A LEGISLATIVE AND JUDICIAL ANALYSIS OF SEXUAL RELATIONSHIPS BETWEEN AMERICAN SECONDARY STUDENTS AND THEIR TEACHERS

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A LEGISLATIVE AND JUDICIAL ANALYSIS OF SEXUAL RELATIONSHIPS BETWEEN AMERICAN SECONDARY STUDENTS AND THEIR TEACHERS (318 pp.)

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The purpose of this study is to analyze legislation and case law regarding sexual relationships between American secondary school students and their teachers. Chapter one provides an introduction to the study, and chapter two reviews relevant literature. In chapter three, codes of criminal and administrative law are reviewed to determine which sexual relationships between educators and students are permissible and prohibited in each state. Federal statutes, including Title IX of the Rehabilitation Act of 1972 and § 1983 of Title 42 of the United States Code, are reviewed to determine how federal law applies to sexual relationships between teachers and students.

Next, case law is reviewed to determine how state and federal courts have ruled regarding sexual relationships between teachers and students. While the primary focus of the dissertation is sexual relationships between teachers and students, case law related to sexual relationships between students and other school employees is reviewed as well. In chapter four, the dissertation reviews state and federal court cases in which employees terminated for engaging in sexual relationships with students filed suit against their former employers or state boards of education alleging wrongful termination or other

adverse employment action. In chapter five, the dissertation reviews state and federal court cases in which students who engaged in sexual relationships with educators filed suit alleging various rights violations by the school district.

In chapter six the study analyzes the trends of the judicial rulings. Generally, in wrongful termination claims, courts tended to support schools if they provided due process to terminated employees. In student suits against school districts alleging Title IX or § 1983 violations, courts tended to support schools that did not display deliberate indifference to actual knowledge of sexual harassment or display a custom or policy that promotes harassment.

Finally, the study provides a primer for school administrators. The primer discusses warning signs of sexual harassment, offers tips for school administrators to prevent sexual relationships between employees and students, and gives guidance to school administrators to respond properly when such relationships come to light.

To the victims of childhood sexual abuse: understand that you are not alone and you are not to blame. I hope you find the help you need to recover.

To school employees and other adults who work with children every day: never underestimate your responsibility and power to keep kids safe.

THE SECOND FISHERMAN: A PARABLE

a fisherman on a river bank
at the bottom of a hill
saw a drowning child

he jumped in to save him

soon there was another
and another and
he was quickly overwhelmed

a second fisherman
seeing this
climbed to the top of the hill
so that he could stop them

from falling in

-anonymous

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CHAPTER ONE

INTRODUCTION

Background

The COLUMBUS DISPATCH published an in-depth series in October 2007 titled "The ABCs of Betrayal" which exposed many Ohio educators who had engaged in consensual sexual affairs with students.[1] In some cases, the teachers were arrested, convicted, and jailed while in many others the teachers were allowed to continue working or to resign quietly, often finding employment in other school districts.[2] An Associated Press study found similar phenomena across the United States.[3] The authors noted that while many teachers who engaged in affairs with students resigned or had their licenses revoked, school leaders are still reluctant to investigate and prevent abuse.[4] Some teachers who are aware of colleagues engaging in affairs with students ignore the misconduct to protect friendships and avoid public degradation of their profession.[5] Many school districts engage in a practice known as "passing the trash," whereby the district allows the teacher to resign quietly out of fear of negative publicity or wrongful termination lawsuits.[6]

The role of the modern school leader is complex. It is the responsibility of schools to protect students. School administrators who take this mission seriously should be aware of the laws that exist to help them protect children. School leaders also serve as stewards of public resources. Superintendents, principals, and other administrators

should understand that when sexual affairs between students and teachers come to light, legal challenges are likely to come from both victim and perpetrator. Victims may claim a district failed in its duty to protect. Perpetrators may file wrongful termination suits. This dissertation will examine state laws that prohibit and attempt to prevent teacher-student sexual relationships. Additionally, this work will review how courts nationwide have ruled when either party involved in such relationships challenges school districts.

Purpose of the Study and Questions Addressed by the Study

The purpose of this research is to analyze U.S. legislation and case law as it relates to sexual relationships between American school teachers and their students. Several questions will be addressed by the study, including:

1. What state legislation prohibits sexual relationships between teachers and students?
2. How does federal legislation, specifically Title IX of the Rehabilitation Act of 1972, the Fourteenth Amendment, and 42 U.S.C. § 1983, apply to sexual relationships between teachers and students?
3. What are specific outcomes and trends of judicial law involving teachers alleging wrongful termination after having sexual relationships with students?
4. What are specific outcomes and trends of judicial law involving students alleging rights violations by school employees after having sexual relationships with teachers?

School administrators may discover a school employee under their charge having a sexual relationship with a student. Administrators need to be aware of legislation and

case law related to these relationships so they can be prepared to act properly when they discover a relationship.

The American Legal System

Federal and state courts comprise the dual judicial American legal system. The federal and state judicial systems include courts of appeals that may review rulings of lower courts. The type of case to be heard, the geography of the parties, or the cause of action may determine court jurisdiction. Contested wills may be heard in probate court, for example. Civil suits, or torts, contesting alleged violations of federal law may be heard by the United States district court overseeing the geographic area in which the parties reside.

The Federal Judiciary

The federal judicial system is made up of three levels of courts. The lowest level includes ninety-two trial courts known as federal district courts. Each state has at least one federal district court. Federal district courts hear cases involving conflicting parties who reside in different states or cases involving questions of federal law or the United States Constitution.

The intermediate level of the federal judiciary consists of thirteen circuit courts of appeal, each representing a geographic area. For example, the Sixth Circuit Court of Appeals hears appeals of cases arising out of federal district courts in Michigan, Ohio, Kentucky, and Tennessee. Three judges serve on each circuit court of appeals. The decisions of each circuit court are binding only within that specific circuit. Thus, it is not

uncommon for the rulings of one circuit court to be in conflict with the rulings of another circuit court.

The Supreme Court is at the highest level of the federal judiciary and is comprised of the Chief Justice of the United States and a number of Associate Justices determined by Congress, which is currently set at eight.[7] The President has the power to nominate Justices, and appointments are made with the advice and consent of the Senate. Justices are appointed to the Supreme Court for life and their decisions are final, only to be overturned by amendments to the Constitution, law changes, or the Supreme Court's own subsequent rulings. As of March 2011, the Chief Justice is John G. Roberts. The Associate Justices are Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel A. Alito, Sonia Sotomayor, and Elena Kagan.

The State Judiciary

Like the federal judiciary, each state also employs a tiered judicial system including trial courts at the lowest level, intermediate courts of appeal, and a state supreme court at the highest level. Courts may have different names among states, and judges may be selected through various means, including appointment or popular vote. Similar to federal courts, state courts have jurisdiction either through geography or subject matter. The United States Supreme Court has authority to overturn state supreme court decisions if a conflict exists.[8]

Legal Authority

Legal authority is a published source of law that sets forth rules, doctrine, or reasoning that judges use to make legal decisions. In legal research, the mere fact that a case is available to read does not necessarily mean it is a published work. Indeed, cases that are unpublished will be clearly marked as such. In other words, "published" is not synonymous with "in print." Only published works are those that can be cited as authority.

