standard of the *Davis* three-part test was unmet, as the Pattersons' failed to show how Hudson's response was "clearly unreasonable in light of known circumstances."[61] As for the other two prongs of the *Davis* test,

57. *Id.* at 454.

58. *Id.* at 453.

59. Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (2005).

60. *Patterson*, 551 F.3d at 443 (majority opinion).

61. *Id.* at 444 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

it is undisputed that the Pattersons met the burdens for those requirements.[62]

On appeal, the Pattersons' only claim was that the district court erred in determining that, as a matter of law, Hudson was not deliberately indifferent and thereby did not violate Title IX. As such, the Sixth Circuit Court focused entirely on the Title IX claim against Hudson, and did not consider the alleged violation of equal protection, or the case against Hudson's superintendent as Title IX holds no individual liability claim.[63] The Sixth Circuit undertook a *de novo* review, analyzing all facts in the light most favorable to the non-moving party, the Pattersons.[64] After a thorough analysis of the facts of the case, the Sixth Circuit majority concluded that the Pattersons did indeed demonstrate a genuine issue of material fact regarding whether Hudson's actions were deliberately indifferent and the case was reversed and remanded.[65] To reach this decision, the court relied heavily on its own reasoning from a prior Title IX Sixth Circuit case, *Vance v. Spencer County Public School District.*[66] The *Vance* court, in turn, relied on the Supreme Court decision in *Davis* to arrive at its conclusion that a school board was deliberately indifferent to the sexual harassment of a female high school student by other students and therefore liable under Title IX.[67]

## V. THE DAVIS THREE-PART TEST FOR DETERMINING TITLE IX LIABILITY

In 1999, the Supreme Court ruled in *Davis v. Monroe County Board of Education* that Title IX may support a private cause of action against a recipient of federal funds where there exists a claim for student-on-student sexual harassment.[68] In order to establish the prima facie case for this claim, the

62. *Id.* at 450 (where the other two prongs of the Davis Test require the plaintiff to establish that (1) the sexual harassment was so severe that it could be said to deprive the plaintiff of access to the educational opportunities, and (2) the funding recipient had actual knowledge of the sexual harassment).

63. *Id.* at 444.

64. *Id.* at 444 (relying on Nat'l Enters., Inc. v. Smith, 114 F.3d 561, 563 (6th Cir. 1991) for the standard of review).

65. *Id.* at 446.

66. Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000).

67. *Id.*

68. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

plaintiff must establish that (1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) the funding recipient had actual knowledge of the sexual harassment, and (3) the funding recipient was deliberately indifferent to the harassment.[69] Eleven years later, the *Davis* decision still stands as the precedential case defining student-on-student sexual harassment in the school environment.

The *Davis* decision came about from a situation where a fifth-grade girl had been the victim of sexual harassment by another student who made vulgar comments such as "I want to get in bed with you" and "I want to feel your boobs," as well as attempts to touch the girl's breasts and genital area.[70] Although the victim reported each incident to her teacher and her mother, and the teacher assured the mother that the principal was aware, this harassment continued for several months and the offender went undisciplined.[71] It was also reported that a number of other girls in the same fifth-grade class tried to report similar complaints to the principal, but the teacher denied their request, stating, "If [the principal] wants you, he'll call you."[72] For five months this behavior continued until finally the offending student pled guilty to sexual misconduct. The damage to the victim, however, had already been done, as her previously high grades dropped, her level of distractedness in school rose, and her father even found a suicide note that she wrote.[73] The court concluded that the school district's lack of response suggested "deliberate indifference" where (1) the principal failed to discipline the student beyond stating "I guess I'll have to threaten him a little bit harder," (2) the teacher made no effort to separate the plaintiff from the student when their classroom seats were adjacent, and (3) the Monroe County Board of Education had yet to instruct its personnel on how to respond to peer sexual harassment, nor had it developed policy on the matter.[74]

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69. *Id.* at 629, 633.
70. *Id.* at 633.
71. *Id.* at 634.
72. *Id.* at 635.
73. *Id.* at 634.
74. *Id.* at 634–35.

As student-on-student harassment under Title IX had not been addressed previously, the *Davis* court borrowed heavily from language found in Title VII to conclude that:

> [A]s Title VII encompasses a claim for damages due to a sexually hostile environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.[75]

The *Davis* Court also looked to a handbook issued by the Department of Education's Office for Civil Rights for guidance on what a school district's appropriate response should be for student-on-student harassment.[76] The handbook stressed that a school should "take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."[77]

The final standard on deliberate indifference to come out of *Davis* is still used by courts today, and holds that a federal funds recipient (public school) is deliberately indifferent where "recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."[78] This does not mean a school must "'remedy' peer harassment, and [] 'ensur[e] that . . . students conform their conduct to' certain rules. Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable."[79]

The phrase "not clearly unreasonable" is the prong where circuit courts, as well as district courts, have split. Exactly what type of conduct ensures that a school district's response to student-on-student harassment is "not clearly unreasonable" is still up for debate. However, the *Davis* majority opinion was clear to stress that avoiding liability is not accomplished "only

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75. *Id.* at 636.

76. *Davis* at 526 U.S. at 648 (citing Dep't of Educ., Office for Civ. Rts., Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039–12040 (Mar. 13, 1997)).

77. Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 261 n.5 (6th Cir. 2000).

78. *Davis*, 526 U.S. at 648–49 (citations omitted).

