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TITLE IX SEXUAL HARASSMENT: "SHOULD HAVE KNOWN" IS NO LONGER SUFFICIENT PROOF: TWO CASES HOLDING ACTUAL KNOWLEDGE BY THE SCHOOL DISTRICT IS REQUIRED

Doe v University of Illinois: Student to Student Harassment
Gebser v Lago Vista Independent School District: Teacher to Student Harassment

Sexual harassment, whether it is from a teacher to a student or a student to a student, continues to present problems for public school districts. In March 1998, and then in June 1998, two court cases were decided which impact the legal liability of school districts in Illinois when it comes to the issue of Title IX sexual discrimination/harassment lawsuits. The first case, the Seventh Circuit decision of *Doe v University of Illinois*[1] decided on March 1998, dealt with the liability of school districts under Title IX for student-on-student sexual harassment. The second case, the United States Supreme Court decision of *Gebser v Lago Vista Independent School District*[2] decided on June 22, 1998, dealt with the liability of school districts under Title IX for teacher-to-student sexual harassment of which the district had no actual notice. In this article, both of these cases will be reviewed. Following the discussion of the cases, the implications for school administrators in the state of Illinois will be outlined.

Doe v University of Illinois

Facts of the Case

Jane Doe was a student at University High School in Urbana, Illinois. From January 1993 through early May 1994, Jane Doe was subjected to continuous verbal and physical sexual harassment from a self-styled "posse" of male students. This harassment included unwanted touching, epithets, and the deliberate exposure of one student's genitals in front of Doe.[3] Doe and her parents complained on numerous occasions to officials of the high school including two successive school Principals, a counselor, the Assistant Director, and the person appointed as intake officer for sexual

harassment complaints. After not receiving satisfaction, Doe and her parents complained to two Vice chancellors at the University of Illinois, two University police officials, the Ombudsperson, and the liaison person between the University and the high school. Even though University High School is a public school, the University of Illinois has responsibility for overseeing the school's administration.

The school officials did suspend two of the male students for ten days and transferred one student out of Doe's biology class. Doe, however, claimed:

> [T]hat the school and the University took little or no meaningful action to punish the sexual harassment or to prevent further occurrences. Indeed, the complaint alleges that some administrators suggested to Doe that she herself was to blame for the harassment, and that it was she who ought to adjust her behavior in order to make it stop. On one occasion, University High's Assistant Director told Doe and two of her friends to start acting like "normal females" and scolded them for making allegations of harassment that might injure some of the male students' futures.[4]

Doe's parents removed her from University High School, sent her to a private high school in another state, and then filed suit against the University of Illinois and various individual officials of University High and the University of Illinois.

Legal Arguments Presented

By the time this case was heard by the 7th Circuit Court of Appeals, the various arguments had been reduced to one complaint and one defense. Doe, the complainant, alleged that the University of Illinois had violated her rights under Title IX. In defense, the University of Illinois asserted that the Title IX claim was barred by the Eleventh Amendment to the United States Constitution because Title IX does not validly abrogate the States' (and thus the University's) sovereign immunity from suit. In less legal language, the University of Illinois

claimed that it could not be sued under Title IX because of sovereign immunity under Illinois law.

The Eleventh Amendment Immunity Issue: The wording of the Eleventh Amendment to the United States Constitution provides,

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The University interpreted this wording to mean that it was immune from any federal court suits under Title IX. Doe, however, argued that "the explicit text of the Amendment mentions only suits brought against a State by citizens of another State or of a foreign country"[5] not for all federal court suits. Therefore, Doe argued that immunity was not present in a federal question suit by a citizen of Illinois against the University of Illinois.

In coming to its conclusion, the court reaffirmed its earlier decision in *EEOC v Elrod*[6], stating that the appropriate question was whether the objectives of Title IX were within the power of Congress under the Fourteenth Amendment. The resounding answer was that such objectives were within the power of Congress.

> Protecting Americans against invidious discrimination of any sort, including that on the basis of sex, is a central function of the federal government. Prohibiting arbitrary, discriminatory government conduct is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment.[7]

The court went on to hold

> [T]hat Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment. For that reason, Congress validly abrogated the States' Eleventh Amendment immunity from suit when it passed the Equalization Act expressly making States subject to suits to enforce Title IX.[8]

The Title IX Issue: Once it became clear that the University of Illinois was not immune from a law suit under Title IX, the court turned to the issue being raised by Doe. Title IX provides that:

> [N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[9]

The court took notice that prior case law had already determined that sexual harassment of a student by an employee of the school in a federally funded educational program or activity can cause liability for the employer school under Title IX.[10] What the court was trying to determine in the case of Jane Doe, however, was whether the school district which received the federal funds was liable under Title IX for failing to take prompt, appropriate action to remedy known sexual harassment of one student by other students. What made this an even more difficult decision was that circuit courts across the country were split on this issue of liability.[11]

On the issue of liability, the court in the instant case held that:

> [A] Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place. . . The failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex, and so, once a plaintiff has alleged such failure, she has alleged the sort of intentional discrimination against which Title IX protects.[12]

Because of the disagreement as to the imposition of liability under Title IX, the court explained the rationale behind its decision.

