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School Law - Unlimited Liability for Schools or Appropriate Protection for Victims - Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238

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CASE NOTES

SCHOOL LAW—Unlimited Liability for Schools or Appropriate Protection for Victims? *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238 (10th Cir. 1999).

INTRODUCTION

In late 1993, a severely disabled student in Denver alleged that her school had failed to respond appropriately after she was battered and sexually assaulted by a fellow student on several occasions. In *Murrell v. School District No. 1, Denver, Colorado*,¹ a three-judge panel for the United States Court of Appeals for the Tenth Circuit affirmed a trial court ruling in her favor, applying a new, controversial standard for reviewing such complaints of so-called peer sexual harassment in schools. The standard applied in *Murrell*, which allowed the courts to impose liability on schools and school officials for failing to take appropriate action in such incidents, was handed down just a couple of months before in a 5-4 decision of the United States Supreme Court in the case of *Davis v. Monroe County Board of Education*.²

The events leading up to the Tenth Circuit's decision in August 1999 began some six years earlier. Penelope Jones enrolled at Denver's George Washington High School in October 1993.³ Jones was born with spastic cerebral palsy, which severely impairs her ability to use and control the right side of her body.⁴ She is deaf in her left ear, and testing showed that she functioned at the intellectual and developmental level of a first grader.⁵

According to allegations in the original complaint filed by Jones's mother, Penelope Murrell, Jones was assigned to a special education program taught by teachers Kathleen Brady and Nelia Hicks.⁶ Her troubles began when she encountered another special education student, "John Doe," who was alleged to have significant disciplinary and behav-

1. 186 F.3d 1238 (10th Cir. 1999).

2. 526 U.S. 629 (1999).

3. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243 (10th Cir. 1999).

4. *Id.*

5. *Id.*

6. *Id.*

ioral problems that included sexually inappropriate conduct.⁷ Although school officials allegedly knew about Doe's behavioral problems, the school appointed him to a position as a "janitor's assistant," through which he gained access to unsupervised areas of the school.⁸ Sometime in November 1993, Doe allegedly took Jones to a secluded area and sexually assaulted her.⁹ A janitor discovered the two students, returned them to class and advised the teachers where he had found them.¹⁰ Although the teachers allegedly knew that Doe had sexually assaulted Ms. Jones on this occasion, they did not inform her mother.¹¹

During November 1993, the sexual assaults allegedly continued. On at least one of the occasions on which Doe allegedly battered and sexually assaulted her, Jones informed the teachers of Doe's conduct. The teachers allegedly told Jones not to tell her mother about the incident and encouraged her to forget it had happened at all.¹²

On or about November 24, 1993, Doe allegedly again took Jones to a secluded area of the school and battered and sexually assaulted her.¹³ The complaint alleges that although the teachers knew she had been battered and may have known she was sexually assaulted, they informed Murrell only about the non-sexual battery.¹⁴

Because of these incidents, and because she had begun to engage in self-destructive and suicidal behavior, Jones left school and entered a psychiatric hospital.¹⁵ Only then did Murrell learn about the sexual assaults and batteries of her daughter by Doe.¹⁶ Although Murrell immediately contacted the teachers to advise them of what she had learned, the teachers denied the incidents could have occurred, told Murrell to send Jones back to school and refused to discuss the matter further.¹⁷ A tele-

7. *Id.* The opinion is not specific as to the precise nature of Doe's alleged sexually inappropriate conduct.

8. *Id.* The opinion does not describe the precise nature of the employment relationship between Doe and the school.

9. *Id.*

10. *Id.* It is not clear from the opinion whether the janitor actually observed the alleged sexual assault.

11. *Id.*

12. *Id.* at 1244.

13. *Id.*

14. *Id.* The opinion is not specific as to the precise nature of the alleged non-sexual battery.

15. *Id.*

16. *Id.*

17. *Id.*

phone call to the principal, Vivian Johnston, allegedly went unanswered.¹⁸

Jones was released from the hospital and attempted to return to school on December 6, 1993, but stayed for only one day because she allegedly was once again battered by Doe and ridiculed by other students for his earlier sexual attacks on her.¹⁹ Following several unsuccessful attempts to contact the school principal, Murrell learned from the teachers and Doe's mother that school officials had scheduled a meeting to discuss Doe's sexual conduct with Jones.²⁰ That meeting was held on December 10, 1993, and was attended by the principal, Doe's mother, the teachers, Murrell and her husband, and Jones. The teachers and the principal allegedly were hostile toward Jones and Murrell.²¹ The principal allegedly suggested that the sexual contact between the two students may have been consensual, although she knew that Jones was legally incapable of consenting and that Doe had admitted assaulting Jones after she had resisted his advances.²²

The principal allegedly declined to investigate the incident, and when Murrell suggested that she suspend both students pending an investigation, the principal allegedly responded by suspending only Ms. Jones for "behavior . . . detrimental to the welfare, safety or morals of other pupils or school personnel."²³

In the meantime, the school district allegedly neither notified appropriate law enforcement officials nor disciplined Doe in any way.²⁴ He continued to attend George Washington High School and retained his job as a janitor's assistant, with the same access to all parts of the school that he had previously enjoyed.²⁵

Murrell filed suit in the United States District Court for the District of Colorado on her own behalf and as guardian ad litem for her daughter.²⁶ The complaint named the principal and the teachers individually and in their capacities as school officials.²⁷ Murrell asserted that the

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The opinion does not specifically state whether Doe admitted to sexually assaulting Jones or whether his alleged admission related to non-sexual battery.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1242.