79. *Id.* at 648–49.

by purging their schools of actionable peer harassment." Nor does it mean that "administrators must engage in particular disciplinary action," where victims of peer harassment would make "particular remedial demands."[80] In fact, the majority opinion went on to articulate that "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[81]

## VI. THE SIXTH CIRCUIT STRETCHING VANCE TOO FAR: HOW PATTERSON RATCHETS UP THE LEVEL OF SCHOOL RESPONSIBILITY TO THE IMPOSSIBLE TASK OF PREVENTING ALL FUTURE PEER HARASSMENT

*Vance*, like *Davis*, involved a case of student-on-student harassment where the parents claimed, and the Sixth Circuit Court agreed, that the school acted deliberately indifferent.[82] In *Vance*, a high school female was repeatedly harassed by the same male classmates, including lewd name-calling, shoving, and propositioning, culminating in an episode of sexual assault in the classroom where two boys held her down, pulled her hair, and tried to take off her shirt while another boy took off his pants.[83] Although the female student's mother wrote a letter to the principal detailing this incident, the boys were never disciplined, nor were law enforcement officials involved. The court found the school deliberately indifferent.[84]

The defendant school in *Vance* tried to argue that the *Davis* standard meant that as long as the school did *something* in response to harassment complaint, it had satisfied the *Davis* standard and was not deliberately indifferent. The court in *Vance* did not accept this argument. Rather, the court in *Vance* responded with this statement:

> Such minimalist response is not within the contemplation of a reasonable response. Although no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably in light of the known circumstances. Thus, where a school district has knowledge

80. *Id.* at 648.
81. *Id.* (citing T.L.O. v. New Jersey, 469 U.S. 325, 342 n.9 (1985)).
82. *Vance*, 231 F.3d at 253.
83. *Id.* at 256.
84. *Id.*

> that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.[85]

In *Patterson*, the Sixth Circuit majority viewed the prior *Vance* fact pattern as analogous to the case at hand: both cases involved a student being harassed by peers over an extended period of time. Both cases involved an escalating event of sexual assault by other students. In both cases the Sixth Circuit determined that *Davis*'s third prong of "deliberate indifference" was met where the school's lack of response to the harassment was "clearly unreasonable in light of the known circumstances."[86]

However, what the *Patterson* court fails to take into account are the significant differences between the facts of the *Patterson* case and the facts of the *Vance* case. In *Vance*, whenever the female student would complain of being harassed, the administration either did nothing, or only verbally reprimanded the offending classmates, which led to an escalation of the harassment. The disciplinary action was not effective, and the same classmates were repeat offenders. In *Patterson*, each time the administration gave a verbal reprimand to a harassing student, that student never bothered DP again. In *Vance*, when the female student was sexually assaulted by the group of males, the school did not take any disciplinary action, did not launch an investigation, did not involve law enforcement officials, and did not offer the female student a change of classroom, even when the mother filed a report with the district's Title IX coordinator.[87] In *Patterson*, when the locker room sexual assault incident occurred, the school launched an investigation, expelled the offender permanently, and involved the law enforcement who charged the offender criminally.[88]

How much should the courts require the schools to do before they are outside the zone of "deliberate indifference"?

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85. *Id.* at 260–61.

86. *Id.* at 260.

87. *Id.* at 253.

88. Patterson v. Hudson Area Schs., 551 F.3d 438, 443 (2009).

The *Vance* court clearly articulates that "[t]he recipient is not required to 'remedy' sexual harassment nor ensure that students conform their conduct to certain rules, but rather, 'the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.'"[89] The court goes on to articulate that a victim in these circumstances does not have "a right to particular remedial demands" and that "courts should not second guess the disciplinary decisions that school administrators make."[90]

If the *Patterson* decision stands, the courts might ratchet up the level of school vigilance and responsiveness so high, that schools will be asked to do the impossible task of remedying all future harassment, as well as purging schools of all current peer harassment. The court in *Vance* was correct to acknowledge that if a school just does *something*, they still might not be entirely off the hook. However, the *Patterson* court has taken this one step too far by second-guessing the school authorities' responses to dealing with student-on-student harassment.

## VII. THE DAVIS STANDARD APPLIED TO THE SPECIAL EDUCATION SECTOR

Although none of the players in the *Davis* case were special education students, many of the cases that follow *Davis* involve special education students, and in particular, mentally or physically disabled students. The world of special education adds a whole new set of rules, statutes, due process considerations, and policies that further complicate incidents of student-on-student sexual harassment. When peer harassment occurs, the *Davis* standard calls for actions by schools that are "not clearly unreasonable" in light of the known circumstances.[91] But it remains unclear what qualifies as sufficient intervention when the students themselves are physically, emotionally, or mentally disabled.

89. *Vance*, 231 F.3d at 260 (citing *Davis*, 526 U.S. at 648–49).

90. *Patterson*, 551 F.3d at 446 (citing *Vance*, 231 F.3d at 260).

91. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

### *A. Special Education Students as Targets of Peer Harassment*

In *Patterson*, the boy DP was classified as a special education student and given an IEP allowing him to access a resource room during his eighth grade year, which proved to be successful in combating the peer harassment. However, in ninth grade his IEP was modified and the principal "didn't think that [the high school resource room] was the place for [DP]."[92] This was one of several factors considered by the Sixth Circuit in determining there was a genuine issue of material fact regarding whether Hudson's actions were deliberately indifferent.[93]

In another Sixth Circuit case, *Soper v. Hoben*, a parent filed a Title IX suit against a school district when her special education daughter, Renee, was raped by one of her classmates. However, the court dismissed the claim against the school district, finding the last two prongs of the *Davis* Test were unmet.[94] Renee was a middle school student who had Down's Syndrome and was classified as an "educable mentally impaired" student (EMI). She was placed in a class with several other EMI students, including "Boy A," the boy who raped her. Prior to enrolling in this class, Renee's mother had informed the school and teacher of a prior kissing incident between Renee and Boy A, and the teacher reassured the mother that they would "keep an eye on the children," stating "[t]hey're well supervised."[95] However, shortly into the school year, Renee was raped by Boy A after he told her to hide in the back room when the teacher was locking up.[96] Additionally, Renee was molested by two other male classmates.[97]

