LAW AND POLICY 2000:
Peer Harassment after the *Davis* Case

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The Discussion Format

This presentation will be conducted in a discussion format, comparable to interviews with Professor Kaplin by Gary Pavela for Synthesis: Law and Policy in Higher Education.

The presentation is not scripted. It is designed to be a wide-ranging, conversational, overview of key law and policy issues pertinent to peer sexual harassment as well as student harassment based upon other characteristics such as race or sexual orientation. Related issues of campus civility will also be addressed.

Audience participation is encouraged. Gary Pavela will stop at various points in the discussion to solicit relevant questions and comments from the audience. Please direct your questions or comments to the issue being addressed at the time.

Both Professor Kaplin and Gary Pavela will be available immediately after the presentation for individual questions.

The Law Before *Gebser* and *Davis* Cases*

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the United States Supreme Court determined that a student could sue a school district for money damages under Title IX for a teacher's alleged sexual harassment of that student. But *Franklin* did not definitively establish a standard of liability for determining when a school district or other educational institution would be liable for harassment perpetrated by its teachers and other employees. Moreover, since *Franklin* was a case regarding faculty harassment, it did not address issues concerning an educational institution's potential liability for a student's sexual harassment of another student.

Both types of liability questions, however, were extensively discussed in the lower courts after the *Franklin* case. No pattern emerged; different courts took vastly different approaches in determining when liability would accrue to an educational institution for the actions of its teachers, employees, or students. At one extreme, some courts determined that an educational institution could be vicariously liable on the basis of common law agency principles of *respondeat superior*; see, e.g.,

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* Expanded versions of the material in this section and the following two sections will appear in the Year 2000 Supplement to Kaplin & Lee, *The Law of Higher Education* (3d ed. 1995), and in an article by Professor Kaplin tentatively scheduled to be published in the *Journal of College and University Law* later this year. Copyright © 1999 by William A. Kaplin.

Kracunas and Pallett v. Iona College, 119 F.3d 80 (2d Cir. 1997)(faculty harassment); or by a "knew or should have known" standard; see, e.g., *Doe v. Petaluma School District*, 949 F. Supp. 1415 (N.D. Calif. 1996)(peer harassment). At the other extreme, some courts determined that an educational institution should be liable only if it treated complaints of female students differently from those of male students; see, e.g., *Rowinsky v. Bryan Independent School District,* 80 F. 3d 1006 (5th Cir. 1996) (peer harassment), or should not be liable at all (see, e.g., *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997)(*en banc*)(peer harassment)). In the middle ground, other courts held that an educational institution should be liable only in certain narrow circumstances where it had notice of the harassment and failed to respond *(Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997)(faculty harassment)); *Doe v. University of Illinois,* 138 F.3d 653 (7th Cir. 1998)(peer harassment).

The U.S. Department of Education also weighed in on these liability issues in the OCR's *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* 62 Fed. Reg. 12034 (March 13, 1997). Regarding teacher or employee harassment of students, the *Guidance* states:

> A school will . . . be liable for hostile environment sexual harassment by its employees . . . if the employee - - (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on

> behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution . . . . If the school fails to take immediate and appropriate steps to remedy known harassment, then the school will be liable under Title IX [62 Fed. Reg. at 12039].

Regarding peer harassment, the *Guidance* states that schools (including colleges) may be liable under Title IX for harassment of a student by peers if "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action" (62 Fed. Reg. 12039).

The U. S. Supreme Court has now resolved the disagreements among the courts on liability principles for Title IX harassment cases, and in the process has declined to adopt the standards in the OCR Guidance. In *Gebser v. Lago Vista Independent School District*, 118 S.Ct. 1989 (1998), the Court considered an educational institution's liability for a faculty member's harassment of a student. One year later, in *Davis v. Monroe County Board of Education,* 119 S.Ct. 1661 (1999), the Court addressed an educational institution's liability for peer sexual harassment under Title IX. In each case the student-plaintiff prevailed by a narrow 5-4 vote. Justice O'Connor authored both majority opinions, but the justices that joined her in *Gebser* dissented in *Davis.* Both cases adopt variants of the actual notice approach to

liability. Although both cases concerned elementary/secondary education, the principles established in the cases apply to higher education as well.

The *Gebser* Case

In the *Gebser* case, the U.S. Supreme Court determined the extent to which "a school district may be held liable in damages in an implied right of action under Title IX . . . for the sexual harassment of a student by one of the district's teachers." In a 5-4 decision, the Court majority held that Title IX damages liability is not based upon common law agency principles of *respondeat superior* nor upon principles of constructive notice. Distinguishing Title IX from Title VII, which utilizes such principles, the Court instead held that students may not recover damages from a school district under Title IX for teacher-student sexual harassment "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct" (118 S. Ct. at 1993). According to the Court, "[i]t 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" (118 S. Ct. at 1997). Applying these principles to the student's claim, the Supreme Court determined that the student had not met the standards. The Court therefore affirmed the lower court's award of summary judgment to the school district.

In reaching its decision in *Gebser*, the Court acknowledged that the school district had not implemented any sexual harassment policy or any grievance procedure for implementing such a policy:

> Petitioners focus primarily on Lago Vista's asserted failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims. They point to Department of Education regulations requiring each funding recipient to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints, 34 C.F.R. § 106.8(b) (1997), and to notify students and others "that it does not discriminate on the basis of sex in the educational programs or activities which it operates," §106.9(a). Lago Vista's alleged failure to comply with the regulations, however, does not establish the requisite actual notice and deliberate indifference. And in any event, the failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's non-discrimination mandate, 20 U.S.C. § 1982, even if those requirements do not purport to represent a definition of discrimination under the statute. *E.g., Grove City,* 465 U.S., at 574-575, 104 S. Ct., at 1221-1222 (permitting administrative enforcement of regulation requiring college to execute an "Assurance of Compliance" with Title IX). We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of

those sorts of administrative requirements [118 S.Ct. at _____].