27. *Id.*

school district violated Title IX of the Education Amendments of 1972 (Title IX),²⁸ based on the school district's alleged knowledge of and failure to remedy sustained sexual harassment, assault, and battery of Jones.²⁹ Murrell also asserted two claims under 42 U.S.C. § 1983 against the school district, and individually against the principal and the two teachers.³⁰ The first of these constitutional claims alleged that the school district, principal, and teachers violated the Equal Protection Clause of the Fourteenth Amendment by failing to remedy Doe's sexual harassment of Jones.³¹ In her second § 1983 claim, Murrell alleged that the school district, principal, and teachers violated the Due Process Clause of the Fourteenth Amendment by failing to protect Jones from Doe.³²

The district court dismissed the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief may be granted.³³ The court, which acted prior to the issuance of the United States Supreme Court opinion in *Davis v. Monroe County Board of Education*,³⁴ held that Title IX provides no cause of action for a school's failure to prevent and remedy student-on-student sexual harassment, and that the school district had no constitutional duty to protect Jones from assaults by a fellow student.³⁵ Murrell and Jones appealed the Title IX and equal protection claims to the Tenth Circuit, which relied on the then-newly issued opinion in *Davis*.³⁶ The Tenth Circuit reversed the district court's dismissal of the Title IX claim and the equal protection claim as to the principal and teachers as individuals, finding that the elements needed to establish a school's Title IX liability for peer sexual harassment, as outlined in *Davis*, were satisfied, and that the individual school employees enjoyed no qualified immunity from the equal protec-

28. 20 U.S.C. §§ 1681-1688 (1999). The statute provides in pertinent part: "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"

29. *Murrell*, 186 F.3d at 1242.

30. 42 U.S.C. § 1983 (1994). The statute provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

31. *Murrell*, 186 F.3d at 1242.

32. *Id.*

33. *Id.* at 1243.

34. 526 U.S. 629 (1999).

35. *Murrell*, 186 F.3d at 1243.

36. *Id.* at 1245.

tion claim.³⁷ However, the court affirmed the district court's decision on the equal protection claim as applied to the school district, finding that the complaint failed to allege that the school district engaged in an "official policy" or "custom" of deliberate indifference to sexual harassment.³⁸

This case note traces the evolution of the law governing peer sexual harassment cases and examines how the *Murrell* court applied rules laid out in *Davis*. The *Davis* court was sharply divided, and the decision included a lengthy, stinging dissent that predicted a wide range of undesirable consequences as a result of the majority's holding. This note examines whether the concerns raised by the dissent in *Davis* were borne out in the *Murrell* case, and speculates on the *Murrell* decision's potential effect on liability for schools within the Tenth Circuit.

BACKGROUND

Although the problem of student-on-student sexual harassment has probably been a feature of public education for decades, it was only during the 1990s that the federal courts began considering claims in which plaintiffs sought to impose liability against schools for the actions of students over which the schools exercised authority. The law in this area developed in increments, as the courts first resolved the question of whether private claims for monetary damages were available under Title IX. The courts then struggled to reconcile the imposition of liability with settled principles of agency law and qualified immunity for individual school officials, as well as questions about adequate notice for schools receiving federal funds.

Early cases

1. *Franklin v. Gwinnett County Public Schools*.

One of the early cases that paved the way for later claims of sexual harassment of students by fellow students was *Franklin v. Gwinnett County Public Schools*.³⁹ *Franklin* did not involve a student in the role of harasser, but rather a teacher and coach who made sexual advances toward a female student and ultimately subjected her to coercive sexual intercourse.⁴⁰ The case presented the question of whether the implied right of action under Title IX, first recognized by the Supreme Court in

37. *Id.* at 1249, 1251-52.

38. *Id.* at 1249-50.

39. 503 U.S. 60 (1992).

40. *Id.* at 63.

Cannon v. University of Chicago,⁴¹ supported a claim for monetary damages.⁴²

In *Franklin*, the Court reversed both the federal district court and the United States Court of Appeals for the Eleventh Circuit and held that a damages remedy is available for an action brought to enforce Title IX.⁴³ The Court reasoned that Congress had no intention to limit the remedies available to a complainant in a suit brought under Title IX,⁴⁴ and reaffirmed the longstanding rule articulated in *Bell v. Hood*,⁴⁵ that when a federal statute provides for a general right to sue, "federal courts may use any available remedy to make good the wrong done."⁴⁶

2. *Doe v. Petaluma City School District*.

With the right to sue *and* recover money damages under Title IX established, the stage was set for the first cases to consider the question of a school's liability for student-on-student sexual harassment. The issue was first decided by a federal court in *Doe v. Petaluma City School District*.⁴⁷ *Doe* involved the case of a female junior high school student who was subjected to harassment by both male and female peers, which took the form of sexual comments and lewd writings about Doe on the school's restroom walls.⁴⁸ Doe was subjected to epithets such as "slut" and "ho" (slang for whore), and taunts of her having a hot dog in her pants.⁴⁹ Doe and her parents informed a school counselor of these incidents numerous times, and for several months the counselor refused to take any action at all, telling Doe that "boys will be boys" and "girls cannot sexually harass other girls."⁵⁰ Although the counselor did finally warn some of the offenders, he never reported the incidents to the school's Title IX officer, nor did he ever tell Doe or her parents that the school had a Title IX policy and a Title IX officer who was responsible for enforcing the policy.⁵¹

Doe's complaint raised the issue that would become important in subsequent cases involving peer sexual harassment—whether the inac-

41. 441 U.S. 677 (1979).

42. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63 (1992).

43. *Id.* at 76.

44. *Id.* at 73.

45. 327 U.S. 678 (1946).

46. *Franklin*, 503 U.S. at 66.

47. 54 F.3d 1447 (9th Cir. 1995).

48. *Id.* at 1449.

49. *Id.* at 1456.