Legal authority refers to types of information available and the power that information has to influence a legal decision. A judge must follow binding authority, but has discretion in the weight given to persuasive authority to the degree by which the information actually persuades. Only primary authority, such as judicial precedents, constitutions, and administrative rulings, can be mandatory, but only if a court superior to the court deciding the case rendered it, and the issue being decided is comparable to the authority being considered. For example, a federal district court must follow decisions of a federal circuit court, but not vice versa. Also as example, one circuit court does not have to follow the rulings of a different circuit court; nor does one district court have to follow the rulings of another district court; nor does one state supreme court have to follow the decisions of a different state supreme court. Secondary authority is any authority that is not primary. It is never mandatory. However, it can be used as persuasive authority if no prevailing primary authority exists.

Constitutional law. The United States Constitution is the supreme law of the land. It establishes the American government, setting forth rights of the people and the

states. Each state also has a constitution, which serves as the supreme law of each state. However, state constitutions may not be in conflict with the Federal Constitution.

Statutory law. Statutory law is created by state or federal legislatures. These laws, called statutes, must not be in conflict with constitutional law. Statutes generally command or prohibit actions. Chapter three will discuss relevant statutes from each state that prohibit sexual relationships between teachers and students. Title IX and 42 U.S.C. § 1983 are also examples of statutory law.

Regulations. Regulations are rules issued by governmental administrative agencies. Governmental agencies typically are given power to create rules through statute.

Case law. Judges determine case law (or common law) through their rulings in particular decisions. In making decisions, judges use binding and persuasive authority to interpret constitutions, statutes, regulations, and other case law. Judges write their decisions, which may then be used as binding or persuasive authority, as applicable, for future cases. Even though the judges write their opinions, only those that are "published" can be used as authority.

Administrative law. Administrative law consists of rules and regulations related to the functioning of state or federal governmental agencies. Chapter three will discuss administrative law created by state departments of education regarding ethical requirements for teachers and rules for relationships between teachers and students.

Legal Principles

Judicial review. Law changes. When state or federal judges hear cases, they rely on their interpretation of current statutes and regulations and the prior decisions of judges who have ruled on cases involving similar issues. In considering past cases, courts will follow them, overrule them, or modify them. In general, sound decisions in past cases will strongly influence future decisions.

Upon receiving an unfavorable decision, parties may appeal to the next higher court. Appellate courts review the records of the lower court to determine if the law was applied correctly and if proper procedures were followed. Courts of appeal may affirm the lower court's ruling, overturn the ruling, remand the case to the lower court with instructions for further action, or a combination of these options. Intermediate level courts are required to review all appealed cases. State and federal supreme courts are not required to do so. Four federal Supreme Court Justices must agree to hear a case before it will be reviewed. State procedures vary.

Legal remedies. When a party is successful in a suit, a variety of remedies are available. Money is the most common remedy in the cases to be reviewed in this study, in the form of compensatory (or actual) damages, punitive damages, and attorney's fees. Relevant to cases to be reviewed in this study, a court may also order writs of mandamus or prohibition, injunctions, and restraining orders.

Legal Literature

This study will be conducted using legal research, which is comprised of three categories: primary sources, secondary sources, and search tools.

Primary sources. Primary sources are actual written statements of law by governmental sources. Primary sources include legislation, case law, rules, regulations, constitutions, and administrative agency opinions. Primary sources are applicable until they are overruled or repealed.

Secondary sources. Secondary sources are materials such as treatises, law reviews, scholarly journals, textbooks, legal encyclopedias, and legal dictionaries. They are used to help one interpret or locate primary sources.

Search tools. Search tools help scholars, attorneys, and judges find primary and secondary sources. Increasingly, search tools that can help a person find full-text legal resources, including state and federal court cases, statutes, and administrative laws, are available online. Internet based search tools also provide access to legal journals, legislative transcripts, legislative committee reports, and general interest articles from periodicals and other sources. The most comprehensive web-based search tools are LEXIS/NEXIS, Westlaw, and Findlaw.

It is important to note that not all necessary legal sources can be found electronically. Digests and reporters of state and federal cases and Shepard's citations are available in print in good research or legal libraries. These resources may provide full-text sources of information and direct a researcher to additional relevant resources.

Limitations of the Study

This study will review applicable statutes, administrative law, and case law regarding sexual relationships between American school teachers and their students. While diligent efforts will be made to access all relevant case law, the history of

American jurisprudence is so voluminous that a complete review of all cases is impossible, even with the increasing power of available search tools.

Similarly, to review all state criminal statutes and administrative law in a time-sensitive manner, the research necessarily will be done using on-line search engines. The expectation is that the available material is complete and up to date. However, due to the sheer volume of material and the fluid nature of law, a complete analysis of all applicable law cannot be guaranteed.

Delimitations of the Study

This study will be delimited to American law through 2010. The study will include primarily accessible, published state and federal case law, unique unpublished state and federal case law, state statutes, and state administrative regulations. Cases reviewed will include those in which an American school teacher engaged in a consensual sexual relationship with a student of the school district in which the teacher was employed. Only cases involving students who were in grades six through twelve at some time during the relationship will be used, as these grades most typically represent pubescent and post-pubescent students. While the main focus will be on the relationships of teachers, cases involving other school employees (e.g., coaches, tutors, administrators, and classified staff) will be considered.

This study will also review only cases involving consensual relationships. It is important to note that the term "consensual" will be used in its colloquial, not legal meaning. That is, cases reviewed will include those in which students were willing participants in a sexual relationship that occurred over time and did not report the

relationship to authorities until sometime later, even if case law or statute determines that the student was unable to "consent" due to age or the "position of authority" of the teacher. Cases that involve teachers who physically coerced sex from a student will not be reviewed.

Definitions

Affirm – The decision of a court of appeals that the decision of a lower court was correct.

Allegation – A statement of claimed fact contained in a complaint until proven affirmative.[9]

Appeal – To ask a superior court to review the decision of a lower court.

Appellant – The party filing the appeal, generally the loser at the trial court level.

Appellate Court – A court that hears the appeal of the lower court.

Appellee – The party who must respond to the complaint of the appellant, generally the winner at the trial court level; also known as the "respondent."

Case – A cause of action or lawsuit; also shorthand for reported decisions which can be cited as precedents.[10]

Compensatory Damages – Money ordered by a court to be paid by the losing party to the prevailing party to reimburse for actual losses sustained.

Complaint – The first document filed by a party alleging wrongdoing by another party.

Concur – To agree.

Cunnilingus – Oral stimulation of the female genitalia.

Dissent – The opinion of a judge of a court of appeals that disagrees with the majority opinion, also known as "dissenting opinion."

Due Process - a fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result. While somewhat indefinite, the term can be gauged by its aim to safeguard both private and public rights against unfairness. The universal guarantee of due process is in the Fifth Amendment to the U.S. Constitution, which provides "No person shall…be deprived of life, liberty, or property, without due process of law," and is applied to all states by the 14th Amendment. From this basic principle flows many legal decisions determining both procedural and substantive rights.[11]

Fellatio – Oral stimulation of the penis.