Upon hearing about the rape and molestation incidences, the school immediately launched an investigation, contacted Child Protective Services, and implemented a plan for increased supervision of Renee while in school.[98] Additionally the school installed windows in the special education classroom doors, placed aides in the class and on the school bus, and

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92. *Patterson*, 551 F.3d at 441.
93. *Id.* at 446.
94. Soper *ex rel.* Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999).
95. *Id.* at 849.
96. *Id.*
97. *Id.*
98. *Id.*

referred all three boys to counseling sessions.[99] However, Boy A was not suspended until months later, when he was formally charged by law enforcement, and the two boys involved in the molestation incident were never disciplined by the school.[100] Despite the dissatisfaction of Renee's mother with the school's response, the Sixth Circuit found that the "prompt and thorough response by school officials" was not "clearly unreasonable in light of the known circumstances."[101] The court contrasted the quick actions of school officials in this case with *Davis* where the school failed to respond to complaints of peer sexual harassment for over five months.[102]

Alternatively, the dissenting opinion for *Soper* points out that the school did in fact have notice of a prior incident of harassment involving Renee and Boy A when Renee's mother reported the prior kissing incident and specifically requested that Renee and Boy A not be left alone together.[103] However, the school did not honor this request and although "assurances were given, no steps were actually taken to minimize or stop the harassment."[104] Rather, on the day of the rape, Boy A was allowed to accompany Renee alone to her locker.[105] Instead of incorporating the prior harassment incident into the "deliberate indifference" analysis, the court simply treated the rape incident as the first sign of "notice" and used that as the starting point to assess how quickly and effectively the school prevented a future recurrence of rape. However, if the court had expanded its analysis to include this prior incident, then "arguably, these actions amounted to deliberate indifference."[106]

What is interesting is how the Sixth Circuit distinguished this case from *Vance*, where the court stated: "Because of Spencer's deliberate indifference, it is readily distinguishable from *Soper v. Hoben*."[107] *Soper* was decided first, in 1999, just a few months after the *Davis* decision, and *Vance* was decided

99. *Id.* at 850.
100. *Id.* at 850.
101. *Id.* at 855.
102. *Id.* (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999)).
103. *Id.* at 857 (Moore, J., dissenting).
104. *Id.*
105. *Id.* at 849 (majority opinion).
106. *Id.* at 857 (Moore, J., dissenting).
107. Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000).

one year later in November of 2000. The Sixth Circuit then looked back to *Vance*, not to *Soper*, in making its 2009 decision for *Patterson v. Hudson Schools*.

Outside the Sixth Circuit, other courts are struggling with the same balancing act. Part of the debate within this *Davis* "deliberate indifference" standard lies in whether or not a school district is required to treat the continued harassment of one student as a systemic issue. If the standard calls for a systemic approach, then a school must effectively prevent the future harassment by *any* student perpetrator against the victim. The other view would be to hold a school district accountable only for the failure to stop continued harassment by a known perpetrator.

In *Doe v. Bellefonte Area School District*, the Third Circuit held that the school district was not deliberately indifferent to known circumstances of student-on-student harassment where a student was harassed for three years by his peers for his "effeminate" characteristics.[108] Although this case does not involve a student with disabilities, it further clarifies that schools need not completely eradicate peer harassment before escaping liability, but instead must act in a "clearly reasonable" manner. The student's parents filed suit against the school district under Title IX, believing that the school was "deliberately indifferent" because their "method of dealing with specific, identified perpetrators was not 100% effective in stemming the harassment."[109] The parents suggested that the school should have treated the ongoing harassment as a "systemic problem." The court, however, relied on language from *Davis* to make its decision and recognized that the school was quick to respond with "reasonable actions which eliminated further harassment between Doe and the student(s) involved in each incident."[110] The school took further steps to respond by warning, counseling, and even suspending the offending students, holding assemblies to educate the student body, and circulating memoranda to faculty and staff putting them on notice of the reported harassment of Doe.[111] The court held that the school district was *not* deliberately indifferent

108. Doe v. Bellafonte Area Sch. Dist., No. 03-4210, 106 Fed. App'x. 798 (3d Cir. Aug. 4, 2004).

109. *Id.* at 799.

110. *Id.* at 800.

111. *Id.*

despite the fact that it "did not undertake the specific remedial action that Doe desired," but rather, insisted that the court "refrain from second-guessing the disciplinary actions made by the School District which effectively eliminated each reported source of harassment."[112]

A similar case to *Soper v. Hoben* from the Sixth Circuit, but with a different outcome, was brought to the Tenth Circuit in *Murrell v. School District No. 1*, where the court found that the school district *was* liable under a Title IX claim. In this case the school principal and teachers had knowledge of the sexual harassment and assault of a student, who was a developmentally and physically disabled student, but chose to turn a blind eye.[113]

Penelope Jones was both physically disabled, due to cerebral palsy and deafness in one ear, and also developmentally disabled, functioning intellectually at the level of a first-grader, although she was a high school student.[114] When she enrolled in high school, her mother informed her teachers as well as school administrators that Penelope had been sexually assaulted at her previous school and "expressed her fear that her daughter's mental and physical disabilities would place her at continued risk."[115] The school assured Penelope's mother that she would be "properly supervised,"[116] but did not inform her mother of several instances where a developmentally delayed male student harassed and sexually assaulted Penelope. It was not until Penelope starting engaging in suicidal behavior and entered a psychiatric hospital that her mother was informed of the sexual assault incidents.[117] Additionally, the school failed to notify the appropriate law enforcement officials, did not discipline the male student who perpetrated the assaults, and instead suspended Penelope and suggested the sexual contact was consensual, even though the school knew Penelope was legally incapable of consenting.[118]