50. *Id.*

51. *Id.*

tion of a school official violated her rights under Title IX and thereby gave rise to a cause of action under section 1983. She sued both the school district and the school counselor as an individual.⁵² After a partial dismissal, she filed a second amended complaint, asserting a Title IX claim against the school only, and a section 1983 claim against the counselor only.⁵³ The district court held in part that for a school district to be liable for money damages for failure to take appropriate action in response to complaints of student-on-student sexual harassment, a court must find that it intentionally discriminated against the plaintiff on the basis of sex.⁵⁴ The court also ruled that the counselor could not be sued as an individual under Title IX but could be sued for Title IX violations through section 1983, and that the counselor was not entitled to qualified immunity.⁵⁵ The counselor appealed, asking the United States Court of Appeals for the Ninth Circuit to resolve whether he could be sued for a Title IX violation under section 1983.⁵⁶ The appellate court ruled in the counselor's favor because:

[W]e cannot say that [the counselor's] duty to act under Title IX was clearly established at the time of his inaction [I]t is not reasonable to charge [the counselor] at the time in question with the kind of knowledge, foresight or even ingenuity required to anticipate that Title VII analogies might be used in this fashion to hold him individually liable to Doe under Title IX.⁵⁷

As if to forewarn, the court noted that if the counselor "engaged in the same conduct today, he might not be entitled to qualified immunity."⁵⁸

3. *Davis v. Monroe County Board of Education.*

The federal judiciary seemed ready to embrace a broader application of Title IX protections in the area of peer sexual harassment in the schools when the Eleventh Circuit issued its opinion in *Davis v. Monroe County Board of Education*,⁵⁹ which preceded later Supreme Court consideration of the same case. In *Davis*, the parents of a fifth grade female student, LaShonda, brought an action against the school board, the school superintendent, and the elementary school principal, alleging

52. *Id.* at 1449.

53. *Id.*

54. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).

55. *Doe*, 54 F.3d at 1449.

56. *Id.*

57. *Id.* at 1452. Title VII of the Civil Rights Act of 1964 prohibits sex-based harassment in the context of employment. 42 U.S.C. § 2000e-2 (1999).

58. *Doe*, 54 F.3d at 1452.

59. 74 F.3d 1186 (11th Cir. 1996).

sexual harassment by a fellow classmate.⁶⁰ The alleged harassment by the classmate, "G.F.," occurred over a six-month period of time, and included such activity as attempts to fondle LaShonda, fondling her, and directing offensive language toward her.⁶¹ G.F.'s actions increased in severity until he finally was charged with, and pleaded guilty to, sexual battery in May 1993.⁶² Although LaShonda reported each of the incidents to her teachers and her mother, and her mother regularly reported the incidents to the teachers and/or the principal, the school officials failed to take any action to protect LaShonda.⁶³ Even Davis's request that LaShonda's assigned seat next to G.F. be changed to a different location was refused, and she was not allowed to move her seat away from G.F. until she had complained for more than three months.⁶⁴ School officials never removed or disciplined G.F. in any manner for his sexual harassment of LaShonda.⁶⁵

Davis brought the lawsuit under Title IX and section 1983, asserting that the school officials' failure to act discriminated against LaShonda and denied her the benefits of a public education in violation of Title IX, and that the school's omissions violated LaShonda's liberty interest to be free from sexual harassment in violation of her substantive due process rights under the United States Constitution.⁶⁶

The United States District Court for the Middle District of Georgia dismissed the Title IX claim against the board, concluding:

The sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to LaShonda was not proximately caused by a federally funded education provider.⁶⁷

The court also dismissed the section 1983 due process claims against the board and the individual defendants, stating that LaShonda

60. *Id.* at 1189.

61. *Id.* at 1188.

62. *Id.* at 1189.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1188.

67. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994). The Supreme Court has held that Title IX may be enforced through an implied private right of action. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992). However, only federally funded institutions can be held liable for violating the Title IX. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988).

had not alleged any special relationship between herself and the school, nor had she alleged that the defendants placed her in a dangerous situation.⁶⁸ In short, the court held, the state did not act to make her less capable of caring for herself.⁶⁹

On appeal, the Eleventh Circuit rejected Davis's due process and equal protection claims without discussion.⁷⁰ However, the appeals court reversed the lower court on the Title IX claim against the school board.⁷¹ The court held that (1) Title IX encompasses claims for damages due to a sexually hostile educational environment created by a fellow student or students when supervising authorities knowingly fail to act to eliminate harassment, and (2) the student sufficiently stated a Title IX claim against the school board for damages for a sexually hostile educational environment created by a fellow classmate.⁷²

The Eleventh Circuit relied heavily on the U.S. Supreme Court's decision in *Franklin*, which applied a Title VII hostile environment analysis to a Title IX claim for damages.⁷³

Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working 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.⁷⁴

The court noted that "a student should have the same protection in school that an employee has in the workplace."⁷⁵

4. *Rowinsky v. Bryan Independent School District*.

If it appeared that the law governing peer sexual harassment in the schools was developing in an orderly fashion following the Eleventh Circuit's opinion in *Davis*, the United States Court of Appeals for the Fifth Circuit completely muddied the waters in *Rowinsky v. Bryan Inde-*

68. *Aurelia D.*, 862 F. Supp. at 366.

69. *Id.*

70. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188 (11th Cir. 1996).

71. *Id.* *Davis* did not appeal the district court's dismissal of the Title IX claims against the individual defendants.

72. *Id.* at 1193, 1195.

73. *Id.* at 1191.

74. *Id.* at 1193 (emphasis added).