Judgment – The decision of a court in a lawsuit.

Majority Opinion – A written explanation of the court's judgment favoring the winner of a hearing.

Moral turpitude - A gross violation of standards of moral conduct or vileness.[12]

Nolo contendere - Latin for "I will not contest" the charges, which is a plea made by a defendant to a criminal charge, allowing the judge to then find the defendant guilty, often called a "plea of no contest."[13]

Opinion – A written explanation of a court's judgment.

Plaintiff – The party who brings a lawsuit against another party.

Precedent - A prior reported opinion of an appeals court which establishes the legal rule (authority) in the future on the same legal question decided in the prior judgment.[14]

Quid Pro Quo Harassment – From the Latin meaning "something for something," harassment that includes the delivery of sexual favors to the perpetrator in exchange for favorable treatment or avoidance of unfavorable treatment for the victim.

Remand – To send a case back to a lower court for further action.

Remedy – the means to achieve justice in any matter in which legal rights are involved. Remedies may be ordered by the court, granted by judgment after trial or hearing, by agreement between the person claiming harm and the person believed to have caused it, and by the automatic operation of law. Some remedies require that certain acts be performed or prohibited; others involve payment of money to cover loss due to injury or breach of contract; and still others require a court's declaration of the rights of the parties and an order to honor them.[15]

Reversal – When a higher court determines the judgment of a lower court was incorrect, thereby overturning the decision.

Sexual Activity – Sexual conduct, sexual contact, or both.

Sexual Conduct – Vaginal intercourse, anal intercourse, cunnilingus, fellatio, or the anal or vaginal penetration by any object or body part.

Sexual Contact – Touching the erogenous zones, including thighs, buttocks, breasts, or pubic regions, of another for the purpose of sexually arousing either person.

Sexual Intercourse – Penetration of another's anus or vagina with any body part or object.

Summary Judgment – A court order that no issues of fact exist and therefore a decision can be made as a matter of law without trial.

Trial Court – The court that holds the original trial.

Vicarious Liability – Attaching responsibility to a person for harm or damages caused by another person in a lawsuit.[16]

Justification of the Study

Stories of inappropriate sexual relationships between school employees and students have infiltrated the media. A school administrator's first job is to protect the students, then to insure that the learning process continues by minimizing distractions and refocusing the school and community. Long after the buzz of the community dies down, however, school administrators must be prepared for the legal fallout that is bound to come. Having a strong understanding of applicable statutes, codes, and case law will better prepare administrators to act should they ever find themselves dealing with a student-employee sexual relationship.

School administrators may discover a school employee under their charge having a sexual relationship with a student. Administrators need to be aware of legislation and case law related to these relationships so they can be prepared to act properly when they discover a relationship. Research has been conducted regarding various aspects of sexual harassment in schools. A comprehensive look at legislation and case law as it relates

specifically to consensual sexual relationships between students and teachers has not yet been written.

Procedures

Materials to be used include state statutes and administrative regulations. The American Digest System, National Reporter System, LEXIS/NEXIS, Westlaw, and Findlaw will be used to find case law. Secondary sources to be used include government documents, scholarly journals, and selected textbook materials. In addition, interviews may be conducted with professors and attorneys with knowledge of law related to the topic.

Procedures for the study include careful reading of each statute, regulation, and case. The researcher will then organize and synthesize the above information thematically. A written synopsis of each case will include a briefing of case facts, an analysis of the law involved, and the judgment of the court.

Overview of Remaining Chapters

Chapter Two

This chapter will include a review of literature related to sexual relationships between teachers and students, including discussion of similar dissertations and scholarly journals.

Chapter Three

This chapter will include an analysis of each state's criminal statutes related to sexual relationships between teachers and students, an analysis of administrative code in each state related to sexual relationships between teachers and students, and a discussion

of Title IX and 42 U.S.C. § 1983 as they relate to sexual relationships between teachers and students.

Chapter Four

This chapter will include briefs of teachers or other school employees who, after having engaged in a sexual relationship with a student, filed suit against a school board for wrongful termination or other adverse employment actions.

Chapter Five

This chapter will include briefs of state and federal civil court cases in which students who engaged in sexual relationships with school employees, or the students' families, brought suit against administrators who supervised the employees in question, or the districts in which the employees and administrators were employed.

Chapter Six

Chapter six will answer each of the questions posed in Chapter one, including:

1. What state legislation prohibits sexual relationships between teachers and students?
2. How does federal legislation, specifically Title IX of the Rehabilitation Act of 1972, the Fourteenth Amendment, and 42 U.S.C. § 1983, apply to sexual relationships between teachers and students?
3. What are specific outcomes and trends of judicial law involving teachers alleging wrongful termination after having sexual relationships with students?

4. What are specific outcomes and trends of judicial law involving students alleging rights violations by school employees after having sexual relationships with teachers?

Chapter six will also provide guidelines for school administrators in prevention of, identification of, and proper reactions to sexual relationships between students and teachers in their districts

CHAPTER TWO

REVIEW OF LITERATURE

Introduction

While mass-media continuously report stories of educators engaging in inappropriate and illegal behavior with students,[17] few research-based studies of student sexual abuse by educators exist. This may be due to school administrators' desire to protect victims or their fear of negative publicity.[18] However, a review of available literature shows the extent of educator sexual misconduct with students; how the problem is perceived by educators and communities; who the perpetrators and victims are; how school leaders respond to the problem; and how victims, other students, and the school community are affected by the problem.

Defining Terms

Labeling educator sexual misconduct with students is challenging. What is "sexual abuse" in one state may be "sexual misconduct" in another or "molestation" in a third.[19] Often terms are used interchangeably depending on varying legal definitions among state and federal law, and researchers' and practitioners' terminology.[20] Some actions may violate criminal laws while other actions, such as hand-holding and back rubs, may not be criminal but may be inappropriate or otherwise illegal.[21] However, most definitions and terms are consistent in that behaviors described are sexual in nature and unwelcome. Most importantly, sexual misconduct is defined by the victim's reaction

or interpretation of the act, not the actor's intent.[22] It also must be noted that a victim's willing participation in the act does not necessarily mean the act was welcome.

This review of literature will use the term "sexual misconduct" to refer to sexual behavior between educators and students, which may include contact, noncontact, or both. Noncontact sexual misconduct may be verbal or visual, such as showing pornography or engaging in sexual talk. Contact sexual misconduct includes fondling, kissing, penetration, touching of genitalia, or any other physical contact designed to arouse the person touching or person being touched.[23] The term "educator" will mean any classified or certified employee of an elementary, intermediate, middle, or secondary school or other district employee who does not work in a school building. Educators may include teachers, principals, custodians, tutors, bus drivers, coaches, advisors, counselors, and so forth. The term "student" means any person enrolled in an educational institution through grade twelve.