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112. *Id.*
113. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999).
114. *Id.* at 1243.
115. *Id.*
116. *Id.*
117. *Id.* at 1244.
118. *Id.*

As this case occurred in the same timeframe as the *Davis* case, the Tenth Circuit waited for the Supreme Court's ruling in *Davis* before making its own decision.[119] In relying on *Davis*, the Tenth Circuit reasoned in *Murrell* that where school officials had actual knowledge of repeated sexual assault by a student and yet decided to remain idle, this was deliberate indifference.[120] Furthermore, this "deliberate indifference to her claims totally deprived [Penelope] of [her] educational benefits."[121] In this case, all prongs of the *Davis* Test were met, and the school was held liable.

However, the *Murrell* court felt that the *Davis* decision "did not expressly set out the standard for determining when a school board has sufficient notice that harassment is taking place."[122] So, the Tenth Circuit looked to a Seventh Circuit Title IX decision, *Doe v. University of Illinois*, which held that a school district is liable if "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the [harasser] and the power to take action that would end such abuse and failed to do so."[123] The *Murrell* court went on to explain that in addition to actual knowledge of the harassment, a school official must also possess the "requisite control over the situation" in order to invoke Title IX liability through the *Davis* standard.[124] The court, in addressing this "requisite control" standard and in acknowledging the fine line of Title IX claims, discussed the impossibility of circumscribing all possible fact scenarios into one cut and dry "actual knowledge accompanied by deliberate indifference" standard:

> We decline simply to name job titles that would or would not adequately satisfy this requirement. "[S]chool districts contain a number of layers below the school board: superintendents, principals, vice-principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject the traditional hierarchical structure altogether." *Rosa H.*, 106

119. *Id.* at 1245.
120. *Id.* at 1247.
121. *Id.* at 1249.
122. *Id.* at 1247.
123. *Id.* (citing Doe v. Univ. of Ill., 138 F.3d 653, 668 (7th Cir. 1998)).
124. *Id.* at 1246.

> F.3d at 660. Because officials' roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. *Davis* makes clear, however, that a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision, would meet this definition.[125]

The court reasoned that a school district is liable where it "has made a conscious decision to permit sex discrimination in its programs, and precludes liability where the school district could not have remedied the harassment because it had no knowledge thereof or had no authority to respond to the harassment."[126] This limits liability to "circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[127] The *Murrell* court went on to quote from *Davis*, stating that the school principal's "response to the harassment or lack thereof [was] clearly unreasonable in light of the known circumstances."[128]

### *B. Special Education Students as Perpetrators of Peer Sexual Harassment*

Special education students as targets of peer sexual harassment is only one side of the coin. Special Education students are sometimes the perpetrators as well. In a 2008 survey of Utah special education teachers, 92% reported observations of peer sexual harassment incidents involving students with disabilities, with an 88% observation rate of situations where the disabled students was the perpetrator, and an 84% observation rate of those students as the target.[129] With so many special education students prone to be the perpetrator, and not just the target, school administrators and teachers should take care not to lightly dismiss these types of

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125. *Id.* at 1247 (citing Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997)).

126. *Id.* at 1246.

127. *Id.* (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999)).

128. *Id.* at 1248 (citing *Davis* 526 U.S. at 648).

129. Young, *supra* note 9, at 213–24 (where 250 Utah special education teachers were surveyed, with 129 responding to the survey).

harassment incidents without further investigation. Take, for the example, the case of *Jones v. Indiana Area School District* in 2005, where school officials with sufficient control had actual knowledge of ongoing harassment by a special education student against another student.[130]

As a student in the Indiana Area School District, Rachel Jones was assigned alphabetically to the same home room as special education student John Doe, a mentally retarded student who suffered from Sturge-Weber Syndrome.[131] Rachel's mother, Nancy Jones, was employed as a vision specialist in her daughter's school district by an agency that contracted with several school districts within the area to provide educational services.[132] At first Doe harassed Rachel by sending her notes and drawings expressing his desire to be her girlfriend.[133] Rachel reported this behavior to her homeroom teacher in the eighth and ninth grades, and Rachel's mother also reported this behavior to Rachel's guidance counselor.[134] At this time Doe had an IEP with a behavior plan, but no services were provided to help him with deal with this type of harassing behavior, and no mention was made of Rachel's reports in his behavior plan.[135] In tenth grade Doe's harassing behavior increased and Rachel's mother had continuous and ongoing conversations with Doe's special education teacher about this unwanted affection and attention towards Rachel.[136] In eleventh grade Doe began to stalk Rachel, waiting for her at her locker, walking her to class, waiting for her at her car after school, etc.[137] Rachel enlisted the help of her biology teacher, who made efforts to keep an eye on Rachel in the hallways for the next two years, and who also passed along these concerns to the administration.[138]

In the spring of her eleventh grade year, Rachel and her mother met with the vice principal of the school to discuss further concerns about Doe stalking Rachel, and about rumors