75. *Id.* at 1192.

pendent School District.⁷⁶ *Rowinsky* rejected the *Davis* analysis, holding that Title IX prohibits only acts by *recipients* of federal financial assistance themselves (the schools or their employees), not the acts of third parties, such as students who allegedly engaged in sexual harassment against fellow students.⁷⁷

Rowinsky relied heavily on agency principles for its decision, noting that Title IX is legislation authorized by the Spending Clause of the United States Constitution⁷⁸ and that “imposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX.”⁷⁹ The *Rowinsky* court held that a school district might violate Title IX “if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.”⁸⁰

The Tenth Circuit quickly followed the Fifth Circuit’s *Rowinsky* holding in the case of *Seamons v. Snow*.⁸¹ A male student brought Title IX and section 1983 claims against the school district and various school officials after he was assaulted by five upper class football teammates and bound naked to a towel rack with adhesive tape. The victim’s genitals were also taped and one of his teammates brought a girl the victim had dated into the locker room to view him.⁸² The court dismissed the claims on grounds that he had not alleged that the harassment was based on sex—for example, that he failed to allege the school officials would have responded differently had a female student brought a similar claim.⁸³

The Office for Civil Rights Guidelines

If the law in the area of student-on-student sexual harassment appeared to be in disarray during the mid-1990s due to the federal courts’ varying interpretations and inconsistent application of Title IX

76. 80 F.3d 1006 (5th Cir. 1996).

77. *Id.* at 1012 (emphasis added).

78. *Id.* The Spending Clause provides in pertinent part: “The Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States” U.S. CONST. art. I, § 8, cl. 1.

79. *Rowinsky*, 80 F.3d at 1013.

80. *Id.* at 1016.

81. 84 F.3d 1226 (10th Cir. 1996).

82. *Id.* at 1230.

83. *Id.* at 1233.

standards, the Department of Education's Office for Civil Rights (OCR) evinced no uncertainty when it issued its comprehensive guidelines on the matter in early 1997. Titled *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Guidance)*, the document stated bluntly, "OCR continues to believe that the *Rowinsky* decision was wrongly decided."⁸⁴

The *Guidance* makes clear that the OCR favors broad application of Title IX principles to claims of peer sexual harassment in the schools. Prior to the Supreme Court's decision in *Davis*, a school could not be held liable for the actions of its students because students are not agents of their schools.⁸⁵ Rather than reject such an agency theory, the *Guidance* would simply hold schools liable for *their own misconduct*: "Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice."⁸⁶ Additionally, the *Guidance* states that a school has actual notice of sexual harassment if an agent of the school receives notice.⁸⁷

The *Guidance* makes clear that not all behavior with sexual connotations constitutes sexual harassment under federal law. The harassment must be "sufficiently severe, persistent or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment."⁸⁸ The *Guidance* implies that alarmist concerns about innocent behavior giving rise to federal tort liability are unfounded: referencing a newspaper account of a six-year-old boy who was punished for kissing a female classmate, the document noted, "[t]he *Guidance* confirms that a kiss on the cheek by a first grader does not constitute sexual harassment."⁸⁹

Gebser v. Lago Vista Independent School District

The next major development in the law governing peer sexual harassment of students involved the case of *Gebser v. Lago Vista Independent School District*⁹⁰ *Gebser* concerned a male teacher who allegedly seduced a female high school student. The student then brought claims against the school district based on the theories of respondeat

84. 62 Fed. Reg. 12,034, 12,036 (1997).

85. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1245 (1999).

86. 62 Fed. Reg. at 12,040.

87. *Id.* at 12,042.

88. *Id.* at 12,034.

89. *Id.*

90. 524 U.S. 274 (1998).

superior and constructive notice.⁹¹ The plaintiff, Gebser, had not reported the relationship to school officials.⁹² The Supreme Court decided five-to-four against Gebser's arguments, establishing that for a school district to be liable under Title IX, a school official must have "actual knowledge of discrimination" and must have "authority to address the alleged discrimination and to institute corrective measures" while "failing adequately to respond."⁹³ Further, the *Gebser* majority stated, the response must amount to "deliberate indifference" to discrimination for a damages remedy to be applicable.⁹⁴ Thus, although *Gebser* did not involve a case of peer sexual harassment of a student, it established a standard that would be applied in future court decisions relating to peer sexual harassment.

Writing for the dissent, Justice Stevens disagreed with the majority's conclusion that Gebser had not alleged an intentional violation of Title IX of the type recognized in *Franklin*.⁹⁵ Justice Stevens noted that the sexual abuse of Gebser committed by the teacher was surely intentional and that it occurred during, and as a part of, a curriculum activity in which he wielded authority over Gebser that had been delegated to him by the school.⁹⁶ The activity was subsidized, in part, with federal funds.⁹⁷ The Court's holding that the law does not provide a damages remedy in the case is at odds with settled principles of agency law, Stevens noted, under which the district is responsible for the teacher's misconduct because he was aided in accomplishing the tort by the existence of the agency relationship.⁹⁸

The Supreme Court's resolution of Davis v. Monroe County Board of Education

The most important decision in the evolution of the law relating to peer sexual harassment of students was handed down in 1999 by the Supreme Court in *Davis v. Monroe County Board of Education*.⁹⁹ *Davis* reached the Supreme Court after the Eleventh Circuit, en banc, vacated

91. *Id.* at 283.

92. *Id.* at 274.

93. *Id.* at 290.

94. *Id.*

95. *Id.* at 297-98 (Stevens, J., dissenting).

96. *Id.* at 298.

97. *Id.*

98. *Id.* at 298-99. The *Gebser* majority held that agency principles do not apply under Title IX, as they do under Title VII employment discrimination claims, because Title IX does not include specific reference to an educational institution's "agents." *Id.* at 283.