First, the court, citing United States Supreme Court precedent in

Franklin v Gwinnett County Pub. Schs.[13], stated that Title IX automatically placed on schools the duty not to discriminate on the basis of gender. If and when a school violated that duty, the school could be held liable for that failure. Referring to the instant case, the court went on to say:

> School and University officials were unquestionably aware that Title IX subjected the school to liability for intentionally discriminating against or denying educational benefits to students on the basis of sex. There is also no question that the campaign of harassment that Doe alleges was sufficient to deny her the full benefit of her education and subject her to discrimination at the school. If, as alleged, school and University officials knew about the harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was not "on notice" that such failure could subject it to Title IX liability rings hollow.[14]

Consequently, it was the belief of the court that the University of Illinois was aware of its duty under Title IX. By failing to take appropriate and timely action to stop a practice of sexual harassment, especially when officials of the University had specific knowledge of the behavior of the offending students, did indeed open the University to legal liability under Title IX.

Second, the court turned to past interpretations of Title VII (usually reserved for employer/employee disputes) to help interpret the scope of Title IX. Under Title VII, case law had established that if an employer is aware that an employee is being harassed in the workplace because of his or her race, gender, religion, or national origin, and the employer does nothing to stop the harassment, the employer is liable for discrimination under Title VII.

> Translated to the Title IX setting, this standard would mean that the University is liable for harassment by its students, regardless of the fact that students are not agents of the school, so long as it knew or had reason to know about the harassment and could

> have prevented some or all of it by taking appropriate action in response.[15]

Moreover, the interpretation of Title IX stated above is in agreement with the interpretations of the statute by the Department of Education's Office of Civil Rights (OCR), the federal agency charged with enforcing Title IX. The OCR's final policy guidance on this matter states:

> [A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, 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.[16]

Although the OCR policy statement quoted above was not promulgated until after the harassment in the instant case had occurred, it did reflect longstanding OCR policy as shown in documents dating back to 1989. In the words of the court:

> It is clear, then, that Title VII case law and the interpretations of the responsible federal agency support the imposition of Title IX liability for the University's failure to respond promptly and appropriately to the sexual harassment of Jane Doe. Accordingly, this Court holds that Title IX does make schools liable for failure to respond promptly and appropriately to known student-on-student sexual harassment.[17]

The court went on to clarify that the prompt and appropriate action did not mean that the school was actually successful in completely eradicating sexual harassment from its campus. The measure of appropriateness is that the action chosen, from a range of possible responses, be "plausibly directed toward putting an end to the known harassment."[18]

In general terms, it should be

> enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.[19]

The final topic handled by the court was determining what constituted "notice" so as to trigger liability in the school district. After reviewing case law, the court held that actual knowledge of the harassment was the appropriate standard to be used. The court felt that actual knowledge, rather than "knew or should have known" was an appropriate limitation upon the liability to which suits based on student-to-student harassment subject schools.

> It will prevent schools from being blind-sided by liability based upon events that officials did not even know were taking place. All that is required is that they [potential plaintiffs] report the alleged harassment to responsible school officials, thus giving the school a chance to respond before it is hauled into court.[20]

Gebser et al. v Lago Vista Independent School District

Facts of the Case

Alida Star Gebser was an eighth-grade middle school student at Lago Vista Independent School District. In the spring of 1991, she joined a high school book discussion group led by Frank Waldrop, a senior high teacher in the school district. Waldrop often made sexually suggestive comments to the students in this book discussion group. When Gebser entered high school in the fall of 1991, she was assigned to courses taught by Waldrop each semester. Waldrop continued his practice of making sexually suggestive comments to the students. He, however, started to direct more and more of his comments to Gebser especially during times when they were alone in the room. In the spring 1992, Waldrop took the next step and initiated actual sexual contact with Gebser. The initial sexual contact included kissing and fondling. Over the next several months Waldrop engaged in sexual intercourse with Gebser on more than one occasion, often

during class time but never on school property.

Gebser did not report the relationship to school officials because "while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher."[21] In the fall of 1992, parents of two other students in Walrop's class complained about the sexual comments made by Waldop to the students during class time. When confronted, Waldrop "indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again."[22] Several months later, in early 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. He was subsequently terminated from his position with the district and his teaching license was revoked. Throughout this entire time period the Lago Vista district had neither a grievance procedure for sexual harassment nor a formal anti-harassment policy.

In November 1993, Gebser and her mother filed a Title IX and negligence suit against the Lago Vista School District and Waldrop. For legal reasons, the negligence portion of the suit was ultimately dropped. Only the Title IX complaint moved up through the courts. The Fifth Circuit Court of appeals held that:

> [S]chool districts are not liable in tort for teacher-student sexual harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.[23]

The United States Supreme Court granted certiorari to address the issue of Title IX liability.

