

NJPSA EDUCATION LAW PRIMER

SEXUAL HARASSMENT



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Introduction

The law of sexual harassment has been the subject of much litigation over the past several decades. The cases have defined sexual harassment in the workplace as conduct which creates a “hostile” environment predicated on one’s gender. The cases have also demonstrated the importance for employers to have in place anti-harassment policies that help educate and sensitize employees to acts of harassment, that have procedures that allow employees to report acts of harassment with assurances against acts of retaliation, and that provide measures to prevent the recurrence of the harassing conduct; measures ranging from counseling to removal of the harassing employee.

This is equally true in the school setting. All school districts must have well publicized sexual harassment policies. School employees must be made aware of the complaint process, as well as the need to promptly report alleged harassing conduct. Supervisors and administrators must be trained to respond effectively to complaints of sexual harassment.

The purpose of this primer is to provide the educational practitioner with a better understanding of what constitutes sexual harassment, the cases that have helped define it and the laws that have been enacted to remove it from the workplace and the classroom, the responsibility of supervisors to act upon receipt of reports of harassment and the rights of the victims of harassment. **This primer should not be construed as legal advice.**

Table of Contents

- Format 4
- 1) What is the definition of sexual harassment? 5
- 2) What are some examples of sexual harassment?. 5
- 3) What is “severe” or “pervasive” conduct that may rise to the level of sexual harassment? . . 6
- 4) What are the major state and federal statutes that address sexual harassment? 6
- 5) May an employer be liable for sexual harassment actions taken by others even if it does not have actual knowledge that harassment has occurred? 7
- 6) What is the role of the supervisor in ensuring an appropriate work environment? 8
- 7) What is the employer required to do in the investigation and reporting of sexual harassment claims? 8
- 8) Can a district policy go too far in banning sexually suggestive speech? 9
- 9) Student-on-Student Harassment - When may a school district be liable for damages in cases of student-on- student sexual harassment? 9
- 10) What is the school district’s duty of care regarding sexual harassment? 10
- 11) Teacher-to-student sexual harassment – liability for the school district?. 12
- 12) Supervisor-to-subordinate sexual harassment - ramifications? 14
- 13) Teacher-to-teacher sexual harassment - ramifications? 14
- 14) When is a teaching staff member entitled to indemnification by the school board in cases involving sexual harassment claims? 15
- 15) What are the requirements for a school district policy regarding the prevention and remediation of “harassment, intimidation and bullying”? 16

Format:

The Education Law Primer - Sexual Harassment, is organized in a Question and Answer format that will assist members in quickly accessing information on specific topics. Each answer generally includes citations to specific New Jersey case law and statutes, and a discussion of how the emerging legal principles should be applied in a school setting. Please note that the Education Law Primer is an evolving document which will be updated as appropriate.

NJPSA members are strongly encouraged to access the Education Law Primer on-line at NJPSA's website, www.njpsa.org, in the "Members Only" area. The on-line version of the Primer allows members to click on a specific question/topic and receive information directly on point. We will also publish on-line updates to various chapters of the Primer as necessary in order to address major new developments in the law.

For additional information regarding sexual harassment or other legal issues, please contact NJPSA's Legal Department.

1. What is the definition of “sexual harassment?”

The courts have recognized two types of sexual harassment; “quid pro quo” sexual harassment and “hostile work environment” sexual harassment.

Quid Pro Quo sexual harassment is defined as an implicit or explicit threat that if one does not accede to a sexual demand it will have a negative consequence, either in the sense of a loss of employment or loss of promotion or an unfavorable evaluation. In the context of schools, students can also be victims of quid pro quo harassment; for example when a teacher threatens to lower a student’s grade if the student doesn’t accede to a sexual demand.

Hostile work environment sexual harassment occurs when an employer or a fellow employee harasses another employee because of his or her gender or sexual preference to the extent to which the working environment becomes “hostile” or “abusive.” In the context of schools, students can be victims of hostile school environment when the harassment is sufficiently severe, persistent or pervasive so as to limit the student’s ability to benefit from education.

Samuel Silas v. William Paterson University, 2001 WL 605204, N.J. Adm., 2001

“Sexual harassment may range from sexual innuendos made at inappropriate times, perhaps in the guise of humor, to coerced sexual relations. Sexual harassment represents a misuse of authority and power to exploit a vulnerable person, contaminating the teacher/student, supervisor/subordinate relationship or those among student peers or staff colleagues.”

Lehmann v. Toys R Us, 132 N.J. 587 (1993)

Lehmann is the leading New Jersey case defining the elements of hostile work environment sexual harassment claims. The New Jersey Supreme Court held that:

“A plaintiff states a cause of action for hostile work environment sexual harassment when he or she alleges discriminatory conduct that a reasonable person of the same sex in the plaintiff’s position would consider sufficiently severe or pervasive to alter the conditions of employment

and to create an intimidating, hostile, or offensive working environment.”