130. Jones v. Indiana Area Sch. Dist., 397 F. Supp. 2d 628 (W.D. Penn. 2005).
131. *Id.* at 634.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

of Doe and his friends wanting to beat up Rachel.[139] The vice principal told Doe that he could not be friends with Rachel anymore, thinking this would alleviate the problem, but subsequent reports proved otherwise and the vice principal even went so far as to hold a meeting with Doe's parents that spring.[140] Also that spring, in an IEP conference for Doe, IEP team members reported "no" when asked if Doe exhibits "behaviors that impede his learning or that of others."[141] In the fall of Rachel's senior year, Doe continued to stalk her and even tried to force himself into her car located on school grounds in the parking lot.[142] The vice principal continued to assure Rachel and her mother that they would talk to Doe, but his behavior did not change. A few months later Doe physically blocked Rachel in the weight room for half an hour.[143] At this point, Rachel's mother involved the State Police, who advised the school that Rachel should have someone with her at all times.[144] The school eventually provided a female aid to "tail" Doe around the school, even though Doe's mother stated that a male aid was needed.[145] The school also arranged for Doe to be transported directly from his work assignment to his home and the district advised its teachers and coaches that Doe should not have any contact with Rachel.[146] The district also modified Doe's IEP behavior plan to specifically include his problem with Rachel for the first time since his harassment of Rachel began, five years earlier.[147]

Rachel's mother made repeated attempts to engage school officials in stopping Doe's harassment, including addressing the school board, and sending a complaint to the Pennsylvania Department of Education.[148] The school board did instruct a district employee to look into the possibility of transferring Doe to a neighboring district, but the request was denied when that employee told the neighboring district about Doe's harassment

139. *Id.* at 635–36.
140. *Id.* at 636.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 637.
145. *Id.*
146. *Id.*
147. *Id.* at 638.
148. *Id.*

problems.[149] The district also offered Rachel the option of switching to homebound instruction, which she did not accept, as her current involvement in AP classes helped her candidacy for college entrance.[150] After Rachel's mother Nancy became so involved in advocating for Rachel, the superintendent sent a request to Nancy's boss asking her to be transferred to another district to which Nancy responded with a grievance claiming the transfer was discriminatory and lacked just cause, but her grievance was eventually denied by a collective bargaining agreement arbitrator.[151]

Rachel and her mother subsequently filed suit in district court alleging, among other claims, that the school district violated Rachel's Title IX rights.[152] While the other counts were dismissed, the court found that there was a genuine issue as to material facts in determining if the school district was "deliberately indifferent" under the *Davis* standard.[153]

At first glance, a school official might have dismissed Doe's behavior as harmless, because "he didn't know any better." However, it was enough for the court to find that his behavior had the potential to substantively interfere with another student's educational opportunities. It could be that Doe is like many other students with disabilities, who have "difficulty understanding how others perceive their behavior and may lack the awareness to detect obvious social cues."[154] Students in these types of situations are often disregarded as a threat of liability for the school as "sexual harassment remains an almost invisible issue for special education."[155] Regardless of the reason or motive for the harassment, responses by school officials to peer sexual harassment "require sensitivity to both the target and the perpetrator" as "[a]ll students have a right to attend school without fear of harassment."[156]

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149. *Id.* at 638–39.
150. *Id.* at 639.
151. *Id.* at 641.
152. *Id.*
153. *Id.* at 642.
154. Young, *supra* note 9, at 210.
155. *Id.* at 210.
156. *Id.* at 219.

### *C. Peer Harassment Where Both Parties are Disabled Students*

Whether or not a school district exercised "deliberate indifference" in the face of student-on-student sexual harassment can sometimes be a very close call, especially where both students are developmentally delayed. In *Counts v. Clackamas*, a developmentally delayed female student was allegedly raped by her classmate, another developmentally delayed male student, and her parents filed a Title IX suit against the school district.[157] The parents contend that the school district failed to take adequate measures in preventing a subsequent sexual assault after a prior incidence occurred with this same male student assaulting another female student the previous year.[158] The district court ultimately found that genuine issues of material fact existed as to whether the district was deliberately indifferent to the rights of a disabled student.[159]

In *Counts*, all three students were classmates in a "life skills" class for special education students when the first incident of sexual assault occurred between the male student and one of the female classmates in the bathroom during "recycling time."[160] Even though the specific facts of the incident never became entirely clear and the police investigation was inconclusive, the district risk manager investigating the case admitted that "insufficient supervision on the part of our staff was clearly an issue that might have allowed this to have occurred."[161] The court found that at this point in the series of events "at a minimum, the District was put on notice that it had potential problems with supervision" of its developmentally delayed students.[162] As a result of this first incident, the district developed a plan that would have placed this particular male student under a high level of supervision where he would be visually observed at all

157. G.C. *ex rel.* Counts v. N. Clackamas Sch. Dist., 654 F. Supp. 2d 1226 (D. Or. 2009).

158. *Id.* at 1229.

159. *Id.* at 1226.

160. *Id.* at 1230–31.

161. *Id.* at 1239 (stated in a November 15, 2004 memo by the district risk manager in a "lengthy conversation" he had with a detective who worked on the KW case).