The Pervasiveness of Educator Sexual Misconduct with Students

Sexual misconduct between educators and students is particularly troubling because of the position of trust in which educators are placed. Compulsory attendance laws require parents to send their children to school, and parents trust the adults acting *in loco parentis* will be positive influences on their children and look out for their safety and well-being.[24]

Much evidence exists that educator sexual misconduct with students is widespread.[25] However, it is unknown how frequently educators engage in sexual misconduct for several reasons: few studies have been conducted; studies that have been

conducted have not used comparable samples and methods; and most student victims of sexual misconduct do not file formal complaints.[26] Also, educator sexual misconduct may go unreported due to the tendency of those who abuse not to seek help, the pressure on student victims to remain silent, and the reluctance of school leaders to believe the worst about their colleagues.[27]

Nonetheless, anecdotal evidence suggests that the number of students accusing educators of sexual misconduct has risen since Anita Hill's allegations of sexual harassment towards Supreme Court justice Clarence Thomas during a Senate Judiciary Committee hearing in 1994.[28] Also, increasing legal requirements of school leaders to report sexual abuse of students to police or child services may have caused an upsurge of incidents being reported to such agencies.[29]

Empirical studies also have found the problem of educator sexual misconduct to be pervasive. A COLUMBUS DISPATCH study identified at least fifty Ohio educators who became too personal with students or engaged in sexually inappropriate behavior and were still able to keep their licenses.[30] An Associated Press investigation found more than 2,500 cases in which educators across the United States were punished for engaging in sexual misconduct with students, with nearly 90% of the perpetrators being male.[31] A congressional report estimated 4.5 million of the approximately 50 million students in American schools are subjected to sexual misconduct by a school employee sometime throughout their schooling.[32]

A regional survey of North Carolina high school graduates found that 82.2% of females and 17.7% of males reported sexual misconduct by educators during their

schooling.[33] The same survey found 13.5% of the sample had engaged in sexual intercourse with an educator.[34] Another study found that 1% of adults reported being abused in elementary school by educators, and 3% reported being abused in secondary school by educators.[35] These numbers extrapolate to nearly 98,000 educators having engaged in sexual misconduct with students on some level.[36] The same researcher estimates that 5% of educators have engaged in sexual misconduct with students, either verbally or physically.[37] Yet another study reported 4.1% of 4,340 adults surveyed had a physical sexual experience with a teacher.[38]

A national survey conducted by the American Association of University Women (AAUW) of 1,632 students in grades eight through eleven throughout the continental United States found that 18% of students alleged being victim to sexual misconduct by a school employee.[39] This included 10% of males and 25% of females reporting being harassed by educators, with African-American girls being more likely than whites to be targeted, and whites being more likely to be targeted than Hispanics.[40] Students, however, often are reluctant to report being victims of educator sexual misconduct. Of those students reporting misconduct in the AAUW survey, for example, only 7% reported the infraction to a teacher, and only 23% reported it to a parent or other family member.[41] Thus, when students are asked directly about being victim of educator sexual misconduct, substantial numbers of students admit it is a problem; however, most students are not asked directly.[42]

So even though researchers' estimates of the prevalence of the problem vary, it is clear educator sexual misconduct with students exists in the United States. While the

possibility exists that students may fabricate claims of sexual misconduct by educators for a variety of reasons, data suggest false allegations are minimal. Rather, it is much more likely a student will fail to report an incident of sexual misconduct than fabricate an incident, as professionals estimate that only 2% to 6% of incidents are reported.[43]

Students who report sexual misconduct by educators most often allege contact abuse of a superficial nature. These allegations often include fondling, pinching, and touching breasts, buttocks, or pubic areas. Complaints about inappropriate touch are likely to be lodged by two or more students at the elementary level and by individual students at the secondary level.[44] For superficial contact abuse at all grade levels, male educators are more commonly the perpetrators, and females are more commonly the victims.[45]

Contact abuse involving sexual intercourse, fellatio, cunnilingus, and digital or object penetration is also more likely to happen between male perpetrators and female victims.[46] The misconduct most often happens at after-school functions, at educators' homes, and in parked cars.[47]

The Profile of Educators Who Engage in Sexual Misconduct with Students

While no clear profile of educators who engage in misconduct students exists, perpetrators share common characteristics and patterns of behavior.[48] These educators often are well liked by students, peers, and community.[49] They are frequently described as being hard-working family men and are often well-educated, more law-abiding, and more religious than average.[50] Most perpetrators are heterosexual, with more than two-thirds of educator sexual misconduct involving students of the opposite sex.[51] One study

found the average age of perpetrators to be in their late twenties, with a range of twenty-one to seventy-five years, and 80% of the suspects being male.[52] Another study found 96% of the perpetrators to be males who abused 76% females and 24% males; 4% of the perpetrators were females who abused 86% females and 14% males.[53] Many studies indicate that educators engaged in sexual misconduct with students often have relationships with multiple students; thus, there are fewer educator abusers than student victims.

Offenders have been employed in a variety of jobs in the education field, including teacher, coach, administrator, bus driver, custodian, and more.[54] However, almost all studies report teachers as being most likely to be the perpetrator, followed by coaches. One British study found 90% of offenders to be teachers.[55] The educators who engage in sexual misconduct tend to be employees such as coaches, band directors, drama directors, and club advisors; they have frequent one-on-one access to students because they supervise extracurricular activities.[56] A Texas study found 25% of that state's educators disciplined for sexual misconduct to be coaches or music teachers.[57] Most offenders are not in prison, are not known by members of the community to be offenders, and have a propensity for repeating their crimes.[58]

Educators who engage in sexual misconduct generally fall into one of four categories. First, some have psychosexual disorders such as pedophilia or hebephilia. Pedophiles have an adult psychosexual disorder in which they have a sexual preference for prepubescent children,[59] and hebephiles have a sexual preference for adolescents. Pedophiles and hebephiles are likely to have sought a job where they would be close to

potential victims. Often they test to see if the victims can keep a secret and groom their victims by introducing pornography or touching to the students in ways that make the victims feel guilty and responsible for the abuse.[60]

Second, some educators involved in sexual misconduct are characterized as romantics who do not have a sexual attraction to children per se, but who find themselves entangled in romantic relationships with a student. These educators often feel they have done nothing wrong because the victims appear to be willing participants in the sexual activity.[61]

The third type of educator engaged in sexual misconduct is an opportunistic sexual predator motivated by power and control.[62] A fourth type is the educator who engages in inappropriate activity that is not necessarily criminal in nature, such as giving personal gifts to a student or touching him in an inappropriate, yet patently nonsexual, manner.[63] In all four situations, the educator engages in the relationship to satisfy the educator's own needs at the expense of the victim.[64]

Educators involved in sexual misconduct progress through three phases of exploitation to increase their chances for successful abuse of child victims.[65] In the first phase the offender trolls and tests, selecting a school in which sexual misconduct policies are loose and selecting a student victim who is emotionally vulnerable, whose parents likely are disengaged.