Nonetheless, the Court held that the school district's failure in this regard was not evidence of "actual notice and deliberate indifference," nor did this failure "itself constitute 'discrimination' under Title IX" (118 S. Ct. at 2000).

The *Davis* Case

In the *Davis* case, the Court determined the extent to which a school district may be held liable in damages under Title IX for peer sexual harassment (one student's harassment of another student). In another 5-4 decision, a different majority held that Title IX damages liability for peer harassment is based upon the same actual notice and deliberate indifference standards that govern liability for teacher harassment under *Gebser*:

> We consider here whether the misconduct identified in *Gebser* - - deliberate indifference to known acts of harassment - - amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does [119 S. Ct. at _____].

In light of the arguments that had been made in the lower courts, and in light of the Court's prior decision in *Gebser*, there were only two alternatives available to the *Davis* court: (1) recognize a peer harassment cause of action under Title IX

parallel to the student/teacher cause of action recognized in *Gebser*; or (2) completely reject any possible Title IX cause of action for peer harassment. The Court was split between these two alternatives, and the former prevailed by only one vote. Had there been a one-vote shift, there would have been no judicial recourse at all under Title IX for students subjected to peer harassment on school grounds during the school day, no matter how severe the harassment and no matter now clear the knowledge of school officials.

The Court took considerable pains to develop the "limited circumstances" that must exist before a school district will be liable for peer sexual harassment. First, the fund recipient must have "substantial control over both the harasser and the context in which the known harassment occurs." Second, "the recipient's response to the harassment or lack thereof . . . [must be] clearly unreasonable in light of the known circumstances." Third, the sexual harassment must be "so severe, pervasive, and objectively offensive, that it denies its victims the equal access to education that Title IX is designed to protect." These three factors, in effect, are added to the two factors from *Gebser* (actual notice and deliberate indifference) to create a five-part test of an educational entity's liability for peer sexual harassment.

The *Davis* test, therefore, is based upon but is not identical to the test in *Gebser*. The Court has added additional considerations into the *Davis* analysis, most

of which would tend to make it more difficult for a harassment victim to establish a claim of peer harassment than a claim of teacher harassment. As the Court noted near the end of its opinion in *Davis*,

> The fact that it was a teacher who engaged in harassment in . . . *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment [119 S.Ct. at _____].

The *Davis* Court's emphasis on *control* also suggests that student harassment claims will be more difficult to establish in the higher education setting than in the elementary-secondary setting. Any court that follows *Davis* will give close attention to the issue of control. The O'Connor opinion indicates that both control over the harasser and "control over the context in which the harassment occurs" are keys to liability. But it is important to note that the Davis case involved elementary education, and O'Connor's reasoning about control is crafted to fit that context. O'Connor acknowledges that "a university [would not] be expected to exercise the same degree of control over its students" as would elementary schools (119 S.Ct. at _____). It should follow that colleges and universities, in general, will have less risk exposure for peer harassment under Title IX because they exert less control over

students and over the educational environment than do elementary and secondary schools.

In her opinion for the majority in *Davis*, Justice O'Connor tries hard to provide guidance on what behavior constitutes sexual harassment - - in particular on how to distinguish peer harassment from mere "teasing." She is only modestly successful. She makes important conceptual distinctions (e.g., between the misconduct of the harasser and that of school officials) and articulates useful definitional guidelines (e.g., the harassment must be severe, pervasive, and objectively offensive). But the distinctions and guidelines are somewhat amorphous and abstract -- a point that the dissent emphasizes. On the other hand, we should not have expected more than modest guidance from the Court. The issues are difficult and contextual, and courts are equipped to provide only incremental guidance on a case-by-case basis. Other guidance to supplement that of the courts must come from other sources -- Congress, the U.S. Department of Education, and, in particular, the colleges and universities themselves. Through the process of devising and explicating their own internal definitions and policies, college and universities can provide more pointed guidance adapted to the circumstances of their own campuses.

In its processes for making and applying harassment policies, institutions should consider mediation programs, education programs for students as well as

student affairs professionals, counseling programs for students, enhanced internal guidelines on sexual harassment (with specific examples of harassment), and increased use of grievance procedures. Through such responses, institutions can make considerable progress in discouraging sexual harassment problems from arising, handling those problems that do arise in ways that alleviate the urge to litigate in the courts, and constructing suitable defenses should judicial claims be filed. Good team work between administrators and college counsel would be necessary to effectuate these preventive planning initiatives (see Kaplin & Lee, *The Law of Higher Education,* sec. 1.7 (3d ed. 1995)).

Finally, the issue of sexual harassment (and other forms of unlawful harassment) can be a starting point for ethical development programing on college campuses. See Pavela: "Fifteen Principles for the Design of Ethical Development Programs (www.collegepubs.com) ("Reference Desk") ("Student Ethical Development Programming").

[] *Distinguish legal requirements from ethical obligations.* Colleges are awash in programs designed to alert students to their legal responsibilities, usually involving substance abuse, sexual harassment, sexual assault, and misuse of computer facilities. There's a growing danger that legal

analysis will be substituted for ethical judgment. Generally, the law should be regarded as a floor, not a ceiling. Whenever legal requirements are identified, *ethical* issues should also be raised, preferably by role-playing, or other devices designed to elicit sympathy or understanding.