In *Lehmann* the Court created a four (4) part test to determine the presence of hostile work environment sexual harassment. The test consists of the following:

1. The complained of conduct would not have occurred but for the employee’s gender;
2. The conduct is sufficiently severe or pervasive;
3. To make a reasonable woman (or man depending on who is the victim of the sexual harassment);
4. Consider the conditions of employment are so altered as to make the working environment hostile or abusive.

The first prong of the test is satisfied when the alleged conduct is sexual or sexist in nature, as with sexual comments or touching. The remaining parts of the test can be met either through a series of incidents or a single incident of harassment if sufficiently severe or pervasive to make a reasonable woman (or man) consider the work environment hostile or abusive.

2. What are some examples of sexual harassment?

Examples of Quid Pro Quo Harassment:

- Employee receiving preferential treatment in consideration for sexual favors;
- Retaliation against an employee who turns down a sexual advance; or
- Receiving preferential treatment for wearing suggestive clothing.

Examples of Hostile Work Environment Sexual Harassment

- Off-color jokes, slurs or epithets;
- Sexually suggestive voice, email or text messages;
- Whistles or cat calls;
- Repeatedly asking an employee for a date;
- Patting someone on the rear;
- Displaying sexually explicit photographs;
- Sexually assaulting someone; or
- Making repeated comments about one’s clothing.

3. What is “severe” or “pervasive” conduct that may rise to the level of sexual harassment?

It is important to note that every complained of offensive conduct, even if sexual in nature or based on gender, does not necessarily constitute sexual harassment. For a complainant to make a case for hostile work environment sexual harassment the complained of conduct must be serious; it must be “severe or pervasive” enough for the complainant to reasonably believe that the environment has been made “hostile.”

Taylor v. Metzger, 152 N.J. 490 (1998)

Generally, for conduct to be “severe” or “pervasive” there has to be a series of incidents that would make the reasonable woman (or man) believe the work environment to be hostile or abusive. However, the New Jersey Supreme Court held that the “severe” or “pervasive” standard can also be met by a single act, if the act is sufficiently egregious. The central issue in *Taylor v. Metzger* was whether a single derogatory racial comment directed against a subordinate employee by a supervisor can create a hostile work environment in violation of New Jersey’s Law Against Discrimination (LAD).

Facts:

- Carrie Taylor, an African American, worked in the office of the Burlington County Sheriff.
- On January 31, 1992, Taylor, while at the Burlington County Police Academy for firearms training and weapons qualification encountered defendants Henry Metzger and Undersheriff Gerald Isham. Taylor said hello, and, in response, Metzger turned to Isham and stated: “There’s the jungle bunny.” Isham laughed.
- Plaintiff believed the remark to be a demeaning and derogatory racial slur, but she did not reply. She became a “nervous wreck,” immediately began crying, and went to the bathroom.
- Taylor subsequently returned to the Police Academy classroom, in which she was the only African American and the only woman. Holding back tears, she related her experience to co-workers. They laughed with one remarking: “I’m a black Irishman.”

The New Jersey Supreme Court held that the one incident was sufficient to present to a jury for a determination as to whether it was “severe” or “pervasive” enough to have created a hostile work environment.

In *Godfrey v. Princeton Theological Seminary*, 196 N.J. 178 (2008), the New Jersey Supreme Court held that for purposes of a sexual harassment claim under the New Jersey Law Against Discrimination, whether conduct is severe or pervasive requires an assessment of the totality of the relevant circumstances, which involves examination of: (1) the frequency of all the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance and (4) whether it unreasonably interferes with an employee’s work performance.

4. What are the major state and federal statutes that address sexual harassment?

There are two major state laws, and two major federal laws intended to prevent sexual harassment. These are:

Law Against Discrimination (LAD) – N.J.S.A. 10:5-1

The New Jersey Law Against Discrimination makes it unlawful to subject people to differential treatment based on: race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, mental or physical disability, perceived disability, and AIDS/HIV status. The LAD prohibits, among other things, unlawful discrimination in employment.

The New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to - 42, is a statutory scheme designed, in part, to ensure the prohibition of sexual discrimination in the workplace. “[T]he LAD is remedial legislation. Its very purpose is to change existing standards of conduct.”

NJ Anti-Bullying Bill of Rights Act - N.J.S.A . 18A: 37- 13 e t seq.

Requires each school district to adopt a policy prohibiting harassment, intimidation and bullying on school property, at school-sponsored functions, on school buses and off-school property (with limitations).

Note: This law pertains to harassment, intimidation and bullying of students only – not staff.

Title VII of the Federal Civil Rights Act - 42 U.S.C. Sec. 2000e et seq.

Makes it unlawful *“for an employer... to discriminate against an individual... because of such individual’s race, color, religion sex, or national origin.”*

Title IX of the Education Amendments of 1972

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. Title IX was the first comprehensive federal law to prohibit sex discrimination of students and employees of educational institutions.