In the second phase, the offender grooms the situation, setting up a public persona of trust where accusations against the offender are likely not to be believed. The offender also becomes helpful to parents, perhaps by providing rides or tutoring, so that gaining

access to the student outside of school hours is easier. Also, the offender grooms the student, often by desensitizing the student to inappropriate behaviors. The employee may tell the student of personal problems, inquire into the student's sexual or romantic life, ask the student to do personal favors for the employee, and provide or recommend drugs, alcohol, or pornography to the student, among other things. The employee may also grant favors to the student, such as giving gifts, exchanging notes, escorting to class, writing late slips, allowing late homework, and other similar inappropriate acts.[66]

The third phase includes the offending educator being more aggressive in defending the behavior by suggesting the behavior demonstrates greater caring of students than other employees. The educator may continue to gain latitude from the student's family in having access to the student during nonschool hours while at the same time undermining the parents' authority to the student. The educator will also exploit the student through bribes, extortion, intimidation, and coercion.

The Profile of Victims of Educator Sexual Misconduct

Student victims of educator sexual misconduct are often vulnerable children who come from homes where little affection is shown. Their homes are often characterized as alcoholic or abusive. Many victims are poor students who struggle academically and socially. They often are grateful for attention given to them by the offending educator[67] and bond tightly with the perpetrator based on affection and trust.[68] Victims frequently have had life experiences that left them with confused senses of personal boundaries, thus making them unable to deter inappropriate adult behavior.[69]

One study found Black, Native American, and Latino children overrepresented as victims of educator sexual misconduct, and White and Asian students underrepresented in comparison with their representation in their samples.[70] Some studies suggest students with disabilities are more likely in general to be sexually abused than those who are not disabled.[71] However, those studies do not distinguish victims by the offender, so there is no way to determine whether the reported cases are examples of educator misconduct.

Most students targeted for sexual misconduct by educators are female, but the variance between sexes for victims is less than for offenders. One study found that of students who alleged sexual abuse by a school employee, 22% were male and 78% were female, with boys being more likely to be abused in elementary school than high school and girls being equally likely to be abused in elementary and high school.[72] The same study found the victims of educators involved in romantic sexual misconduct most often to be middle and high school students who are more likely to be female.[73] Another study found similar results, with almost 70% of romantic abuse victims female and two-thirds fourteen years and older.[74] These female victims of romantic educators often develop early physically and have histories of poor behavior, thus making them less credible witnesses towards the offender.[75]

Victims of pedophiles and hebephiles are more likely than victims of romantic offenders to be male and of elementary school age.[76] No trends have been found regarding the school setting, with public, private, religious, urban, and rural schools all reporting cases of staff abuse of students.[77]

Most student victims of educator sexual misconduct do not report the misconduct to school authorities, but informal information is frequently passed on to others through rumors and innuendos. Students most commonly state the reason for not reporting educator sexual misconduct is the fear that they will not be believed.[78] When students do report misconduct, it is almost always of the contact variety; noncontact visual or verbal misconduct is rarely reported.[79] Furthermore, victims rarely report educator misconduct to law enforcement, subjecting offenders only to personnel actions at the school district level.[80]

The Affect Educator Sexual Misconduct with Students Has on Victims

Research suggests that educator sexual misconduct with students causes physical, mental, and emotional damage to the targets.[81] Such damage includes not wanting to go to school, losing sleep, becoming disinterested in class, and feeling embarrassment.[82] Male victims of female offenders often do not notice emotional damage until their 30s or 40s, which may include addictive behavior and compulsive disorders, such as substance abuse, gambling, and sexual disorders.[83] Victims of both genders often have trouble forming strong romantic relationships in later life.[84]

Some victims may have strong feelings of shame and betrayal when abused by trusted pseudo-parental figures, such as educators, which are similar to feelings experienced by victims of incest.[85] Others may feel as if they lured the adult into the relationship and feel guilt for not having protected the adult from the harmful consequences of disclosure.[86] The trauma of the sexual misconduct causes some victims

to deny the act occurred and blocks their understanding of the damage they have suffered.[87]

At some point the victim knows asexual relationship with an educator is not the norm.[88] This may cause the victim to feel evil, perverted, or more mature than classmates.[89] The victim is likely to feel fearful of the misconduct coming to light and may have trouble revealing details to investigators.[90]

Often student victims of sexual misconduct by educators are given no help by the school district.[91] Sometimes the victims are offered counseling services. In many cases the victims, who are often poor students, report being ostracized as untruthful or morally ambiguous. After accusing an educator of misconduct, student victims are likely to be taunted by other students and educators, made worse by the likelihood they come from homes where little support is offered during this stressful time.[92] Many times the victims drop out of school or transfer to a new district, even in cases where the misconduct was proven.[93]

One study found that nearly 46% of students who had been victims of educator sexual misconduct reported having academic problems following the misconduct.[94] Problems included earning lower grades, being less participatory in class, being less able to pay attention, and finding it more difficult to study at home.[95] Furthermore, the probability of such academic problems increased as the severity of the misconduct increased.[96]

School Employees' Perception of Colleagues' Sexual Misconduct with Students

A study of educators' perception of the seriousness of ethical violations found that more than 90% of educators view engaging in a romantic relationship with a student to be an extremely serious ethics violation, more so than any other type of ethics violation; educators also see making sexually provocative statements to students as serious, but slightly less so than engaging in a romantic relationship.[97] This is likely because the relationships are both a conflict of interest for the educator and a cause of harm for the student.[98] Six percent of educators surveyed believed that sexual relationships between educators and students occur frequently.[99]

When educator sexual misconduct with a student occurs, many of the offender's colleagues struggle to find a balance in their reaction, either understating or exaggerating the damage of the misconduct.[100] Sometimes when allegations of misconduct are made, educators are more likely to be angry at the victims or the investigators than they are at the perpetrators.[101] These educators may feel the student or investigator is out to get their colleague and may react by completely refusing to touch students, even with appropriate hugs or pats on the shoulder. They have a difficult time accepting their trusted colleague is capable of engaging in such heinous actions; instead, it is more comfortable to believe the victim is lying.[102]

Other educators, though, reminisce about times when they observed an interaction between the accused educator and victim that felt uncomfortable and, upon reflection, feel guilty for not having trusted their initial judgment.[103] They may have seen

something that simply did not feel right and be upset that they did not report their observation to a supervisor.[104]

School officials are more likely to treat seriously allegations of contact sexual misconduct than of noncontact sexual misconduct.[105] One study found that 89% of all educator sexual misconduct with students reported by superintendents involved contact.[106] Of noncontact sexual misconduct, superintendents are more likely to view visual misconduct (e.g., showing pornography to a student or exposing oneself to a student) as more severe than verbal misconduct (e.g., telling a student she has nice breasts or inquiring into a student's sexual activity).[107] Overall, however, school officials are likely to perceive noncontact sexual misconduct as less serious than contact sexual misconduct, and they are likely to report noncontact sexual misconduct less often than contact misconduct.