99. 526 U.S. 629 (1999).

the prior decision by the Eleventh Circuit panel and held that Davis had not stated a claim under Title IX.¹⁰⁰

The Supreme Court, in a five-to-four decision authored by Justice O'Connor, reversed the Eleventh Circuit's en banc decision, effectively affirming the previous panel decision. The Court's decision also reads as an affirmation of at least some of the language used by the Department of Education's Office for Civil Rights when it issued its 1997 *Guidance*. For example, the Court held that a school district can be liable for peer sexual harassment if the harassment is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."¹⁰¹ Yet the Court also implied that plaintiffs would continue to have to meet a difficult burden of proof, noting that "[d]amages are not available for simple acts of teasing and name-calling among school children, even where these comments target differences in gender."¹⁰²

Additionally, the Court referenced the "actual knowledge" and "deliberate indifference" standard established in *Gebser* when it noted that federal funding recipients could be liable in damages "only where their own deliberate indifference effectively 'caused' the discrimination"¹⁰³ The Court further held that, "[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action."¹⁰⁴

Thus, the *Davis* Court made clear that a court may impose liability under Title IX for peer sexual harassment of students when the harassing behavior is so severe, pervasive, and offensive that it denies students equal access to federally funded education opportunities, while school officials with actual knowledge of, and authority to remedy, the harassment remain deliberately indifferent.¹⁰⁵

Davis was notable for a stinging dissent that was nearly as long as the majority opinion. The dissenting opinion, authored by Justice

100. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc).

101. *Id.* at 652.

102. *Id.* at 642-43.

104. *Id.* at 644.

105. *Id.* at 646-47.

Kennedy and joined by Chief Justice Rehnquist and Justices Scalia and Thomas, was rooted in faithful adherence to federalism and outlined five major points of opposition:

1. The majority opinion obliterates distinctions between national and local spheres of interest by allowing the federal government to wield its Spending Clause power without concern for the federal balance.¹⁰⁶ Only if states receive clear notice of the conditions attached to the grant of federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power.¹⁰⁷

2. The *Davis* majority has created unlimited Title IX liability that will result in the diversion of scarce resources from educating children as schools are forced to defend against meritless claims. Schools will respond by adopting whatever federal code of student conduct the Department of Education sees fit to impose on them. The federal government is thus imposing itself into one of the most traditional areas of state concern.¹⁰⁸

3. Title IX does not impose an unambiguous duty on schools to remedy peer sexual harassment. Title IX prohibits only misconduct by grant recipients, not misconduct by third parties, and the majority opinion represents "arbitrary line-drawing" without explaining what degree of control over students is sufficient to impose liability on schools.¹⁰⁹ The majority view is a rejection of agency principles and, even though the Court has not recognized liability of non-agents under Title VII, it rejects out of hand an agency limitation on Title IX.¹¹⁰

4. A school's control over students is much more complicated and limited than the majority acknowledges.¹¹¹ In some states, schools have a continuing duty to educate even students who are suspended or expelled.¹¹² Schools cannot exercise the same degree of control over thousands of students that they do over a

106. *Id.* at 654 (Kennedy, J., dissenting).

107. *Id.* at 655 (citing *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (Kennedy, J., dissenting)).

108. *Id.* at 657-658 (Kennedy, J., dissenting).

109. *Id.* at 662 (Kennedy, J., dissenting).

110. *Id.* (Kennedy, J., dissenting).

111. *Id.* at 664 (Kennedy, J., dissenting).

112. *Id.* at 666 (Kennedy, J., dissenting).

few hundred adult employees.¹¹³ Further, the majority failed to deal with distinctions between elementary, high school, and university students. The *Davis* decision applies with equal force to universities, which do not exercise custodial or tutelary power over their adult students.¹¹⁴

5. The schools are the “primary locus of most children’s social development” and accordingly are “rife with inappropriate behavior by children . . . learning to interact with their peers.”¹¹⁵ Norms of the adult workplace which have defined hostile environment sexual harassment are not easily translated to peer relationships in the schools. “A teacher’s sexual overtures to a student are always inappropriate, while a student’s romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.”¹¹⁶ Almost every child is at one time or another teased by peers in school. “The majority’s test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.”¹¹⁷ “After today, Johnny will find the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.”¹¹⁸ Most disturbing is that “[t]he majority does not even purport to explain what constitutes an actionable “denial of equal access to education.”¹¹⁹

Despite the forcefulness of the dissenting opinion, the *Davis* majority made clear that school officials would no longer be able to hide behind agency principles and avoid liability for student-on-student sexual harassment, even though “substantial control” over the harasser is most easily demonstrated when the offender is an agent of the funding recipient.¹²⁰ Rather than hold a school liable for the actions of its students, who are not agents of the school, the *Davis* decision noted that liability in *Gebser* was predicated on the school’s *own* failure to act.¹²¹ The Court noted that it had previously observed “that the nature of [the State’s] power [over public schoolchildren] is custodial and tutelary,

113. *Id.* at 667 (Kennedy, J., dissenting).

114. *Id.* (Kennedy, J., dissenting).

115. *Id.* at 672 (Kennedy, J., dissenting).

116. *Id.* at 675 (Kennedy, J., dissenting).

117. *Id.* at 678 (Kennedy, J., dissenting).

118. *Id.* at 686 (Kennedy, J., dissenting).

119. *Id.* at 676 (Kennedy, J., dissenting).

120. *Id.* at 645.

121. *Id.* at 645-46.

permitting a degree of supervision and control that could not be exercised over free adults."¹²² *Davis* thus resolved most of the issues with which federal courts wrestled earlier and provided a standard for evaluating future claims against schools for student-on-student sexual harassment.

PRINCIPAL CASE

The case of *Murrell v. School District No. 1, Denver, Colorado*, presented factual circumstances that, while roughly analogous to those alleged in *Davis*, were even more egregious and presented a more vulnerable victim. In determining that liability could be imposed on both the school and individual school officials for alleged deliberate indifference, the Tenth Circuit found the facts of *Murrell* easily susceptible to a *Davis*-type analysis.