Legal Arguments and Analysis

As stated above, Title IX provided that:

> no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.[24]

Gebser advanced two possible stan-

dards under which Lago Vista would be liable for Waldrop's conduct. First, she looked to a "Policy Guidance" issued by the Department of Education which held school district accountable for damages under Title IX where:

> [A] teacher is aided in carrying out the sexual harassment of students by his or her position of authority with the institution, irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware.[25]

Second, Gebser argued that the school district should be liable for damages under the legal theory of "constructive notice." In other words, the school district "should have known" about harassment but failed to uncover it and eliminate it.[26]

As a defense, the Lago Vista School District advanced the holdings of the Fifth Circuit cases of *Rosa H. v San Elizario Independent School District*[27] and *Canutillo Independent School District f Leija*.[28] The court in *Rosa H* had required actual notice by the school district before it could be found liable for damages under Title IX. Lago Vista had also been successful in the lower courts in showing that, not only did the school district not have actual notice of the harassment, it had insufficient knowledge to constitute even constructive notice.

After reviewing the legislative history of Title IX, as well as relevant case law, the United States Supreme Court concluded:

> [T]hat it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.[29]

The Court went on to discuss that unlimited recovery of damages under Title IX did not seem to have been intended by Congress when the law was passed. Thus, to allow individuals to recover damages absent actual notice and lack of action by the school district, would amount to allowing unlimited damages and would appear to be contrary to the intent of Congress. Moreover, actual notice must be given to an "ap-

propriate person." Under 20 U.S.C. Sec. 1982 an "appropriate person" is an official of the school district with:

> [A]uthority to take corrective action to end the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.[30]

The fact that Lago Vista did not have a sexual harassment policy and grievance procedure as required by law was not enough, in and of itself, to equal actual notice of Gebser's harassment by Waldrop. Nor did failure to promulgate such a policy and grievance procedure constitute discrimination under Title IX.

In the last paragraph of its opinion, the Supreme Court summarizes its stand both as regarding the instant case and Title IX in general:

> The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of recovery than an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under

state law or under 42 U.S.C. Sec. 1983. Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.[31]

Implications for Administrators

The most obvious outcome of both the Seventh Circuit decision in *Doe v University of Illinois* and *Gebser v Lago Vista Independent School* district is the need, in the state of Illinois, for actual notice to trigger liability under Title IX. Whether it is student-to-student harassment or teacher-to-student harassment, school districts in Illinois will no longer be held to the "knew or should have known" standard. Instead, either the school district knew about the harassment and was indifferent in its response, in which case liability would attach. Or the school district had no actual knowledge, in which case it will not be held monetarily liable for activity of which it was unaware.

These are the two clearest cut scenarios. However, what happens if the school district did have knowledge, had policies and procedures in place, followed those policies and procedures, and were still unsuccessful in eradicating the offensive behavior? The wording of *Doe* would appear to state that such behavior on behalf of the school district would still be sufficient to avoid liability under Title IX. The Court in *Gebser* supports this reasoning by requiring a two-prong test. The first prong requires actual knowledge of the harassment by an appropriate person. The Court defines an appropriate person as an official of the school district with authority to take corrective action to end the discrimination. The second prong requires deliberate indifference by the school district to the actual knowledge which it has received.

Two items are crucial to ensure that a district has done what it can to minimize legal liability under Title IX. First, districts should adopt board policy making it very clear that sexual discrimination and harassment in any form will not be tolerated by the district. This policy should cover employer-to-employee

harassment, employee-to-student harassment, student-to-employee harassment, and student-to-student harassment. It can be drafted by the board itself or, preferably, by the board's attorney. In addition, procedures to elaborate these policies and to provide a grievance procedure for alleged victims should be drafted. Again, these procedures can be drafted by administrators or by the board's attorney. Both the policy and procedures should be disseminated to everyone in the school community. This includes administration, faculty, staff, students, and parents. The district should hold assemblies to educate students on sexual harassment, and in-services to educate administrators, faculty and staff on sexual discrimination and harassment should be conducted annually.

Second, once the policies and procedures are in place, follow them! This seems like a very obvious suggestion, but often school districts either don't have the time or don't feel the need to follow through on every complaint; only those which seem "real" or "credible." Let the procedure determine "credibility." All complaints should be investigated and pursued if liability is to avoided. Once that complaint has been made, the school district now has actual knowledge. In *Gebser*, the fact that Lago Vista did not have a policy in place was not considered discrimination. However, if a policy had been in place and had not been followed, Lago Vista could have been considered to be showing "deliberate indifference." Avoid even the appearance of indifference by first, taking the time to enact the policies and procedures as required by law and second, by following those procedures when a complaint is made.

The combination of these two cases has done a great deal in clearing up the question of liability under Title IX for Illinois administrators. Because the *Gebser* case dealing with employee-to-student harassment is a United States Supreme Court case, it is now the standard for the entire country. *Doe v University of Illinois*, however, only is binding on those states in the Seventh Circuit, of which Illinois is one. Other circuits are not in agreement with the need for actual notice to avoid liability under Title IX for student-to-student harassment. The

important thing for Illinois administrators to remember is that under Title IX, actual knowledge is the requirement for liability to attach. "Should have known" is no longer sufficient proof.