Leaders of the two major teachers' unions in the United States, the American Federation of Teachers and the National Education Association, have denounced educator sexual misconduct with students while warning that the rights of educators must be protected and that the possibility of false accusations must be considered.[108]

Community Perception of Educator Sexual Misconduct with Students

Community reaction to revelations of educator sexual misconduct with students varies. In some places, the public tend to castigate student victims of sexual misconduct and support perpetrators.[109] Because offenders are often educators who are popular with students and in charge of sports, band, clubs, and other activities, they generally are held in high esteem by the community. When victims allege misconduct by these iconic

community figures, community members most often believe the employee is the victim of a false allegation and an attempt to smear the employee's reputation.

In other places, victims of sexual misconduct by educators are lionized by the community. This is true especially when the victim is male and the educator is an attractive female.[110] What may be described as rape or sexual abuse for a female victim is often seen as a sexual conquest for a male victim of a female perpetrator.[111] Even pop culture presents male students having sex with female educators in a favorable light. Van Halen's 1984 song "Hot for Teacher" and the 1998 movie *Wild Things* glamorized such relationships.[112] A 2004 study showed the public as less likely to believe a female educator should lose her license after engaging in sexual misconduct with a male student and that such relationships are normal parts of growing up for boys.[113]

Female victims of male offenders also sometimes are seen at fault by the community. The thinking by some is that teenagers have the ability to think and the girls should know better than to date educators.[114] Sexual abuse experts disagree, reasoning that no child has power to say "no" to an authority figure or the ability to anticipate the emotional consequences of a sexual relationship with an adult.[115]

Educator Sexual Misconduct with Students' Affect on the School Community

The school community suffers when educators engage in sexual misconduct with their students. The trust between a school and community is shattered because the community sees the school as not having fulfilled its fundamental duty to protect children from harm.[116] By extension, the school is also seen as having failed educationally, as no

child can be believed to be learning to his greatest potential when being victimized at the very place in which the student is being educated.[117]

An educator engaging in sexual misconduct with a student can also cause much anger and dissension among a community, particularly a small community in which involved parties are more likely to share kinships or blood relations. In a small Ohio community, for example, a female student claimed to be raped by a teacher. The teacher was the son of a former school board member and a cousin to the principal, and his father was on the County Commission. The victim was the daughter of a district receptionist and granddaughter of a board member. The allegation divided the staff, the Board, and the community. The school nurse and counselor who first took the complaint, the personnel director who conducted the investigation, the victim and her family, and the students who testified all received threatening phone calls. People changed jobs and families moved out of the community. The victim left the state to finish her education. [118]

It should be noted that not all people view sexual relationships between students and educators as damaging, particularly if the illegal relationship would otherwise be legal absent the dynamic of the perpetrator being in a position of authority over the victim. Some argue that sexual relationships between educators and students are natural physically but only taboo based on the prevailing social and cultural context.[119] Much like coming out stories of homosexuals were largely unacceptable years ago, some say relationships between educators and students will be commonplace as social mores evolve.[120] While conceding that issues may arise when a student has an intimate relationship with an educator who is responsible for assessing the student, those tolerant

of educator-student sex suggest the media have played a large role in directing public opinion against such relationships as being unequivocally wrong.[121]

School Leader Response to Educator Sexual Misconduct with Students

The National Resource Center for Child Sexual Abuse reports that all fifty states mandate educators to report suspicions of child abuse and neglect to law enforcement or children's protection agencies.[122] Regardless, when allegations of educator sexual misconduct with students are made, school leaders may investigate the reports themselves with the hope of keeping the scandal covered up.[123] Some research suggests that school leaders sometimes protect educators engaged in sexual relationships with students, often citing First Amendment freedoms, but that all parties, including educators, students, and administrators, are engaged in a conspiracy to hide educator-student sexual relationships.[124] One study found the duration of educator misconduct of students ranged from one day to two years before reported; the same study found that other educators were aware of the misconduct before the superintendent by as much as six months.[125]

Often school leaders investigate allegations of employee sexual misconduct with a student with honorable intentions of finding the truth and protecting the victim but are unable to do so competently. Investigations of these situations are often emotionally charged, and properly conducting interviews of witnesses, victims, and perpetrators requires advanced training most school administrators do not have.[126] Administrators who conduct the investigation may not know which questions to ask, of whom to ask the questions, how to properly read body language, or how to display gender sensitivity in asking highly personal questions of students of the opposite sex.[127]

Most often school leaders become aware of educator sexual misconduct when the parents of the victim contact the school system. Less often the victim, the victim's friend, or the parent of the victim's friend will tell a trusted school employee.[128] It is not unusual for a superintendent who begins an investigation into alleged abuse to find that others had made prior allegations against the same educator without those allegations ever being formally reported to the superintendent.[129]

Generally after educator sexual misconduct with a student is alleged, the superintendent or the superintendent's designee will begin an investigation. The investigator usually questions the victim first, sometimes with parents present and sometimes without, and then the alleged perpetrator, generally with a union or legal representative present.[130] Superintendents who consider the allegations to be serious often call the school board president, the school attorney, and the applicable union president.[131] Rarely does the superintendent contact the police, often choosing to keep the investigation in-house, and often gives the alleged perpetrator a summary of the allegations before meeting together to discuss allegations.[132]

Superintendents take allegations against female employees more seriously than male employees, consider misconduct with male victims more serious than misconduct with female victims, and regard homosexual acts as more serious than heterosexual acts.[133] Furthermore, female victims are more likely than male victims to be seen as lying by the investigator.[134]

Many superintendents feel a dissonance when confronted with allegations of educator sexual misconduct with a student. Often the superintendent is torn between

protecting the victim and protecting the accused.[135] This is likely due to the superintendent often being friends of the alleged perpetrator and being uncomfortable investigating a colleague. Superintendents often sympathize with the alleged offender too, especially if the abuser is male and the victim female, particularly an attractive, provocatively dressing female.[136]

Peers are more likely than superintendents to be supportive of educators accused of sexual misconduct with a student.[137] Peers often believe the victim is lying and the administrator doing the investigation is out to get the alleged perpetrator.[138] Some educators allege that a student accusing an educator of misconduct may be transferring the abuse of a father or stepfather; others suggest students charge educators with misconduct as a way to get even for a poor grade given by the educator.[139] Educators sometimes intimidate victims, allow other students to intimidate victims, and completely withdraw from engaging in physical contact from all students for fear of being alleged as an abuser themselves.[140]

A superintendent who completes an investigation and believes an employee engaged in sexual misconduct with a student generally takes one of three actions: try to get rid of the employee, formally discipline the employee, or informally speak to the employee.[141] One study showed that educators with credible accusations of sexual misconduct against them most often voluntarily left the district through resignation or retirement (38.7%).[142] Less often the educators were terminated (15%), and sometimes the educators stayed with the district following some other form of suspension, reprimand

or warning (36.9%).[143] About 7.5% of accusations against educators in the above survey turned out to be false.[144]

Of the educators who left the district following an accusation of sexual misconduct, many received severance pay or the promise of a good recommendation in their search for new employment.[145] This practice, commonly known as "passing the trash," is often justified by superintendents as being a less time consuming, more financially sound decision than engaging in a lengthy termination proceeding. In cases where educators were found to have engaged in sexual misconduct with students yet permitted to maintain employment, they were sometimes transferred to another building, forced to apologize to the victim's family, or assigned different duties.[146]

Summary

Educator sexual misconduct with students can happen anywhere. Sometimes school employees choose their profession because they have psychosexual disorders that cause them to crave sexual relationships with children, and schools provide ample prey. Other times educators find themselves in a romantic relationship with a student that has evolved over time. Whatever the case, such relationships are far too prevalent in American schools.