162. *Id.*

times.[163] However, whether or not this constant supervision actually occurred is disputed, and the next spring the plaintiff female student of this case alleged that this same boy raped her in the bathroom after sneaking past his teacher.[164]

In analyzing this case, the district court's ruling did not turn on one significant fact alone, but rather a compilation of many different factors, such as the district's failure to "train its administrators and teachers in the proper handling and investigation of child abuse reports," failure to reveal in the first investigation relevant records indicating this male student was "sexually curious" in the past, failure to give weight to knowledge that it had of an inappropriate touching incident on the bus, and to the findings of the school psychologist predicting this student was likely to engage in sexual advances.[165] While school liability is not founded upon any one single factor, school officials should still be aware of the weight of each factor. For example, while "[t]he lack of training by itself does not establish deliberate indifference to plaintiff's rights," the court still found that "the District's child abuse reporting and investigation training policies, or lack thereof, [were] relevant in assessing how the District handled [the student]'s allegation."[166]

Although the district judge admits this was a "close case," the court was careful in its analysis and looked to circuit court cases that closely followed *Davis* to guide its own decision.[167] The *Counts* court noted a First Circuit case, *Fitzgerald v. Barnstable School Community*, where the court ruled that "Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or adopt strategies advocated by parents."[168] Additionally, the *Counts* court noted that simply claiming that a school district could have or should have done more "is insufficient to establish deliberate indifference."[169]

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163. *Id.*

164. *Id.* at 1235 n.4.

165. *Id.* at 1240–41 ("the school psychologist noted that in an unstructured setting, the likelihood of sexual advances by AY with his girlfriend, was a '3' or a '4' on a low to high scale of 1 to 6").

166. *Id.* at 1239.

167. *Id.* at 1241.

168. *Id.* (citing Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165 (1st Cir. 2007)).

169. *Id.* (citing Porto v. Town of Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007)).

Contrast *Counts* with *Ings-Ray v. School District of Philadelphia* where a district court granted the school district's motion for summary judgment in response to a student-on-student Title IX harassment claim after finding the district "clearly did not act with deliberate indifference in responding to plaintiff's allegations."[170] Similar to *Counts*, this case involved a mentally disabled male student sexually assaulting a disabled female classmate. However, in this case the male student simply "touched plaintiff's behind while both students were traveling on a school bus."[171] In response to this report, the school immediately suspended the male student for three days, transferred him out of the plaintiff's classes, and arranged for supervision to occur in homeroom and the hallways.[172] Additionally, the school arranged for a police officer and a special interest group to present a program on inappropriate touching to the entire student body.[173] While these specific actions were tailored to the facts of the case, the *Ings-Ray* case is an example of a school that successfully shielded itself from Title IX liability.

### *D. Responding to Inappropriate Behavior by Students with Disabilities*

When a sexual harassment incident occurs between two students, school administrators can respond with any number of disciplinary measures. In fact, the *Davis* standard does not mandate one specific response, but rather articulates a standard that the school "must merely respond to known peer harassment in a manner that is not clearly unreasonable."[174] Additionally, the *Davis* court disagreed with the respondent's demand that "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems form liability or damages."[175] Furthermore, when it comes to suspension and expulsion of students with disabilities, school administrators are bound to the procedural protections of the Individuals with Disabilities Education Act

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170. Ings-Ray v. Sch. Dist. of Phila., No. 02-CV-3615, 103 LRP 19220, at *1 (E.D. Pa. Apr. 30, 2003).

171. *Id.* at *2.

172. *Id.*

173. *Id.*

174. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999).

175. *Id.* at 648 (citing Brief for Respondents at 16).

(hereinafter "IDEA"),[176] and must act accordingly, even to incidents involving the sexual harassment of another student.

Under IDEA, when a student misbehaves and the disciplinary measure would result in a change of placement (including suspension, expulsion, or even a change to a different classroom), the school must hold a "manifestation determination" within ten days to determine "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability."[177] If it is determined that the behavior is not a manifestation of the disability, then in a case of sexual harassment (or any other misconduct), the school may discipline the perpetrator as it would a student without a disability.[178] However, if it is determined that the behavior is connected to the disability, the school administration, working in conjunction with teachers and parents, will come up with a "behavioral intervention plan" (BIP) to address this misconduct.[179] Under special circumstances involving weapons, drug possession, or serious bodily injury of another student, a school "may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability."[180] In applying this "special circumstances" rule to cases of severe sexual harassment, "[a] critic could argue the sense of requiring such a process for students who have already committed criminal behavior such as weapon or drug offenses, or violent sexual assault."[181] However, for most sexual harassment incidents of a lesser severity, the "stay put" provision, given by the Supreme Court in 1988 in *Honig v. Doe*, requires that the disabled student remain in his or her current educational placement and continue to receive the education services that his or her IEP calls for, until a determination is made.[182]

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176. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1450 (2005).

177. Individuals with Disabilities Education Act Procedural Safeguards, 20 U.S.C. § 1415(k)(1)(E) (2011).

178. *Id.* § 1415(k)(1).

179. *Id.*

180. *Id.* § 1415(k)(1)(G).

181. Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77 n.154 (2000) (commenting on IDEA, 20 U.S.C. § 1415(k)(1)).

182. Honig v. Doe, 484 U.S. 305 (1988).

In summary, while a school cannot ignore incidents of sexual harassment where the perpetrator is a student with a disability, a school is not required to suspend or expel the perpetrator if the disability played a role in the misconduct. Rather, to the extent that a school can "offer students an alternative educational setting in lieu of, rather than as a consequence of, suspension or expulsion, the district can both avoid the cost of individualized educational services and reach students who may be heading for trouble before they are in trouble."[183] However, when making decisions about placement of the perpetrator, school officials should keep in mind the rights of the plaintiff, especially if he or she is severely disabled, as many disabled students live in fear of repeat harassment, and in terror of having to face their perpetrator on a daily basis in what should be a safe school environment.