References

[1] Doe v University of Illinois, 138 F.3d 653 (7th Cir. 1998).

[2] Gebser v Lago Vista Independent School District, No. 96-1866 (June 22, 1998).

[3] 138 F.3d at 654.

[4] 138 F.3d at 654.

[5] 138 F.3d at 655.

[6] EEOC v Elrod, 674 F.2d 601 (7th Cir. 1982).

[7] 138 F.3d at 657.

[8] 138 F.3d at 657, 658.

[9] 20 U.S.C. sec. 1681. The Civil Rights Remedies Equalization Act, 42 U.S.C. sec 2000d-7(a)(1), expressly made the States subject to suits to enforce the guarantees of Title IX.

[10] See Franklin v Gwinett County Pub. Schs., 503 U.S. 60; Smith v Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014 (7th Cir. 1997).

[11] The 11th Circuit in Davis V Monroe County Bd. Of Educ, 120 F.3d 1390 (1997) and the 5th Circuit in Rowinsky v Brian Indep. Sch. Dist., 80 F.3d 1006 (1996) declined to find liability. The 4th Circuit in Brzonkala v Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (1997) found liability if the school knew or should have known that the harassment was occurring.

[12]138 F.3d at 658, 659.

[13]Franklin v Gwinnett County Pub. Schs., 503 U.S. 60.

[14] 138 F.3d at 660.

[15] 138 F.3d at 663.

[16] 138 F.3d at 633.

[17] 138 F.3d at 664.

[18] 138 F.3d at 664.

[19] 138 F.3d at 664.

[20] 138 F.3d at 664.

[21] No. 96-1866 at 1.

[22] No. 96-1866 at 1.

[23] No. 96-1866 at 4.

[24] 20 U.S.C. Sec. 1681(a).

[25] No. 96-1866 at 5, quoting Dept. of Education, Office of Civil Rights Sexual Harassment Policy Guidance, 62 Fed. Reg. 12034, 12039 (1997).

[26] Under the law, notice can come in two different forms. Actual notice would have existed if the victim had reported the harassment to the school district. The school district would have actual knowledge that harassment was occurring. The legal theory of "constructive notice" is that because of the nature of the relationships among the people involved (i.e. the school district, the student, and the teacher), the school district in its supervisory capacity "should have known" that something improper was occurring and acted accordingly.

[27] Rosa H. v San Elizario Independent School Dist., 106 F.3d 648 (5th Cir. 1997).

[28] Canutillo Independent School Dist. V Leija, 101 F.3d 393 (5th Cir. 1996).

[29] No. 96-1866 at 6.

[30] No. 96-1866 at 8.

[31] No. 96-1866 at 9.

MUST PUBLIC SCHOOL DISTRICTS PROVIDE SIGN-LANGUAGE INTERPRETERS TO STUDENTS AT PRIVATE RELIGIOUS SCHOOLS?

Nieuwenhuis v Delavan-Drien School Dist. Bd.
996 F.Supp. 855 (E.D. Wis. 1998)

Facts of the Case

Matthew Nieuwenhuis was a resident student of the Delavan-Drien School District. He had a history of hearing and speech-related disabilities which classified him as disabled under the Individuals with Disabilities Education Act (IDEA). Matthew's first IEP meeting took place in March 1992. His original IEP called for full participation in a regular classroom with speech and language therapy twice a week. At the time that this IEP went into effect, Matthew was a student at Delavan Christian School. A second IEP was developed for the 1992-93 academic year during which time Matthew was home-schooled. A third IEP was developed for the 1993-94 academic year during which time he was again home-schooled. All three successive IEPs were extremely similar.

In December 1993, Matthew's IEP was modified to include an "FM-system" in the classroom and was enrolled in the Wisconsin School for the Deaf. Matthew's IEP for the 1994-95 academic year continue both the use of the FM-system and his enrollment in the Wisconsin School for the Deaf. Matthew's IEP for the 1995-96 academic year called for 50% regular education and 50% special education as well as therapy, use of a voice interpreter, use of an FM-system, use of a sign language interpreter, and transportation service. The Delavan-Drien district's placement offer split Matthew's time between the Wisconsin School for the Deaf and a public school in the Delavan-Drien district.[32] While the placement at the Wisconsin School for the Deaf was acceptable to Matthew's parents, the public school placement was not. Instead they wanted the Delavan-Drien School District to pay for a sign language interpreter while Matthew was in attendance at the Delavan Christian School.

The Delavan-Drien School District denied the request for fund-

ing for a sign language interpreter's services at the private sectarian school. This decision was based on the undisputed appropriateness of Matthew's IEP and the fact that neither the IDEA itself, nor the Supreme Court's interpretation of *Zobrest v Catalina Foothills School District*[33] required such funding. Moreover, there was a question as to whether such funding would be in violation of the Wisconsin Constitution's Establishment Clause. At this point a due process hearing was requested.