5. May an employer be liable for sexual harassment actions taken by others even if it does not have actual knowledge that harassment has occurred?

Yes. An employer may be liable for sexual harassment even without actual, firsthand knowledge that harassment has occurred, if the employer reasonably should have known of the harassment. An employer may be held liable for the sexual harassment of its employees under a theory of negligence based on the employer’s failure to have in place well publicized anti- harassment policies, with effective formal and informal complaint structures, and monitoring mechanisms.

In Lehmann, the New Jersey Supreme Court explained:

“when the employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the work environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser.”

Employers Must Have Effective Policies Allowing for the Reporting of Sexual Harassment and for its Effective Remediation

- Employers should establish practical and readily accessible means for employees to log complaints, and have those complaints promptly heard and reviewed. Where it is warranted, the employer must also ensure that appropriate corrective action is taken.
- Supervisory staff must be trained to recognize what may constitute sexual harassment work environment claims and what to do when faced with such complaints.

In *Aguas v. State*, 220 N.J. 494, decided by the New Jersey Supreme Court on February 11, 2015, the Court held that the “negligence” standard imposes upon the employer the burden to prove that: (1) the employer failed to exercise due care with respect to sexual harassment in the workplace, (2) the employer’s breach of duty of care caused employee’s harm and (3) the employee sustained damages. The Court also held that the employer’s implementation and enforcement of an effective anti-harassment policy, or its failure to maintain such policy, were critical factors in determining whether employer was negligent in action for sexual harassment resulting in hostile work environment.

6. What is the role of the supervisor in ensuring an appropriate work environment?

Payton v. New Jersey Turnpike Auth., 148 N.J. 524 (1997)

“A supervisor has a unique role in shaping the work environment. Part of a supervisor’s responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace. An employer has a clear duty not only to take strong and aggressive measures to prevent invidious harassment, but also to correct and promptly remediate such conduct when it occurs. An employer is vicariously liable for sexual harassment if it had knowledge of the harassment but failed to stop it promptly and effectively.”

As expressed in Lehmann, *“an employer’s sexual harassment policy must be more than the mere words encapsulated in the policy. The LAD [Law Against Discrimination] requires an ‘unequivocal commitment’ from the employer not only to oppose sexual harassment, but to employ consistent practices to stop it. Mere implementation and dissemination of anti-harassment policies with a complaint procedure does not alone constitute evidence of the due care required. What is needed is an effective reporting process followed by an unbiased investigation process.”*

7. What is the employer required to do in the investigation and reporting of sexual harassment claims?

The investigation and reporting process should allow for:

- The employee to be able to provide a detailed report of the alleged incident to a designated individual who is charged with hearing and investigating sexual harassment claims;
- The individual designated to hear and investigate sexual harassment claims to be empowered to review the complaint, to speak with the alleged harasser and any witnesses and to take effective measures to immediately end the harassment, including re-assigning the employee or the alleged harasser, even pending the investigation;

- The individual designated to hear and investigate the claim should be empowered to prescribe or to recommend corrective measures to prevent future harassment.

School Districts Need to Have Well-Publicized Policies That:

- Have in place a comprehensive policy against sexual harassment;
- State that as a matter of public policy incidents of sexual harassment will not be tolerated;
- Are prominently displayed and communicated in faculty handbooks and student handbooks;
- Are reviewed annually with teachers and students;
- Appoint an affirmative action officer charged with hearing and investigating sexual harassment claims;
- Address complaints immediately, with sensitivity and confidentiality;
- Inform employees and students of the reporting procedures;
- Provide training to administrators and supervisors, faculty and staff and students as to (1) what the policy says and is intended to do, (2) what constitutes sexual harassment, and the need to prevent it, (3) the responsibility associated with handling complaints, (4) the procedures for reporting violations of policy, as well as the potential liability when the anti-harassment policy is not effectively enforced and (5) the need to take reasonable measures to prevent retaliation against victims and witnesses;
- Ensure that employees are properly sensitized to understand and detect harassment;
- Encourage employees to communicate instances which they believe may constitute harassment;
- Assure that no employee is retaliated against for lodging a complaint regarding sexual harassment.

8. Can a district policy go too far in prohibiting sexually suggestive speech?

***Saxe v. State College Area School District* 240 F.3d 200 (3d Cir. 2001)**

The U.S. Court of Appeals for the Third Circuit held that the language of the school's anti-harassment policy was at some points vague and overbroad and as a result could be interpreted to encompass protected speech.