### *E. Notice and Actual Knowledge Under the Davis Standard*

While *Davis* was monumental in establishing liability for schools in peer harassment cases, it gives little guidance for determining *when* a school district has crossed that line into the liability arena. Prior to *Davis*, the standard for notice was not as strict, stating "if [a] school district has constructive notice of severe and repeated acts of sexual harassment by fellow students, that may form the basis of a [T]itle IX claim."[184] Then in 1998 the Supreme Court instituted the "actual notice" (also referred to as "actual knowledge") requirement in *Gebser v. Lago Vista Independent School District* by holding that a school cannot be liable for damages under Title IX "unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct"[185] A year later, *Davis* extended this same standard to student-on-student harassment. Subsequent circuit court cases have shed light on this standard, clarifying what it means for a school district to

183. Seligmann, *supra* note 181, at 113.

184. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 647 (1999) (citing NAOMI GITTINS & JIM WALSH, NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS 45 (1990)).

185. Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998).

have "actual notice" at a level that qualifies their subsequent action or inaction as "deliberately indifferent."

In arriving at its decision, the *Davis* Court looked at the reasoning of a Seventh Circuit case decided in the prior year, *Doe v. University of Illinois*, where a high school girl and her parents made repeated complaints to school administration when the girl was sexually harassed by a group of male students, only to have the administration take "little or no meaningful action to punish the sexual harassment or to prevent further occurrences."[186] Additionally, some administrators told the girl that she was to blame for the harassment and that her allegations of harassment might injure the futures of the male students.[187] The campaign of harassment never ceased and eventually the girl's parents placed her in a private school.[188] In a suit brought by the girl's parents against the school district for a Title IX violation the court held that:

> [A] Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place.[189]

The Seventh Circuit in this case went on to specify that a school district can be liable if "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so."[190] In short, this case is imputing to the *Davis* standard the requirement that a school official has actual knowledge, actual notice, and the power to take action against the harassment.

However, if the "actual notice" standard requires a student who has been the victim of sexual harassment to distinguish

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186. Doe v. Univ. of Ill., 138 F.3d 653, 655 (7th Cir. 1998).

187. *Id.*

188. *Id.*

189. *Id.* at 661.

190. *Id.* at 668 (citing Smith v. Metro. Sch. Dist., 128 F.3d 1014, 128 (7th Cir. 1997), where the court adopted a requirement of actual knowledge for teacher-on-student sexual harassment and rejected Title IX liability based on a "knew or should have known" standard).

between which school personnel constitute those with the "power to take action" and which employees do not, this could render the standard unmanageable. The Office for Civil Rights (hereinafter "OCR") under the United States Department of Education has said "young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration."[191] The OCR has also articulated that forming an exhaustive list of those employees who carry this power would be inappropriate. Instead, the OCR provides guidance to schools listing factors, considerations, and specific examples of what to do in a certain factual scenarios.[192] Additionally, the OCR guidelines can help administrators distinguish between what is actual sexual harassment, and what is not. Recently, stories across the country have sprung up where a six-year-old boy will be suspended for kissing a girl on the cheek, or for other similar conduct.[193] The OCR guidance notes that this type of behavior would not be considered sexual harassment and goes on to say that "school personnel should consider the age and maturity of students when responding to allegations of sexual harassment."[194]

For students with disabilities, these considerations imbue an even greater sense of responsibility on school officials to be on the lookout for "actual notice" of peer sexual harassment taking place in the school setting. Students with "developmental delays may be perceived as 'easy targets' by other students and adults in the school community."[195] These students are considered easy prey for perpetrators, especially if they lack the ability to respond appropriately to a harassment situation. "Additionally, the individual may have difficulty avoiding future negative interactions with the perpetrator,

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191. U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997) [hereinafter OCR GUIDELINES], *available at* http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html.

192. *Id.*

193. Associated Press, *Sex-harass Suspension of 1st Grader Stirs Debate*, MSNBC.COM (Feb. 9, 2006), http://www.msnbc.msn.com/id/11252421/ns/us_news-education/.

194. OCR GUIDELINES, *supra* note 191.

195. Young, *supra* note 9, at 208.

creating an ongoing cycle of sexual harassment."[196] Furthermore, if a student lacks the ability to verbally communicate, whether due to a hearing impairment, or a language barrier (also including those students for whom English is not their first language), the school needs to have some other avenue for students to report sexual harassment, or at least for school officials to become aware of any possible incidents of harassment against those students. Once aware, school officials should take immediate action that is not "clearly unreasonable in light of the known circumstances."[197]

### *F. Implications for Same-Sex Harassment*

While *Davis* held that Title IX liability extends to student-on-student harassment, it was silent on the issue of same-sex harassment. The Supreme Court gave this idea a starting point in *Oncale v. Sundowner Offshore Services, Inc.* where the Court held that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII."[198] Additionally, the Supreme Court has ruled in another Title VII workplace discrimination case that where harassment is based on failure to live up to stereotypical gender norms, it can be actionable under Title VII, despite the harasser being void of any sexual desire toward the victim.[199] However, the Supreme Court has yet to rule on the specific claim of same-sex sexual harassment under Title IX, although many lower federal courts and state courts have addressed this issue.