Murrell reached the Tenth Circuit after the United States District Court for the District of Colorado dismissed Murrell's claims for failure to state a claim upon which relief may be granted.¹²³ The district court concluded that Murrell failed to establish liability on the part of the school based on the Fifth Circuit's opinion in *Rowinsky*.¹²⁴ *Rowinsky* held that agency principles do not apply under Title IX and that a school district is not liable for the conduct of a harassing student because the student is not an agent of the school.¹²⁵

After hearing oral argument on appeal, the *Murrell* court delayed the case pending the Supreme Court's review of *Davis*.¹²⁶ The court recognized that the outcome of *Davis* would be dispositive of many of the issues it would face in deciding *Murrell*.¹²⁷ Once *Davis* was decided, the Tenth Circuit requested supplemental briefing on the effect of the *Davis* decision.¹²⁸ Under the rule of *Davis*, the Tenth Circuit recognized, a plaintiff must allege four factors to state a claim for school district liability under Title IX: (1) actual knowledge of, and (2) deliberate indifference to (3) harassment that was so severe, pervasive, and objectively offensive that it (4) deprived the victim of access to the educational benefits of the school.¹²⁹

122. *Id.* at 646 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

123. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d at 1238, 1243 (1999).

124. *Id.* at 1245.

125. *See supra* notes 76-80 and accompanying text.

126. *Murrell*, 186 F.3d at 1245.

127. *Id.*

128. *Id.*

129. *Id.* at 1246.

The court, accepting all of the plaintiff's allegations as true for purposes of the appeal,¹³⁰ concluded that Murrell sufficiently alleged actual knowledge and deliberate indifference, the first two prongs of the *Davis* analysis.¹³¹ Murrell alleged that she had telephoned the principal to discuss Doe's conduct, and therefore the principal had actual knowledge of the assaults at least as of the time Jones was in the hospital.¹³² The court also noted that it had no doubt that the principal, as the highest-ranking administrator at the school, exercised substantial control over Doe and the school environment during school hours.¹³³ The Denver Public Schools had a sexual harassment policy that prohibited peer sexual harassment and provided that grievances would routinely be filed with the principal, and that the principal had authority to suspend students for behavior detrimental to the welfare, safety, or morals of other students. According to the complaint, the principal never appropriately disciplined Doe, who continued to enjoy access to unsupervised parts of the school.¹³⁴ The court said, "Her [the principal's] complete refusal to investigate known claims of the nature advanced by Ms. Murrell, if true, amounts to deliberate indifference."¹³⁵

The court also found that, "at least at this stage of the proceedings," it must accept as true Murrell's allegation that Jones's teachers were invested with the authority to halt Mr. Doe's known sexually assaultive behavior. "If they were, their alleged response quite plainly amounts to deliberate indifference," the court asserted.¹³⁶

The court next considered whether the harassment inflicted upon Jones was sufficiently "severe, pervasive, and objectively offensive" to satisfy the third prong of the *Davis* test. Because Doe "repeatedly took Jones to a secluded area and battered, undressed, and sexually assaulted her," the court had no trouble concluding that "the alleged wrongdoing was sufficiently severe, pervasive, and objectively offensive" to state a claim.¹³⁷

130. Review of dismissal under FED. R. CIV. P. 12(b)(6) is *de novo*, with the court accepting as true the factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiff. *Seamons v. Snow*, 84 F.3d 1226, 1231-32 (10th Cir. 1996). Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

131. *Murrell*, 186 F.3d at 1247.

132. *Id.*

133. *Id.*

134. *Id.* at 1248.

135. *Id.*

136. *Id.*

137. *Id.*

Finally, with respect to the Title IX claims, the court considered whether the school officials' deliberate indifference deprived Jones of educational opportunities or benefits to which she was entitled. Because Jones had to leave the school to be hospitalized, and because the principal suspended Jones after her mother suggested the school district should investigate the claim and Jones became home bound, the court had no trouble concluding that she was deprived of educational opportunities or benefits.¹³⁸ Thus, the court reversed the district court's order dismissing Murrell's Title IX claim.¹³⁹

The court next considered the issues associated with the district court's dismissal of Murrell's claim under § 1983. Her complaint alleged that by failing to take steps to eradicate the hostile environment created by Doe, the school district, the principal, and teachers individually deprived Jones of her constitutional right to equal protection of the laws under the Fourteenth Amendment.¹⁴⁰ The defendants argued on appeal that the claim was properly dismissed because: (1) Murrell's complaint failed to allege intentional gender-based discrimination by the school district in the form of an official policy to discriminate and therefore failed to state an equal protection claim as a matter of law; (2) respondeat superior liability is not available under section 1983; and (3) the individual defendants are entitled to qualified immunity.¹⁴¹

The court concluded that Murrell's complaint failed to reveal any allegation that the school district engaged in an official policy or custom of deliberate indifference to sexual harassment, which is necessary to establish municipal or school district liability for sexual harassment under the Fourteenth Amendment.¹⁴² Additionally, the court found nothing in the complaint to indicate that either the principal or the teachers possessed the requisite policy-making authority for purposes of establishing municipal liability under § 1983, and held that the § 1983 claim against the school district was therefore properly dismissed.¹⁴³

138. *Id.* at 1248-49.

139. *Id.* at 1249.

140. *Id.* The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Ms. Murrell had also argued in her original complaint that the school district violated Ms. Jones's rights under the Due Process Clause of the Fourteenth Amendment, but did not revisit that claim on appeal and the Tenth Circuit deemed it waived. *Id.* at 1249 & n.5.

141. *Id.* at 1249.

142. *Id.* at 1249-50 (citing *Randle v. City of Aurora*, 69 F.3d 441, 446-50 (10th Cir. 1995)).

143. *Murrell*, 186 F.3d at 1250 (citing *Randle*, 69 F.3d at 447-50; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)).