The school policy covered harassment based on race, national origin, or religion, and sexual harassment. The sexual harassment component of the policy consisted of the following:

Sexual harassment means unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (a) submission to that conduct is made either explicitly or implicitly a term or condition of a student's education; (b) submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student; (c) the conduct has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive educational environment. This applies whether the harassment is between people of the same or different gender. Sexual harassment can include unwelcome verbal, written or physical conduct, directed at or related to a person's gender, such as sexual gossip or personal comments of a sexual nature, sexually suggestive or foul language, sexual jokes, whistling, spreading rumors or lies of a sexual nature about someone, demanding sexual favors, forcing sexual activity by threat of punishment or offer of educational reward, obscene graffiti, display or sending of pornographic pictures or objects, offensive touching, pinching, grabbing, kissing or hugging or restraining someone's movement in a sexual way.

As to the sexual harassment component of the policy, the court said:

"Because the Policy's 'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content

of which offends someone. This could include much 'core' political and religious speech: the Policy's 'Definitions' section lists as examples of covered harassment 'negative' or 'derogatory' speech about such contentious issues as 'racial customs,' 'religious tradition,' 'language,' 'sexual orientation,' and 'values.' Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights."

9. Student-on-Student Harassment – When may a school district be liable for damages in cases of student-on-student sexual harassment?

In cases of student-on-student harassment school districts may be liable under negligence theory for not taking reasonable measures to stop the harassment, and they may be liable under Title IX of the 1972 Education Amendments for "deliberate indifference" to the acts of harassment depriving the student victim of the educational benefits to which he/she is entitled under the Act.

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

The plaintiff, the parent of a fifth grader, brought suit alleging that as a result of the "deliberate indifference" of the school district her daughter was deprived of the education benefits to which she was entitled under Title IX of the Education Amendments of 1972.

Facts:

A parent sued the school board and school officials under Title IX for failure to remedy a classmate's sexual harassment of a fifth grade student. The alleged harassment consisted of repeated attempts by the student's classmate, G.F., to touch the student's breasts and genital area. G.F. also was alleged to have made vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs." The student reported the incidents to her mother and to her classroom teacher who said that he had reported it to the principal. Notwithstanding these reports, no disciplinary action was taken to stop G.F.'s conduct, which allegedly continued for a number of months despite being witnessed by other staff members. Nor, according to the complaint, was any effort made

to separate G.F. from the complaining student. On the contrary, despite the frequent complaints, only after more than three months of reported harassment was the complaining student permitted to change her classroom seat so that she was no longer seated next to G.F. Moreover, the plaintiff alleged that at the time of the events in question, the Monroe County Board of Education had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue.

Writing for a 5-4 majority Justice Sandra Day O'Connor said lawsuits may be filed against school officials who knowingly and deliberately ignore student-on-student harassment. Referring to Title IX, Justice O'Connor wrote, "*The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.*"

As for when student-on-student gender oriented conduct constitutes harassment, the Court said that this depends on a "*constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the harasser's and victim's ages and the number of persons involved.*" Moreover, Justice O'Connor cautioned that "*courts must bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults.*"

***Hamel v. State of New Jersey*, 321 N.J. Super. 67 (App. Div. 1999)**

Facts:

A seventh grade student alleged that her fellow students habitually teased her and physically assaulted her because she was a "good" student and had received several academic awards. The harassment consisted of pushing, shoving and kicking "on a daily basis," throwing "trash" at her and on one occasion throwing a "condom at her."

Plaintiff asserted that they had discussed the harassment with the principal and the superintendent. Nevertheless, the harassment continued. Plaintiffs alleged that as result of the stress caused by the harassment she collapsed in one of her classes and she experienced partial paralysis in her right leg. Plaintiff was hospitalized for one week following this incident. She also was treated by a psychiatrist complaining of "severe stomach aches, anxiety, and recurring nightmares."

Plaintiff was diagnosed as suffering from permanent post-traumatic stress disorder.

The plaintiff brought suit against the board, staff members, including the principal and the vice principal, parents and other students based on negligence, tortious conduct and negligent supervision. The plaintiff alleged that the student had been harmed because of the failure of the district and its official to take reasonable measures to stop the alleged harassment. The court held that whether the district had been "deliberately indifferent" to the alleged harassment was a "triable" issue to be presented to a jury.

***L.W. v. Toms River Board of Education*, 2004 WL 265241 (N.J. Admin.)**

In this case, the school district was found liable under New Jersey's Law Against Discrimination because it failed to take sufficient action to stop student-to-student sexual orientation harassment that took place over multiple school years.

10. What is the school district's duty of care regarding sexual harassment?

***Frugis v Bracigliano* 177 N.J. 250 (2003)**

The New Jersey Supreme Court summarized the duty of care as follows:

"The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others."