Research suggests that commonalities exist among offenders and victims, and that most often the misconduct goes unreported and unknown to school officials. When such educator misconduct does come to light, often school communities are torn apart as stakeholders defend the perpetrators and attack the victims. The investigation of the offending educator is often maligned, and the damage to the student victim is sometimes

unfixable. After a review of relevant legislation and case law related to educator sexual misconduct, this researcher will provide a primer for proper prevention of and response to such behavior.

CHAPTER THREE

LEGISLATION

Introduction

Many laws exist regarding sexual relationships between teachers and students. Each state has a code of criminal laws that speaks to illegal sexual relations between adults and children. Some state criminal laws specifically refer to the relationships between teachers and students; others speak to relationships between adults and children in general. Criminal laws list penalties for violators that may include fines and imprisonment. Each state also has a code of administrative rules or regulations. These include rules that speak to the expected behaviors for state educators. Those who violate these rules are subject to penalties that may include the suspension or revocation of a license to practice as a teacher in a state. Federal laws speak to the responsibility of governmental agencies to protect students from unwelcome sexual contact and the ability of victims of harassment to make claims for damages when they are not protected by state agencies. A review follows of state criminal code, state administrative code, Title IX as it relates to sexual harassment, and 42 U.S.C. § 1983 as it relates to state liability.

State Law

State Statutes and Criminal Codes

The 10th Amendment to the United States Constitution grants powers to states that are not otherwise granted or prohibited to the states by the Constitution.[147] Among these

is the right of states to create laws. Each state has a legislative body that has the responsibility to enact laws that protect the populace. A law enacted by a legislative body is called a statute,[148] and each state may refer collectively to their statutes by a variety of names. States may call their code of laws "revised statutes," "revised code," "general laws," or some other name.

Each state's code of laws contains criminal laws. People who plead guilty to or are convicted of a criminal law by a jury may be subject to fines and imprisonment. Each state's code of criminal law includes a list of sexual crimes. No state permits a person to force or coerce another to have sexual relations.

Each state also has laws that prohibit some consensual sexual relationships. These laws vary among states based on the age of the victim, the victim's mental or physical capacity to consent, the age difference between the victim and the perpetrator, or the position of trust or authority the perpetrator holds over the victim. Accordingly, each state varies among its laws prohibiting sexual relationships between teachers and students. Some states specifically forbid sexual relationships between teachers and students regardless of age. Some states forbid sexual relationships between teachers and students depending on the age of the student or the age difference between the teacher and student. Other states have no laws prohibiting sexual relationships between teachers and students specifically, but have laws that prohibit sexual relationships in general that would prohibit relationships between teachers and students based on their age or age difference.

The language used in these sexual offense statutes varies. Generally "sexual contact" refers to any touching of an erogenous zone, including the genitals, buttocks, pubic region, or breast. "Sexual conduct" generally means vaginal intercourse, anal intercourse, fellatio, cunnilingus, or the insertion of any part of the body or any object into the vaginal or anal opening of another. Mere insertion is generally enough to complete intercourse, no matter how slight and regardless of emission.

State Codes of Ethics and Administrative Code

In addition to a code of criminal statutes, each state has a code of rules or regulations. These regulations specify procedures and policies for state agencies or departments. The state legislature or individual departments may create the procedures and rules.

Each state has a department of education. The policies they create have the power of law. Among these policies, for example, are requirements for student graduation, teacher licensure, school calendars, achievement testing, course offerings, and so forth. Individuals or school districts that do not follow department policies are breaking the law and are subject to penalties. Penalties may include fines, reprimands, suspension or revocation of licenses, consent agreements, and the like. Imprisonment is not a penalty departments of education can impose.

Among the regulations that affect departments of education operations may be requirements for professional and ethical behavior for teachers, and conditions upon which teachers may have their licenses revoked or suspended or cause a person to be ineligible from obtaining a license to practice. In some states, departments of education

have created specific codes of ethics or professional conduct for teachers. In other states, the rules regarding teacher behavior are found in the codes of regulations.

What follows is a review of state criminal law, administrative regulations, and state educator codes of ethics regarding relationships between teachers and students, where applicable. The review is categorized by the stringency of each state's criminal law and then organized alphabetically.

States that forbid sexual relations between teachers and students irrespective of age. Eight states' criminal codes forbid sexual relationships between teachers and students regardless of the age of the student or the age difference between the student and teacher: Connecticut, Iowa, Kansas, North Carolina, Ohio, Oklahoma, Texas, and Wisconsin. In these states, willing participation of the student in the relationship does not mean that the relationship is consensual.

Connecticut. Under Connecticut criminal law, a school employee is guilty of sexual assault in the second degree if the employee has sexual intercourse with a student enrolled in any school in the district in which the employee works.[149] The employee is guilty of sexual assault in the fourth degree if the employee has sexual contact with a student who attends the same school or other school in the district in which the employee works.[150] Connecticut administrative code prohibits the professional teacher from abusing a position of authority over students for private advantage, sexually or physically harassing or abusing students, or engaging in any misconduct that would put students at risk.[151]

Iowa. Under Iowa criminal law, a school employee who demonstrates a pattern of sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of either the school employee or the student engages in sexual exploitation. This conduct includes kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubic region, or genitals; or anal, oral, digital, or vaginal intercourse.[152] Touching that is necessary in the performance of the employee's duties while acting within the scope of employment, such as an aide diapering a special needs student, would not constitute sexual exploitation.[153]

Under administrative law, licensed educators in Iowa are required to abide by all laws applicable to the fulfillment of their professional obligations. If they do not, their behavior constitutes unprofessional conduct that may result in disciplinary action. It is considered unprofessional for any licensed educator in Iowa to be convicted of crimes or engage in sexual or other immoral conduct with a student. Teachers who engage in sexual involvement or indecent contact with a student will be considered to be violating the code of ethics. This includes the sexual exploitation behaviors defined in Iowa criminal law.[154]

Kansas. Kansas criminal statute prohibits a teacher or a person in a position of authority from engaging in sexual intercourse, lewd touching, or sodomy with a student who is not married to the offender. A person engaging in such an act could be guilty of unlawful sexual relations, even if the sexual activity were consensual.[155] Under Kansas administrative code, the state board of education may cancel any license issued by the state board on the grounds of immorality.[156] The state board of education is also

prohibited from knowingly issuing to or renewing a license of any person who has been convicted of several specific sexual or violent crimes, including unlawful sexual relations.[157]

North Carolina. Under criminal law in North Carolina, a school administrator, teacher, student teacher, school safety officer, or coach at any age is guilty of a felony if engaging in vaginal intercourse or any other sexual act with a student during or after the time the employee and student were together in the same school, but before the victim ceased being a student. Any other school employee who is at least four years older than the student also is guilty of a felony for the same acts. However, an employee other than a teacher, school administrator, student teacher, school safety officer, or coach who is less than four years older than the victim and engages in vaginal intercourse or a sexual act with a student is guilty only of a misdemeanor. The statute specifically states that consent is not a defense to these charges.[158]