After a great deal of delay caused by the inability of the two parties to select a hearing officer, a due process hearing was finally held. The decision was issued in February 1996. The hearing officer found for the school district on all counts. In May 1996, Matthew's parents filed suit in federal district court.

Legal Arguments Presented

The lawsuit filed by Matthew's parents alleged five violations of the IDEA, and a violation of the First Amendment to the Constitution of the United States. The five violations of the IDEA included:

- That the Delavan-Drien School District's failure to provide a sign language interpreter at the private religious school denied Matthew a free and appropriate education;
- That the Delavan-Drien School District's failure to provide Matthew with an FM-system prior to August 1995 denied Matthew a free and appropriate education;
- That the Delavan-Drien School District failed to identify, locate, and evaluate Matthew as required by law;
- That the Delavan-Drien School District failed to insure that a due process hearing decision was rendered within the 45-day time period for such decisions; and
- That the Delavan-Drien School District's failure to provide Matthew a free and appropriate education has caused an incursion by the plaintiffs of legal fees and litigation costs.[34]

Court's Decision and Rationale

The court ruled for the Delavan-Drien School Distirct and dismissed the action filed by the parents. Both the constitutional and statutory aspects of the complaint were reviewed.

Free Exercise of Religion

The District Court chose to deal first with the constitutional issue which had been raised. Basically, Matthew's parents were claiming that the failure of the public schools to provide a sign language interpreter to their son, while he was a student at a private religious school, burdened their Free Exercise of religion and therefore was unconstitutional under the First Amendment. The court did not agree with this contention, stating very clearly that the refusal of a public school to extend benefits available in the public school to students in a private school does not burden religious exercise.

> The fact that Matthew's parents, in opting to send Matthew to a private school, have also opted out of some of the benefits available at a public school, does not violate the Free Exercise Clause.[35]

The second reason cited by the court to show the failure of the Free Exercise claim was that the public school's refusal to provide a sign language interpreter did not "substantially burden" the religious practices of the family. The court stated:

> In the case at bar, even if the court characterizes DDSD's [Delevan-Drien School District] decision to provide no interpreter at DCS as a "burden," the burden is placed on the act of sending a child to a private school, not on a religious practice. Further, the facts demonstrate, on a practical level, the absence of a forbidden burden. First, Matthew is, in fact, enjoying a private education at DCS [Delavan Christian School]. Second, Matthew's attendance for part of the school day at WSD [Wisconsin School for the Deaf], a public institution, undermines the assertion that

> broader, publicly funded benefits at public school impinge on the religious practices of Matthew and his family.
>
> Finally, the court found that the case of *Zobrest v Catalina Foothills Sch. Dist.*, which held that the public provision of a sign language interpreter for use in a private sectarian school did not violate the Establishment Clause of the United States Constitution, did not require such provisions. For those reasons, the court dismissed the plaintiff's Free Exercise claim.

The IDEA

In handling the allegations of misconduct under the IDEA, the court simply went through the five points and made its decision. Regarding the first allegation regarding the failure to provide an interpreter at the private religious school, the court found that the IDEA did not require the public school district to provide a sign language interpreter at Matthew's private religious school.

> Taken as a whole, the regulatory scheme reflects the fact that under the IDEA, when the parent of an eligible child opts out of a public school where a free and appropriate public education could provided, that parent is opting for a lesser entitlement.[36]

This count of the plaintiff's petition was dismissed by the court.

The second allegation was that the Delavan-Drien School District violated the IDEA when it failed to provide a FM-system to Matthew in a timely manner. The court dismissed this count simply because no evidence existed which suggested that any failure of the public school district to provide Matthew with the use of an FM-system before August 1995 denied Matthew of a free and appropriate education. The third allegation, that there was a failure to locate and identify Matthew in 1990 was dismissed as untimely.

The fourth allegation was that there was failure to commence a due process hearing within 45 days of the request for one. The court gave weight to the fact that a request for an extension had been appropriately and timely filed and granted. That

being the case, along with the fact that Matthew's parents failed to present any evidence to the contrary, the court dismissed the fourth count. The fifth allegation regarding attorney's fees was ruled moot and also dismissed.

Implications for Administrators

This case underscores the need of school districts to be very careful about complete compliance with state and federal special education laws. Special education is governed by a myriad of complex laws and regulations, all of which must be followed in scrupulous detail. Sloppy or inarticulate record keeping has no place in special education programs.

Regarding the providing of special education services for students enrolled in private religious schools, the court made a correct interpretation of the *Zobrest* case. The Court in *Zobrest* stated that the Establishment Clause of the First Amendment to the United States Constitution did not forbid the providing of a sign language interpreter in private religious schools. This did not mean that the providing of such a service was mandatory. In addition, nothing in the IDEA requires such provision either. As long as the public school district can provide the free and appropriate education, if a parent chooses voluntarily to send that child to a private school, sectarian or secular, the public school is not obligated to provide that same free and appropriate education at the private school.

References

[1] 996 F.Supp. at 861.

[2] Zobrest v Catalina Foothills School Dist., 509 U.S. 1, 113 S.Ct. 2462 (1993).