Model Jury Charge (Civil), 5.74, "Duty of Teachers and School Personnel to Students"

The duties of school officials to students are set forth in Model Civil Jury Charge 5.74: School personnel owe a duty to exercise reasonable care

for the safety of students entrusted to them. This duty extends to supervisory care required for the student's safety or well-being as well as to the reasonable care for the student at school-sponsored activities in which the student participates. The standard of care is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the circumstances. The duty may be violated not only by the commission of acts but also in the neglect or failure to act. The theory behind the duty is that the relationship between the child and school authorities is not a voluntary one but is compelled by law. The child must attend school and is subject to school rules and discipline. In turn, the school authorities are obligated to take reasonable precautions for his/her safety and well-being. The school personnel are accountable for injuries resulting from failure to discharge that duty. A teacher owes his/her pupils the duty of supervision and will be liable for injuries caused by failure to discharge that duty with reasonable care.

***Jackson v. Hankinson*, 94 N.J. Super. 505 (App. Div. 1967), affirmed 51 N.J. 230, 235 (1968).**

A school district owes a duty of care to the students, whether in school, at school activities or on the school bus. The duty of care is to provide for the safety of the students - to take reasonable measures to protect them from physical injury, as well as harassing conduct. While a school district is not absolutely liable for the conduct of students on a school bus, it is required "to take [reasonable] steps to prevent injury to their students while on the bus." *"A board of education which provides transportation to its students must take reasonable precautions for their safety and well-being while they are on the bus... [T]his opinion does not preclude the imposition of concomitant duty upon a high school and its principal, who acknowledge a potentially criminal or otherwise wrongful conduct taking place on the bus while in route to or from the school, to take steps to prevent injury to their students while on the bus."*

Duty to investigate student-on-student harassment

***S.P. v. Collier High School*, 319 N.J. Super. 452 (App. Div. 1999)**

The principal has a duty to conduct a thorough investigation and, in appropriate cases, inform the parents and the school board of alleged incidents of sexual harassment.

Facts:

The plaintiff, a Jamesburg resident, was enrolled at Collier High School, an alternative high school located in Monmouth County serving over forty school districts.

Plaintiff alleged that beginning in her junior year in 1993, another student, C., began making "lewd [and] sexual comments" on the school bus. Plaintiff told him to keep quiet. When the comments continued, plaintiff went to see the principal. She informed the principal of the problem in or about February or March of 1993. The principal said that he would speak to C.

The comments subsided for a few days. Shortly thereafter, C resumed making the remarks, and also began to grab at plaintiff's chest and genital area. Plaintiff told C to stop. Plaintiff moved to another seat on the bus. C would follow her. Plaintiff told him to stop. She again went to the principal.

The following year, in September and October, the comments and grabbing resumed. Plaintiff again went to the principal. She also met with the administrative assistant.

In or about Christmas 1994, a Collier High School Administrative Assistant found the plaintiff crying in the ladies room. Plaintiff told her what was happening. The administrative assistant went back to the principal. Again, the harassing stopped for a short time.

In May of 1994 plaintiff told her mother that she was never going back on the bus again. The next day, her mother went to school to meet with the principal.

After an investigation, it was learned that the principal had talked to the bus driver about plaintiff's complaints. According to the bus driver, plaintiff was the instigator who had approached

C. Sometimes they would argue and sometimes they appeared to be friendly. The principal had not called the plaintiff's parents because "he did not believe that there was a reason to do so."

The court concluded that the principal had a duty of care to have maintained the safety of the plaintiff because he and the district had "sufficient control, opportunity and ability" to have taken action to have avoided the risk or harm to plaintiff at least by informing the board of what plaintiff had alleged.

Liability for out of district placement

***M.P. v. Delran Twp. Board of Ed.* OAL Dkt. No. EDU 3446-85**

District was held liable for payment of tuition for out of district placement initiated by parent after district failed to take appropriate disciplinary action to end harassment of M.P. by other students.

***B.J. v. Teaneck Bd. of Ed.* 93 N.J.A.R. 2d 429 (1993)**

Commissioner denied parents' request for payment of out of district tuition. After receiving reports of harassment of B.J. by other students, including assault, school officials reported the matter to the police. They did not take any further disciplinary action because they were unable to determine which students were responsible.

11. Teacher-to-student sexual harassment – when is there liability for the school district?

The following cases indicate the general parameters of a "teacher-to-student" sexual harassment claim, as well as the potential liability for the school district, the teacher, the principal and other school officials:

***Franklin v. Gwinnett County Public Schools* 503 U.S. 60 (1992)**

"When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex... We believe the same rule should apply when a teacher sexually harasses and abuses a student."

***Gebser v. Lago Vista Independent School District* 524 U.S. 274 (2001)**

The Court held that a school district may be held liable under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment. (The case dealt only with a board of education's liability under Title IX.)

***In the Matter of the Tenure Hearing of Wayne Slaughter, School District of the City of Bridgeton, Cumberland County,* 2002 WL 1238406. OAL Docket number EDU6140-01.**

Facts:

A middle school pupil, M.C., filed a complaint alleging that when she was having problems with her boyfriend, her teacher, Wayne Slaughter, would say that she was "pretty" and not to worry about it. She also said when she wore something tight, Mr. Slaughter would say her "outfit [was] nice." He would also say, "I bet what's inside is [nice] too and then he would laugh." Also, during the summer the teacher asked M.C. if she would like to go to dinner with him.