Nevertheless, the court held that the claim was sufficient to state a case for individual liability against the principal and teachers under the Equal Protection Clause and that the principal and teachers were not entitled to qualified immunity.¹⁴⁴ By way of contrast to institutional liability, the court noted, a governmental official or supervisory employee may be held liable under section 1983 upon a showing of deliberate indifference to known sexual harassment.¹⁴⁵ Because Murrell's claim alleged that the principal and teachers knew about Doe's harassment of Jones and acquiesced in that conduct by refusing to reasonably respond to it, the court held that she properly stated a claim under section 1983 against the principal and teachers individually.¹⁴⁶

Although the three-judge panel's decision was unanimous as to the result, a concurring opinion by Judge Anderson suggested that some of the language in the court's Title IX analysis was unnecessarily broad, implying that a single teacher's inaction may in some circumstances be enough to trigger Title IX liability.¹⁴⁷ A single teacher's sexual misconduct was not enough to subject a recipient to liability in *Gebser*, Judge Anderson noted, and he suggested it is still an open question after *Davis* whether a single teacher's indifference is ever sufficient for recipient's liability, notwithstanding the *Davis* dissent's characterization of the opinion.¹⁴⁸

The decision thus held that Murrell had properly stated a claim against the school district under Title IX and against the principal and teachers individually under section 1983.

ANALYSIS

As one of the first cases in the United States to apply the princi-

144. *Id.* at 1251. The court noted that individual defendants in an action under § 1983 are entitled to qualified immunity unless it is demonstrated that their conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Further, the court stated that "it has been clearly established since 1992 that a person who exercises the state's supervisory authority may be held liable for consciously acquiescing in sexually harassing conduct by a non-state actor over whom the state actor has authority." *Id.* (quoting *Woodward v. City of Worland*, 977 F.2d 1392, 1401 (10th Cir. 1992) (internal quotation marks omitted)).

145. *Murrell*, 186 F.3d at 1250.

146. *Id.* at 1250-51.

147. *Id.* at 1252 (Anderson, J., concurring).

148. *Id.* (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 679-80 (Kennedy, J., dissenting) (postulating that a district might "be held liable for a teacher's failure to remedy peer harassment.")).

ples set forth by the Supreme Court in *Davis*, the *Murrell* case presents a natural opportunity to evaluate the legal and social policy effects of the *Davis* decision, at least as applied to a single Colorado school district.

Based on its application of the principles announced in *Davis*, *Murrell* was correctly decided. The Tenth Circuit's systematic and faithful adherence to the relevant standards established in *Davis* resulted in an outcome that served the interests of justice while strengthening the law governing sexual harassment in the schools. If the allegations in the *Murrell* complaint are true, Penelope Jones quite plainly was denied equal access to educational opportunities by the school's tolerance of sexual assaults against her by a fellow student. Title IX's purpose is to provide a remedy for victims of sexual discrimination by schools that receive federal funds, and by applying the standard of review set forth in *Davis*, the *Murrell* court determined that her allegations deserve to be litigated.

As already set forth, the dissent in *Davis* predicted horrific consequences for local schools, states' rights, and the federal-state balance of power.¹⁴⁹ Yet one of the most valuable aspects of the Tenth Circuit's decision in *Murrell* was that it provided an effective counterpoint to the concerns raised by the *Davis* dissent, providing the clear indication that if other courts apply *Davis* in the same manner in which it was applied by the Tenth Circuit, the dissent's concerns are needlessly alarmist and unfounded.

Each case will have to be measured against the *Davis* standard by its own set of facts, because the Court in *Davis* did not explicitly define the type of conduct that would qualify as sufficiently "severe, pervasive, and objectively offensive." The court merely cited hypothetical examples of overt, physical deprivation of access to school resources, while also noting that it would not be necessary to show "physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex."¹⁵⁰ Quite plainly, some cases may present close and difficult questions regarding the specific type of behavior that will demand a response from school officials to avoid the imposition of liability. And few cases are likely to involve such heinous conduct as that alleged in *Murrell*.

Nevertheless, a careful reading of *Murrell* suggests that the federal courts will have no trouble restraining themselves from imposing

149. See *supra* notes 106-19 and accompanying text.

150. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650-51 (1999).

unlimited Title IX liability on the public schools. The *Murrell* opinion made clear that it was not buying into the *Davis* dissent's fears about the potential for unlimited liability due to simple acts of teasing and name-calling among schoolchildren,¹⁵¹ and that the "deliberate indifference" standard of *Davis* "provides a high hurdle for plaintiffs."¹⁵² The *Murrell* court quickly put to rest one of the main concerns of the *Davis* dissent:

Davis also recognizes . . . that [d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are only available where the behavior is so severe, pervasive, and objectively offensive that it denies victims the equal access to education that Title IX is designed to protect.¹⁵³

Additionally, the *Murrell* court signaled its understanding that Title IX liability would accrue only if a school "remains deliberately indifferent to acts of harassment of which it has actual knowledge."¹⁵⁴ The court added, "[t]hat standard makes a school district liable only 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 no authority to respond to the harassment."¹⁵⁵

As already set forth, the *Davis* opinion was accompanied by alarmist predictions of unlimited liability for schools. Whether such fears have any real basis remains to be seen, but *Murrell* counters at least some of those concerns because it reinforces the point that plaintiffs must clear a high hurdle, by showing "behavior that is so serious, pervasive, and objectively offensive that it denies its victims equal access to education."¹⁵⁶ The type of harassment allegedly suffered by the victim in *Murrell* was so egregious that it easily meets this standard. It is difficult to imagine that Penelope Jones should have no Title IX remedy against her school if she can prove that school officials knew about the sexual assaults and not only did nothing to stop them, but also suspended her from attending classes. Quite plainly, the school's failure to reasonably respond denied her equal access to educational opportunities. Yet had

151. *Murrell*, 186 F.3d at 1246.