[3] 996 F.Supp. at 862.

[4] 996 F.Supp. at 863.

[5] 996 F.Supp. at 864.

WHO IS RESPONSIBLE FOR ENSURING A LEAST RESTRICTIVE ENVIRONMENT UNDER THE IDEA?

Corey H. v Board of Educ. of City of Chicago
995 F.Supp. 900 (N.D. Ill. 1998)

Facts of the Case

In 1992, several Chicago public school students with disabilities and their parents, on behalf of themselves and a putative class, filed a lawsuit against the City of Chicago Board of Education, its Chief Executive Officer, and the Illinois State Board of Education (ISBE) and its Superintendent. Their complaint was that the City of Chicago and the ISBE were not educating children with disabilities in the least restrictive environment as required by both state and federal law. The practice in Chicago was to place children using the categorical system of education. Using this method, students with disabilities were placed according to the categories, or labels, of their disabilities; that is, a child's program and educational location were determined by the type of disability the child had.[37] Between the time of the filing of the lawsuit and late 1996, the parties were engaged in extensive settlement talks, which even consisted of bringing in outside experts to help resolve the conflict. Those talks broke down in late 1996 and a court date was set for October 1997.

Prior to going to trial, the City of Chicago did reach a settlement with the students and parents. Under the settlement, the City of Chicago agreed that over an eight year period it would take appropriate action designed to bring between 33% and 50% of its 553 schools into compliance with the IDEA's least restrictive environment mandate. The total cost of the settlement would be approximately $24 million.

A settlement was not able to be reached between the students, their parents and the ISBE. The case against the ISBE went to trial as scheduled. Throughout the trial the ISBE continued to deny any responsibility for the mistakes made by the City of Chicago in the placing of its special education students.

Decision and Rationale of the Court

The court found for the parents and against the ISBE, declaring the state had been, and continued to be violating the least restrictive environment requirements of the Individuals with Disabilities Education Act (IDEA). The court enjoined the ISBE from any future violations. In making this determination, the court discussed the legislative history and intent of the IDEA, concluding that the "IDEA and its predecessor statute were intended by Congress to address and correct institutional segregation of children with disabilities."[38] Despite the legal mandates of these federal laws, the City of Chicago continued to ignore individual need when placing students. By its own admission, the City of Chicago failed to find the least restrictive placement for the overwhelming majority of its disabled students.

The liability of ISBE for the failures in the City of Chicago was established by the evidence presented at trial.

Prior to the 1990 ISBE regulations – contrary to the clear directives of the IDEA – Illinois regulations required the local education agency to make least restrictive environment placement decisions based on the child's category of disability at the multidisciplinary conference rather than at the IEP meeting. The legacy of this misguided and unlawful state regulation persists today.[39]

The ISBE failed to perform its monitoring and enforcement function as required by the IDEA and the regulations of the Department of Education. Although there was evidence that the ISBE, from time to time, identified failures by the Chicago Board of Education to comply with the least restrictive environment mandate, the evidence demonstrated that the State took few if any actions to "ensure" that those failures were corrected, and in fact consciously allowed Chicago to continue violating the mandate.[40]

Federal regulations required that the ISBE carry out activities to ensure that school personnel were aware and capable of implementing the least restrictive environment mandate. Although the ISBE operated two programs that addressed training issues, those programs did

not come close to meeting the ISBE's responsibility to "ensure" that teachers and administrators in Chicago were properly trained.[41]

Antiquated certification categories have combined with inadequate training and teacher education in Illinois (geared to the certification categories) impermissibly to perpetuate categorical segregation of children with disabilities.[42]

The ISBE's current funding formula totally contradicts the LRE mandate by perpetuating segregated education of children with disabilities.[43]

The ISBE continued to the present to deny the seriousness of the Chicago Board of Education's noncompliance with the least restrictive environment mandate, and continued to deny its own clear statutory obligations to ensure compliance by the City.[44]

The ISBE's failure to fulfill its responsibilities to ensure that children with disabilities were educated in the least restrictive environment was reflected in the statistical comparison of Illinois to national averages.[45]

The ISBE raised various defenses to support its denial of responsibility for Chicago's failure to comply with the least restrictive environment mandate update. First, the ISBE argued that it could not be responsible for the day-to-day actions of all of the schools in the state. The ISBE maintained that it was responsible only for "oversight and general supervision" by making sure that the Chicago public school had special education regulations, procedures and monitoring requirements that complied with the least restrictive environment guidelines.[46] Citing both case and statutory law, the court decided that once the ISBE had accepted federal funding under IDEA, it became responsible to ensure compliance with the least restrictive environment mandate by all local schools in the state.

The ISBE's second defense centered around its monitoring efforts. The ISBE contended that its monitoring system did not violate the IDEA because the IDEA failed to provide any guidance as to how the ISBE should monitor for least restrictive environment compliance and that the ISBE's monitoring plan was adequate.[47] The court, however, was not interested in the monitoring attempts made, but rather with the

outcomes of that monitoring. Because Chicago was not in compliance with the least restrictive environment mandate, that was proof that the ISBE's monitoring was inadequate, thus not in compliance with the requirements of the IDEA.