The complaint resulted in an investigation by the affirmative action officer. The affirmative action officer interviewed the student, and her mother. Other pupils were interviewed by the board's coordinator for school safety.

Mr. Slaughter's personnel record revealed a memo, which had been written approximately 2-years earlier by the supervisor of security concerning an incident between Mr. Slaughter and a 12th-grade female pupil. Mr. Slaughter was alleged to have said to the student "how come you don't come down to see me and give me anymore hugs?" It was also reported that Mr. Slaughter had said to another pupil "damn, if I was 17 years old I would bang that body up."

The court concluded that Mr. Slaughter's words, actions and conduct were acts of sexual harassment against the pupil. As a result, the tenure charges brought against him were sustained and he was ordered to be removed from his tenured teaching position.

Warren EX REL. Good v. Reading School District, 278 F.3rd 163 (Pa. 2003)

Facts:

Robert Warren, a 4th grader, was asked by his 4th grade teacher to remain in the classroom after school. The teacher locked the classroom door and asked Warren to play a game that the teacher called “shoulders.” The game consisted of the student squatting down between the teacher’s legs and then pushing up so that the student’s shoulders and head touched the teacher’s genital area. The teacher repeated this routine two or three times per week during the school year.

The student wrote about these incidents in a journal that he kept. His parents learned of these incidents after reading portions of the journal. They reported it to the Division of Youth and Family Services (DYFS). DYFS reported the incident to the school district, which led to the teacher’s suspension and ultimate resignation.

The principal had been aware of some “horseplay” incidents involving the teacher, but he had not been aware of the incident involving Warren. Accordingly, the court dismissed Title IX action, which had been brought by Warren and his parents against the school district, and school officials.

In the Matter of the Tenure Hearing of Robert Mantone 93 N.J.A.R.2d (EDU) 322, Mar 17, 1993

Facts:

Robert Mantone was 47. He had been employed as a high school English teacher in the Jersey City school district for nearly 24 years. Most of this time he was assigned to teach various English and journalism classes at Lincoln High School. Throughout his career, he received relatively satisfactory evaluations and he had never been the subject of any prior disciplinary action.

Nevertheless, Charles Cooper, Jr., the building principal, made several classroom observations in which Mantone was merely “sitting at his desk” while his students were “doing nothing.” Mantone was married, but recently had separated from his wife.

D.B. was a transfer student from Baltimore. Three and a half weeks after she began school her irate father visited the principal’s office and complained that Mantone had made inappropriate advances towards his daughter. The father showed

the principal an unsigned love letter addressed to D.B., which Mantone allegedly gave to her in class. The contents of the letter included the unnamed author’s belief that D.B. had “a beautiful body, along with an excellent mind and personality” and the revelation that “I still find you a very attractive young woman and I wondered to myself what it would be like to be with you. I think about it a lot. Am I crazy? Could my dream ever come true with you?” [The father was so incensed about this letter to his daughter that he filed a criminal complaint against Mantone. School officials immediately removed D.B. from Mantone’s class. She later returned to Baltimore, where she is presently a student at a beautician school.

Called as a witness, D.B. verified that Mantone had passed her the letter as he was handing back work in class. Moreover, she indicated that this particular letter was the last of three or four similar letters, which Mantone had delivered to her “every other week.” In the earlier letters, Mantone had repeatedly emphasized that he was “interested in how (her) body looked.” In one of them, he wrote that he “wanted (her) to have his children.” According to D.B., Mantone told her that he was divorced and looking for a future relationship. Often, as she left the classroom, Mantone would comment that she had “nice legs.”

Mantone’s conduct became the subject of tenure charges which were sustained resulting in the loss of his employment.

In the Matter of the Certificate of Robert Mantone. 96 N.J.A.R.2d (EDE) 5, Feb 29, 1996

Subsequent to Mantone losing his employment as a result of tenure charges, the State Board of Examiners initiated a separate action to revoke Mantone’s certificate. The State Board of Examiners concluded that “Mr. Mantone committed a significant breach of trust which created a hostile learning environment in his classroom. Teachers who are entrusted with the care and control of children must exhibit a high degree of self-restraint and controlled behavior. They are “one of the most dominant and influential forces in the lives of children.” In re Jacque L. Sammons, 72 S.L.D. 302, 321 (Comm’r June 12, 1972). Their job is not limited to imparting knowledge alone, but extends to conveying a sense of shared societal values and acceptable modes of behavior. N.J. State Bd. of Examiners v. Buontempo, 94 N.J.A.R.