152. *Id.* at 1252 (Anderson, J., concurring).

153. *Id.* at 1246.

154. *Id.*

155. *Id.*

156. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

the *Davis* Court been swayed by the reasoning of the dissent, no Title IX remedy would have been available to Jones.

The *Davis* dissent's implication that *Davis* imposes liability on schools for the wrongdoing of its students¹⁵⁷ was explicitly rejected by the *Murrell* court. The *Murrell* court made clear that it understood the *Davis* majority's command that liability would not be imposed on a school and its officials for the actions of their students, but for *their own misconduct*, noting that school officials:

[A]llegedly had actual knowledge of Doe's conduct toward Jones from almost the moment it began to occur, and not only refused to remedy the harassment but actively participated in concealing it, including telling Ms. Jones not to inform her mother of Mr. Doe's actions and refusing to inform her mother themselves when presented with myriad opportunities to do so.¹⁵⁸

Indeed, in contrast to the *Davis* dissent's characterization of its opinion, the *Davis* majority made crystal clear that it was *not* imposing liability on a school for the actions of its students,¹⁵⁹ but that a school and individual school officials *can* be liable *for their own misconduct* that involves failing to take appropriate action when they have knowledge of student wrongdoing and the authority to deal with it. A school receiving federal funds is liable for subjecting its students to discrimination when it is "deliberately indifferent to known acts of student-on student sexual harassment and the harasser is under the school's disciplinary authority."¹⁶⁰ The *Davis* court took pains to note that Title IX does not require that funding recipients must "remedy" peer harassment. "On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable."¹⁶¹ *Murrell* was faithful even to this subtle point, when it noted that the principal and teachers were alleged to have known about "Mr. Doe's harassment of Ms. Jones and acquiesced in that conduct by refusing to reasonably respond to it."¹⁶²

The *Davis* dissent's statements about a school's control of its students being much more complicated and limited than the *Davis* majority acknowledged is likewise put to rest by *Murrell*. The *Murrell* court

157. *Id.* at 662 (Kennedy, J., dissenting).

158. *Murrell*, 186 F.3d at 1248.

159. *Davis*, 526 U.S. at 641.

160. *Id.* at 646-47.

161. *Id.* at 648-49.

162. *Murrell*, 186 F.3d at 1250.

scrupulously applied the control element of the *Davis* standard against the particular facts of its case, easily concluding that the school had control over Doe.¹⁶³

Perhaps the strongest feature of the *Murrell* decision was its straightforward presentation of the grossly outrageous circumstances of a nearly helpless victim who suffered so much at the hands of a fellow student as well as school officials. The *Davis* dissent was highly concerned that schools would be subject to suit in federal court for conduct that is an inescapable part of adolescent life.¹⁶⁴ Yet the type of brutal assaults allegedly suffered by the victim in *Murrell* were anything but an inescapable part of adolescence.

Murrell did not address the *Davis* dissent's concerns about erosion of the federal balance and federal intrusion into the operation of the schools. Yet concerns about abstract notions of federalism seem insignificant beside the immediate issues of surrounding an individual's right to be free from discrimination in federally funded educational institutions, issues which demanded and received appropriate judicial resolution in *Murrell*.

Murrell illustrates that the conduct at issue in genuine cases of student-on-student sexual harassment is far more serious than the routine irritations of adolescence and that the schools are obligated to respond appropriately. Responding appropriately, under the standard of *Davis v. Monroe County Board of Education*, means responding in a way that is not clearly unreasonable in light of the known circumstances.¹⁶⁵

Despite the content of the dissenting opinion in *Davis*, public school officials and the practitioners who advise them need not fear the prospect of unlimited Title IX liability for the actions of students over which they have only limited control. While it remains to be seen whether closer cases, with less egregious circumstances, will result in the imposition of liability under the *Davis* standard, both the tone and content of the *Murrell* decision suggest that plaintiffs who seek to recover under these theories must at the very least show powerful evidence of misconduct by schools. As the court observed in *Murrell*, this is a high hurdle for plaintiffs.¹⁶⁶ Some arguably deserving plaintiffs may be unable to recover. Yet maintaining this high hurdle may ultimately strengthen the legal principles involved by ensuring that *Davis* is less

163. *Id.* at 1247.

164. *Davis*, 529 U.S. at 675 (Kennedy, J., dissenting).

165. *Id.* at 648-49.

166. *Murrell*, 186 F.3d at 1252 (Anderson, J., concurring).

vulnerable to attack in future decisions that may seek to erode its central holding.

Rather than providing a fertile breeding ground for federal complaints about playground teasing, or that henceforth "Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away,"¹⁶⁷ *Davis* recognized simply that *deliberate indifference* to "severe, pervasive, and objectively offensive" sexual harassment by students can deprive other students of their right to equal education opportunities, and that no longer may school districts and school officials avoid liability under the theory that students are not agents of the school.¹⁶⁸

CONCLUSION

As applied in *Murrell*, *Davis* requires that prospective plaintiffs who bring student-on-student sexual harassment claims against schools under Title IX and § 1983 must continue to meet a very high standard. Only when school officials have actual knowledge of and were deliberately indifferent to harassment that is so severe, pervasive, and objectively offensive that it deprives a victim of access to the educational benefits of the school will liability be imposed.¹⁶⁹

Courts would do well to use the *Murrell* decision as a model for the correct application of the *Davis* standards in future cases of student-on-student sexual harassment under Title IX. If they do, they will have little difficulty weeding out non-meritorious claims while protecting the educational access rights of students.

SCOTT D. HAGEL

167. *Davis*, 529 U.S. at 686 (Kennedy, J., dissenting).

168. *Id.* at 645-46.

169. *Murrell*, 186 F.3d at 1246.