The third defense offered by the ISBE was that the plaintiffs were attempting to "second-guess" its actions and those of the Office of Special Education Programs which had approved the ISBE's monitoring plan as required by the IDEA. The court summarily dismissed this defense both by interpreting the language of the IDEA and because the ISBE failed to provide evidence to support its argument. Under the wording of the IDEA, while the Office of Special Education Programs is required to approve the actions of the ISBE, the ISBE can also be brought under the scrutiny of the courts and the parents of the children who fall under the IDEA.

After discussing the defenses proffered by the ISBE, the court held that the ISBE was in violation of the IDEA and directed corrective action. The court directed the ISBE to submit a comprehensive compliance plan to the court on or before April 17, 1998 which would address the correction of the violations noted in the court's opinion.[48]

Implication for Administrators

While this case only dealt with the ISBE and the Chicago school system, it can be used as a learning tool for school districts throughout Illinois. The disposition of this case leaves little doubt that courts take compliance with the IDEA very seriously. Chicago saved itself by settling prior to trial. That, however, does not mean that sole liability lay with the ISBE. After all, it was the local school district which was not in compliance with the least restrictive education mandate.

School administrators at all levels should be well versed on the bureaucratic mandates of the IDEA and how it is being handled in his or her school. Even if the district relies on a special education cooperative or consortium, this case makes it very clear that liability for lack of compliance will be found at all levels. It will not be confined just to the cooperative or consortium. Therefore, it is incumbent upon the local school district to ensure that

both the letter and intent of the IDEA is being followed for students within its care, regardless of where that care is being provided.

References

[1] 995 F.Supp. at 908.

[2] 995 F.Supp. at 907.

[3] 995 F.Supp. at 909.

[4] 995 F.Supp. at 910.

[5] 995 F.Supp. at 910.

[6] 995 F.Supp. at 911.

[7] 995 F.Supp. at 911.

[8] 995 F.Supp. at 911.

[9] 995 F.Supp. at 912.

[10] 995 F.Supp. at 912.

[11] 995 F.Supp. at 915.

[12] 995 F.Supp. at 918.

WHEN ARE ASSISTANT PRINCIPALS MANAGERIAL EMPLOYEES?

Chicago Teachers Union, IFT/AFT v IELRB
231 Ill. Dec. 213, 695 N.E.2d 1332 (Ill. App. 1 Dist. 1998)

Facts of the Case

State law in Illinois, which became effective in May 1995, bars Chicago public school assistant principals from membership in the teachers' collective bargaining unit. Assistant principals, however, had been included in the teachers' bargaining unit under the collective bargaining agreement which took effect September 1, 1995. The union filed a petition with the Illinois Education Labor Relation Board (IELRB) to ask that it be recognized as the bargaining agent for Chicago assistant principals. The administrative law judge dismissed the suit, deciding that assistant principals were managerial employees, thus ineligible for membership in the teachers' union. The union immediately filed suit.

Legal Arguments

In its petition to the court, the union made five arguments:

- That the recently enacted law stating that assistant principals could not be part of the teachers' bargaining unit was unconstitutional under the Illinois Constitution.
- That the same law had violated the principals' constitutional right of freedom of association under the United States Constitution.
- That the same law violated the principle of separation of powers under the Illinois Constitution.
- That assistant principals should be recognized as a separate unit covered by the existing contract.
- That the IELRB erred in determining that assistant principals were managerial employees.

The Board of Education filed a cross-appeal with the following two arguments:

- That the IELRB erred in finding that assistant principals were not supervisors.
- That the IELRB erred in finding that former assistant principals who were now full-time teachers, but bore the title of "assistant principal" and received assistant principal stipends, could remain in the teachers' bargaining unit.[49]

Decision and Rationale of the Court

On the topic of the constitutionality of the governing state law, the court declined legal review. As a normal course of action, courts will only address constitutional challenges if the case in front of them can be decided no other way. In the instant case, the court was able to avoid the constitutional question by turning to the status of assistant principals. The court decided that the IELRB had the power to determine whether assistant principals were managerial employees, the case was decided on that issue.

The court affirmed the IELRB's decision that assistant principals were managerial employees thereby excluded from the teachers' bargaining unit. Section 2(o) of the Illinois Educational Labor Relations Act defines "managerial employee" as:

> an individual who is engaged predominately in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.[50]

To find a more detailed definition of "executive and managerial functions" the court looked to prior Illinois case law. It relied on the definition set forth by the Illinois Supreme Court in the case of *Office of the Cook County State's Attorney v Illinois Local Labor Relations Board*.[51]

> Managerial status is not limited to those at the very highest level of the governmental entity, for it is enough if the functions performed by the employee sufficiently align

> him with management such that the employees should not be in a position requiring them to divide their loyalty to the administration . . . with their loyalty to an exclusive collective-bargaining representative.[52]

The court took that definition and applied it to assistant principals.