2d 2 (Examiners Sept. 9, 1994). Pupils learn not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher. Here, Mr. Mantone's misconduct was not an isolated instance, but a pattern of conduct which continued after he had been warned that such behavior would not be tolerated. He took unfair advantage of his position of authority Even after the young ladies spurned his unwelcome advances, he persisted in not treating them with proper respect. Nothing on the record would support a finding that Mr. Mantone's fundamental attitude has improved or that he can be trusted not to abuse his authority."Under these circumstances, the State Board of Examiners revoked Mr. Mantone's certificate finding him unfit to teach in any public school in the State of New Jersey.

12. Supervisor to Subordinate Sexual Harassment - Ramifications?

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)

This case, decided by the United States Supreme Court, involved a claim of hostile work environment sexual harassment by a bank teller against her supervisor. The US Supreme Court held that in order for a hostile work environment claim under Title VII to be successful, the conduct must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.

Wilson v. Parisi 268 N.J.Super. (App. Div. 1993)

Plaintiff was a non-tenured teacher at the Elizabeth High School where defendant Parisi was the executive principal. She alleges Parisi engaged in a course of conduct which amounted to sexual harassment while attempting to persuade her to engage in a sexual relationship with him after she informed him that she had no such interest. She further alleges Parisi attempted to kiss her, kissed her, fondled her, and attempted to pull her into a Hilton Hotel elevator in an endeavor to take her to a hotel room to have sex.

The teacher brought suit against the principal and board of education alleging sexual harassment. Summary judgment was granted by the Superior Court, Law Division, Union County, dismissing 3 of the 4 counts of the Complaint and the teacher

appealed. The Superior Court, Appellate Division, held that: (1) genuine issues of fact existed as to whether the principal acted with required intent in allegedly sexually harassing teacher and whether school board was negligent, precluding summary judgment on the teacher's claims against the principal and board for sexual harassment and assault and battery; and (2) where sexual harassment meets Lehmann standard, there is no reason to require physical injury before permitting victim to seek damages for intentional infliction of emotional distress.

Note: Lehmann v. Toys R Us, discussed earlier in this primer, was a case of supervisor to subordinate hostile work environment sexual harassment.

13. Teacher-to-teacher sexual harassment - ramifications?

The following cases indicate the general parameters of "teacher-to-teacher" (or other teaching staff member to teaching staff member at equal levels) sexual harassment:

In the Matter of the Tenure Hearing of Paul Ashe, Division of Juvenile Services, Department of Human Services, 1996 N.J.A.R.2d (EDU) 442

Facts:

Ashe was a tenured teacher with the Department of Human Services assigned by the Division of Juvenile Services to teach physical education. On a regular weekly schedule, Ashe traveled to juveniles enrolled in various programs throughout the state to provide educational services. Ashe was charged with sexual harassment of a co-worker. The allegations included the following:

On occasion Ashe tried to pull the co-worker into empty rooms on the pretext that he just wanted to talk.

- Ashe admitted that he had gone to the co-worker's home to bring her flowers.
- Ashe had given the co-worker's telephone number to a male friend without her permission. Ashe had told the co-worker at work "look at that body."

Standing behind the co-worker, while she was climbing into a van, Ashe was alleged to have stared at her buttocks.

On one occasion with the building almost empty, Ashe was in the same room with the co-worker. She asked him to leave. He wouldn't.

The Commissioner concurred with the findings of the Administrative Law Judge that the Department of Human Services had presented "compelling evidence" to support tenure charges against Ashe resulting in a 60-day suspension and reduction in salary.

In the Matter of the Tenure Hearing of Adam Mujica, State Operated School District of the City of Paterson 2001 WL 875803, N.J. Adm., Jul 20, 2001

Facts:

Bonnie King-Cook, a physical education teacher at Eastside High School for approximately 25 years, was now a Teacher Assistant to the Principal. Around June 23, 1999, while breaking up a student fight, her left knee was badly scrapped and her upper back was injured. Other teachers helped her to a chair and elevated her leg and the nurse came and applied an ice pack. Prior to the incident, Ms. King-Cook had been proctoring an exam. While the nurse was attending to her, Ms. King-Cook saw R.P., a student in the class, coming down the hall with Mr. Mujica. Ms. King-Cook said, "Why are you coming so late to class and you better not have Mr. Mujica lie for you." Ms. King-Cook thought Mr. Mujica had given a lot of students passes for being late but R.P. did not have a pass. Mr. Mujica came up to her and leaned down and put both of his hands on her calf. R.P. went past her into the gym. Mr. Mujica was about two feet away when he squeezed her calf. She said "Get you f—g hands off my leg. I am not your wife." Mr. Mujica did not move so she said again "Get your f—ing hands off my leg, I am not your girlfriend." He stopped. Mr. Mujica said nothing to Ms. King-Cook just turned and walked away. Ms. King-Cook had never had any problems with Mr. Mujica but she was annoyed and offended. After the incident Ms. King-Cook went to the principal and said she wanted to file a sexual harassment charge. Ms. King-Cook felt what Mr. Mujica did was unwanted and unwelcome and touching her bare legs and squeezing them was sexual.