In *Patterson*, the Sixth Circuit decision outlined in the first portion of this article, the boy DP was verbally harassed by other males on a frequent basis, with the harassment escalating to an incident of sexual assault in the locker room.[200] The Sixth Circuit found there to be a genuine issue of material fact as to the "deliberate indifference" of school officials in their response to the harassment and remanded the case back to the federal district court, the Eastern District of Michigan. The district court subsequently found that the legal standard for sexual harassment under Title IX was not met and held that

196. *Id.* at 210.
197. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).
198. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
199. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
200. Patterson v. Hudson Area Schs., 551 F.3d 438, 439–43 (6th Cir. 2009).

the school district was not deliberately indifferent.[201] Rather, the district court found that the harassment directed at DP was "typical of middle school and high school behavior."[202] The court cited the Supreme Court's *Oncale* Title VII decision by stating: "Whether gender-oriented conduct rises to the level of actionable harassment thus 'depends on a constellation of surrounding circumstances, expectations, and relationships.'"[203] The court went on to explain that name-calling, even when targeted at gender differences, can never rise to the level of the *Davis* standard, which demands that the harassment be so "severe, pervasive, and objectively offensive it denies its victims the equal access to education that Title IX is designed to protect."[204]

However, in exploring the boundaries of a Title IX claim on the basis of same-sex sexual harassment, it is argued that "such claims are equally viable under Title IX as they are under Title VII."[205] However, most of the claims involving same-sex harassment that appear today will involve sexual assault or abuse more often than they will involve verbal or mild physical harassment "based on the failure of a student to live up to stereotypical gender expectations."[206] At the circuit court level, a Title IX same-sex harassment claim has been recognized where a male teacher molested several male students.[207] At the federal district court level a Title IX claim was allowed to proceed where "a male student who advocated gay rights was physically and verbally abused by fellow male classmates based on perceived homosexuality."[208] Another district level Title IX case went forward involving the assault and battery of a middle school student by his male classmate

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201. Patterson v. Hudson Area Schs., No. 05-74439, at *10 (E.D. Mich. July 1, 2010).

202. *Id.* at *9.

203. *Id.* (citing *Oncale*, 523 U.S. at 82).

204. *Id.* (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651–52 (1999)).

205. Paul M. Secunda, At *the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not be "A Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1, 12 (2005).

206. *Id.* at 12.

207. *Id.* at 12 n.74 (citing Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211 (5th Cir. 1998)).

208. *Id.* at 13 n.78 (citing Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 869 (N.D. Ohio 2003)).

where the harassment was based on his perceived homosexuality.[209]

As for cases involving special education students and same-sex harassment, there are very few. In addition to *Patterson*, which was a circuit case, there is one district court decision involving a Title IX claim for same-sex sexual harassment of a student with disabilities which also fails to live up to the *Davis* standard in the eyes of the court.[210] In this case, a twelve-year old mildly retarded boy claims that his male classmate, who is also mentally disabled, sexually assaulted him in the restroom at school by performing anal sex on him.[211] Upon seeing the two boys alone in the bathroom acting suspiciously, the teacher immediately took the two students to the assistant principal. However, school officials did not contact the parents and did not launch an investigation until after the parents became aware of the situation.[212] However, during this time, the teacher made efforts to keep the two students separated in the classroom. Once the investigation began, however, the principal interviewed employees and students, held a meeting with the parents, contacted Child Protective Services and the police, and transferred the perpetrator to another school.[213]

The court found that the responses of the school and the principal were not "clearly unreasonable . . . in light of the known circumstances"[214] and stated that even if the school "could have taken swifter and more appropriate action, there is no legal requirement of perfection."[215] The allegation of sexual assault, even if proven true, was not sufficient to hold the school liable, as the school responded reasonably to the allegation. Furthermore, there were "no other incidents of *gender-related* harassment alleged in any of Plaintiffs' filings."[216] However, the court did find evidence of "prior bullying, teasing, and name-calling"[217] but relied on the *Davis*

209. *Id.* at 5 n.30 (citing Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000)).

210. Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690 (E.D. Tex. 2001).

211. *Id.* at 691.

212. *Id.*

213. *Id.*

214. *Id.* at 693 (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

215. *Id.* at 694.

216. *Id.*

217. *Id.*

standard to declare that "[d]amages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender."[218] In short, the district court seemed willing to acknowledge that same-sex sexual assault would be enough to find the school liable under Title IX in just the same way as opposite-sex harassment, but that verbal or mild physical harassment based on gender differences would not qualify for Title IX protection. However, in the former case, the school's actions would still have to rise to the level of deliberate indifference in order for the court to find liability in a same-sex sexual harassment claim.

## VIII. CONCLUSION

Ever since the Supreme Court ruled in *Franklin v. Gwinnett County Public Schools*[219] that a private individual could sue for damages under Title IX, the number of cases claiming sexual harassment in the public schools have increased dramatically.[220] With the addition of *Gebser* and *Davis* to the mix, lower federal courts have built up a "substantial body of sexual harassment law affecting school districts."[221] For a school administrator just trying to get through the tasks of each day, this giant body of potential liability may feel like a dark cloud looming overhead. However, there is a ray of hope: a school need not purge its entire system of any potential future harassment incidents, nor must it carry out with perfection a plan to stop all teenage hormones. Rather, a school must simply "respond to known peer harassment in a manner that is not clearly unreasonable."[222]

With regards to special education students, however, school officials need to be aware of the unique challenges and barriers that may stand in the way of providing these students a safe environment, free from the fear and terror of sexual assault, especially for those students who have experienced sexual assault in the past. A lack of understanding of the needs of special education students is often the forerunner to situations

218. *Id.* (quoting *Davis*, 526 U.S. at 648).
219. Franklin v. Gwinnett Cnty Pub. Sch., 503 U.S. 60 (1992).
220. ALEXANDER & ALEXANDER, *supra* note 5, at 537.
221. *Id.* at 538.
222. *Davis*, 526 U.S. at 648.

where those students' rights are diminished, and in severe cases, trampled. School officials should also keep in mind that often the perpetrator in a peer harassment situation is a student with disabilities. When this occurs, school officials should take care to act in accordance with the provisions of IDEA and a student's own IEP. Case law, while not plentiful, does exist for harassment claims and can be a guide to school officials as they navigate the waters of Title IX liability. By working together with other administrators and school personnel, any school official can realize the success of providing a harassment-free environment for every student, regardless of that student's disability or limitations.

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