> Assistant principals are like the assistant State's Attorneys in that both assist management in carrying out managerial functions. This responsibility "closely aligns" assistant principals with management in the same way assistant State's Attorneys are aligned with management. The IELRB's conclusion that assistant principals are "managerial employees" is not against the manifest weight of the evidence.[53]

The court next turned to address the questions of whether employees who teach full-time, yet carry the administrative title of assistant principal and receive an assistant principal's stipend are also managerial employees. The court concurred with the decision of the IELRB which did not define such employees as managerial. The rationale of both the IELRB and the court was that "where an assistant principal is assigned the same duties as a teacher, and has not been assigned managerial tasks, that employee is not authorized to engage in managerial functions or assist the principal in a way that aligns professional interests."[54] The court was somewhat confused as to why such individuals continue to carry the title and receive the stipend of an assistant principal but stated that ultimately such decision was up to the Board of Education, not the IELRB.

Implications for Administrators

Two important concepts arose from this case. First, it was clearly reiterated that a court will not overturn an agency decision of the IELRB unless it is against the manifest weight of the evidence. Although the court is not bound by the decision of the IELRB, it will give weight and deference to the interpretation of a statute by the agency charged with its administra-

tion and enforcement. It will be assumed that the agency brings special experience and expertise to the issue. Consequently, administrators should be very careful about attempting to obtain a court reversal of an IELRB decision. Otherwise the administrators are essentially throwing away the money of the school district on a lost cause.

The second concept is that of a "managerial employee." The definition of a managerial employee has been made clear by the decision of the IELRB. That definition has been affirmed by the court. Assistant principals who have actual managerial duties, and are not just full-time teachers on whom a title has been hung, are managerial employees and ineligible for inclusion in the collective bargaining unit. On the other hand, full-time teachers, regardless of the title they bear, are teachers and are included in the collective bargaining unit.

References

[1] 695 N.E.2d at 1334.

[2] 115 ILCS 5/2(o) (West 1996).

[3] Office of the Cook County State's Attorney v Illinois Local Labor Relations Board, 166 Ill.2d 296, 209 Ill.Dec. 761, 652 N.E.2d 301 (1995).

[4] 695 N.E.2d at 1337, quoting 166 Ill.2d at 301-02.

[6] 695 N.E.2d at 1337-1338.

SHERRARD COMMUNITY UNIT SCHOOL V IELRB 231 ILL.DEC. 537, 696 N.E.2D 833 (ILL.APP. 4 DIST. 1998)

Facts of the Case

The Sherrard Community Unit School District No. 200 formulated a plan to realign student attendance at four grade schools in the district. As a result of this realignment, 14 teachers were reassigned. One of the teachers was allowed to appear before the Board of Education and persuade the Board to leave her at her original school and reassign a different teacher. This agreement was made in closed session. The union was not involved with this negotiation and subsequently filed an unfair labor practice charge against the district with the IELRB.

The IELRB investigated and concluded that the district had directly negotiated with one employee concerning a mandatory subject of bargaining (her involuntary transfer) which was in violation of the Illinois Labor Relations Act. Eight months later, however, an administrative law judge for the IELRB entered an order that the district had not violated the ILRA. Seven months after that, the IELRB rejected the order of the administrative law judge and reinstated its decision stating the district was in violation. The district ultimately took the matter to court.

Decision and Rationale of the Court

There were many facts and points of law about which the Association, the District, the Administrative Law Judge and the IELRB were in agreement. One such issue was that reassignment of teachers was considered a "condition of employment" under the ILRA and was also a matter of inherent managerial policy. The administrative law judge ruled that reassignment was a matter of managerial prerogative, therefore not a mandatory subject of bargaining. The IELRB, in its decision, did not reach the general question as to whether reassignment of

teachers was a mandatory subject of bargaining. Instead, the IELRB found that

> [C]ollective bargaining was required because the fact that bargaining took place and easily resulted in a change in plans – granting relief to an employee – proved that here bargaining did not impose an undue burden on the District's authority.[55]

The court agreed with the decision of the IELRB, stating that bargaining did occur between the individual employee and the board. Further it upheld the decision of the IELRB that such action was an unfair labor practice and that the matter must be settled through bargaining that included the Association.

Implications for Administrators

First, this case stands as a reminder that when state school law and the Illinois Labor Relations Act are in conflict, the ILRA shall prevail.

> "Section 17 of the [Illinois Labor Relations] Act states that in case of any conflict between the provisions of this Act and any other law, executive order or administrative regulation, the provisions of this Act shall prevail and control.[56]

The second important concept was articulated quite well by the court at the end of its opinion:

> Perhaps one lesson that is learned from this case is in close cases . . . an educational employer that opts to bargain individually with an employee does so at its peril because the result of the bargaining, as here, is likely to show that bargaining was not unduly burdensome to the educational employer, thus requiring the bargaining to be done with the duly established representative of the employees.[57]

References

[1] 696 N.E.2d at 836.

[2] 696 N.E.2d at 838 quoting 115 ILCS 5/17 (West 1994).

[3] 696 N.E.2d at 839.

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