The incident was later contained in tenure charges brought against Mr. Mujica. The court dismissed this portion of the charges concluding that the act alone did not constitute an act of sexual harassment, which requires conduct so severe and pervasive as to make a reasonable man or woman believe the workplace had become a hostile environment;

"Nor does the touch of Ms. King-Cook's leg for a few seconds even though unwelcome, rise to the level of a violation of the implicit standard of good behavior that amounts to conduct unbecoming."

Note: Same-sex sexual harassment is also actionable under Title VII. See, *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998), involving a male oil rig worker who was sexually taunted by his male coworkers.

14. When is a teaching staff member entitled to indemnification by the school board?

Bower v. Board of Educ. of East Orange, 149 N.J. 416 (1997)

Teaching staff members are entitled to indemnification for the costs of defending against claims of sexual harassment brought by third parties (other than the employing board of education) if the alleged harassment (1) arose out of and was (2) in the course of the performance of the duties of employment.

In *Bower*, a teacher proved by a preponderance of evidence that the acts on which the charges were predicated arose out of and were in the course of performance of duties of his employment, as required by the statute governing teacher's entitlement to indemnification for his legal expenses.

Conduct forming basis of charge allegedly took place in school, during school hours, while teacher was required to be engaged in performing his duties as teacher. As a result the teacher was entitled to indemnification.

N.J.S.A. 18A:16-6 Indemnity of officers and employees against civil actions:

Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher or person assigned to other professional pre-teaching field experience, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, the board shall defray all costs of

defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; provided that: (a) no employee shall be entitled to be held harmless or have his defense costs defrayed in a disciplinary proceeding instituted against him by the board or when the employee is appealing an action taken by the board; and (b) indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in N.J.S.A. 59:10-4. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

N.J.S.A. 18A:16-6.1 Indemnity of officers and employees in certain criminal actions:

Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

15. What are the requirements for a school district policy regarding the prevention and remediation of “harassment, intimidation and bullying”?

The case of *Saxe v. State College Area School District* 240 F.3d 200 (3d Cir. 2001); makes it clear that policies against harassment must be precise. In that case, the board policy against sexual harassment was deemed to be overly broad where the policy included no process for determining whether or not conduct was “severe” or “pervasive” enough to constitute sexual harassment.

New Jersey’s Anti-Bullying Bill of Rights Act

N.J.S.A. 18A:37-13. Legislative findings

The Legislature finds and declares that: a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student’s ability to learn and a school’s ability to educate its students in a safe environment; and since students learn by example, school administrators, faculty, staff, and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying.

N.J.S.A. 18A:37-14. Harassment, intimidation, and bullying defined; definitions as used in this act:

“Harassment, intimidation or bullying” means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c. 122 (C. 18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. creates a hostile educational environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.

18A:37-15. Harassment, intimidation and bullying policy to be adopted by school districts; contents and notice

- a. Each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus. The school district shall adopt the policy through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives.
- b. A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:
 1. a statement prohibiting harassment, intimidation or bullying of a student;
 2. a definition of harassment, intimidation or bullying no less inclusive than that set forth in section 2 of this act;
 3. a description of the type of behavior expected from each student;
 4. consequences and appropriate remedial action for a person who commits an act of harassment, intimidation or bullying;
 5. a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report;
 6. a procedure for prompt investigation of reports of violations and complaints;
 7. the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified;
 8. a statement that prohibits reprisal or retaliation against any person who reports an act of harassment, intimidation or bullying and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation;
 9. consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of harassment, intimidation or bullying;
10. a statement of how the policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions;
11. a requirement that a link to the policy be prominently posted on the home page of the school district's website and distributed annually to parents and guardians who have children enrolled in a school in the school district; and
12. a requirement that the name, school phone number, school address and school email address of the district's anti-bullying coordinator be listed on the home page of the school district's website and that on the home page of each school's website the name, school phone number, school address and school email address of the school anti-bullying specialist and the district anti-bullying coordinator be listed.
- c. A school district shall adopt a policy and transmit a copy of its policy to the appropriate county superintendent of schools by September 1, 2003.
- d. To assist school districts in developing policies for the prevention of harassment, intimidation or bullying, the Commissioner of Education shall develop a model policy applicable to grades kindergarten through 12. This model policy shall be issued no later than December 1, 2002.
- e. Notice of the school district's policy shall appear in any publication of the school district that sets forth the comprehensive rules, procedures and standards of conduct for schools within the school district, and in any student handbook.

Note: NJPSA will be publishing a separate primer pertaining exclusively to New Jersey's Anti-Bullying Bill of Rights Act.