North Carolina administrative code prohibits an educator from committing any abusive act or sexual exploitation with, to, or in the presence of a student, whether or not that student is or has been under the care or supervision of that educator. The educator also is prohibited from using language that is considered profane or vulgar; performing any sexual act; soliciting a sexual act through written, verbal, or physical means; sexually harassing a student; or intentionally soliciting, encouraging, or consummating a romantic or physical relationship with a student, including dating any student.[159] Educators who violate these standards shall be subject to investigation and disciplinary action by the state board of education or the local education authority.[160]

Ohio. Under Ohio criminal law, no teacher, administrator, coach, or other person in authority employed by a school is permitted to engage in sexual conduct with another when the other person is a student of that school, the offender is not a student of that school, and the employee and student are not married to each other.[161] Ohio's code of ethics for professional educators requires educators to maintain a professional relationship with all students at all times, both in and out of the classroom. Conduct unbecoming of a professional educator includes committing any act of sexual abuse of a student or minor, engaging in inappropriate sexual conduct with a student or minor, or soliciting, encouraging, engaging, or consummating an inappropriate relationship with a student or minor.[162]

Oklahoma. Oklahoma criminal law defines sexual battery as when any person lewdly or lasciviously looks upon, touches, mauls, or feels the body or private parts of any child less than sixteen years of age in any manner relating to sexual matters or sexual interest.[163] However, to protect all students from school employees, sexual battery is also defined as the intentional touching, mauling or feeling of the body or private parts of any person sixteen years of age or older when committed by a state, county, municipal or political subdivision employee.[164] Oklahoma administrative code permits teaching certificates and licenses to be revoked by the state board of education for willful violation of any rule or regulation of the board or any federal or state law or other proper cause, but only after proper due process has been given.[165]

Texas. Under Texas criminal code, an employee of a public or private primary or secondary school commits a crime if the employee engages in sexual contact, sexual

intercourse, or deviate sexual intercourse with a student who is enrolled in the school in which the employee works and who is not the employee's spouse.[166] Texas administrative code also prohibits educators from soliciting or engaging in sexual conduct or a romantic relationship with a student.[167]

Wisconsin. In Wisconsin, a school employee who has sexual contact or sexual intercourse with a child who is sixteen or older and not the employee's spouse is guilty of a felony if the child is a student in the school district in which the perpetrator is employed.[168] All people, not just school employees, are prohibited from having sexual contact or sexual intercourse with a person who has not attained the age of sixteen.[169] Under Wisconsin administrative law, the state superintendent may revoke any license for incompetency or immoral conduct on the part of the educator if the state superintendent establishes by a preponderance of the evidence that the person engaged in immoral conduct.[170] Furthermore, the state superintendent is required to revoke an educator's license if the licensee is convicted of any Class A, B, C, or D felony, which includes sexual assault of a child by a school staff person or a person who works or volunteers with children, and sexual assault of a child.[171]

States that forbid sexual relations between teachers and students conditional of age. Twenty-eight states have criminal statutes prohibiting sexual relationships between teachers and students in some cases, but allowing the relationships in other cases: Alaska, Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi,

Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. The legality of the relationships depends either upon the age of the student or the age difference between the student and teacher.

Alaska. In Alaska, a person commits the crime of sexual abuse of a minor if the perpetrator is eighteen years of age or older, engages in sexual penetration with a person who is less than sixteen years of age, and the offender is in a position of authority over the victim.[172] Thus, it appears to be legal for teachers to have sexual relationships with students sixteen years of age or older. However, under Alaska administrative code, a person required to hold a certificate who is employed by a school district may not engage in sexual conduct with a student.[173] Also, an educator must report to the state if the teacher has knowledge of a fellow educator engaging in such an act.[174]

Arizona. Under Arizona criminal law, a person commits sexual conduct with a minor by purposely engaging in sexual intercourse or oral sexual contact with any person under eighteen years of age. Sexual conduct with a minor who is at least fifteen years of age is a felony if the person is the minor's teacher or any other person who directly provides academic instruction to students in any school district, charter school, accommodation school, the school for the deaf and the blind, or a private school in Arizona.[175] Thus, it seems a teacher could have legal sexual relations with a student eighteen or older, and thus not a minor. Under Arizona administrative law, the state board of education must revoke, may not issue, and cannot renew the certification of a

person who has been convicted of, admitted in open court, plead to any of several sexual or violent crimes, including sexual conduct with a minor.[176]

Arkansas. Under criminal code, a person commits sexual assault in Arkansas if the person has sexual contact with a person less than eighteen years of age and the actor is an employee in the victim's school district.[177] Accordingly, a teacher legally could have sex with a student eighteen or older. The Code of Ethics for Arkansas Educators does not seem to restrict the law any further, stating that an educator must maintain a professional relationship with students, both in and outside the classroom,[178] but not defining "professional relationship." The Professional Licensure Standards Board is authorized to recommend to the State Board probation, suspension, revocation or denial of a teaching license, or the issuance of a reprimand or warning to the holder of a teaching license if there is probable cause to believe the teacher breached any of the Code of Ethics or was subjected to disciplinary action in another state on grounds consistent with Arkansas's standard.[179]

Colorado. Colorado criminal statute outlaws a person from knowingly subjecting someone to sexual contact if the person is in a position of trust and the victim is a child less than eighteen years of age, and the perpetrator and victim are not married.[180] Apparently, then, a Colorado teacher could legally have sex with a student eighteen or older. Colorado administrative code does not seem to restrict criminal law any further for educators. However, any educator's license may be denied, annulled, suspended, or revoked when the applicant or holder is convicted of, pleads *nolo contendere* to, or receives a deferred sentence for a violation of any one of several offenses, including

sexual assault, unlawful sexual conduct, or sexual assault on a child by one in a position of trust.[181]

Delaware. In Delaware criminal code, a person who intentionally has sexual contact with a student younger than sixteen is guilty of unlawful sexual contact if the person stands in a position of trust, authority, or supervision over the child.[182] The same person is guilty of rape in the fourth degree if the act is sexual intercourse or penetration with a student between sixteen and seventeen.[183] The same person would be guilty of rape in the second degree if the victim was fifteen or younger.[184] Finally, in Delaware a person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person fifteen years or younger and the defendant is in a position of trust, authority, or supervision over the child.[185] Thus, Delaware criminal code seems to permit a teacher to have sex with a student eighteen or older.

Under Delaware administrative code, a teacher's license may be revoked if the teacher pleads guilty or is convicted of any crime against a child constituting a misdemeanor, except for unlawful sexual conduct in the third degree.[186] The teacher's license will be revoked if the teacher pleads guilty or is convicted of any felony sexual offense,[187] is terminated or dismissed for a sexual offense against a child,[188] or resigns after official notice of allegations of a sexual offense against a child, provided that clear and convincing evidence establishes the underlying misconduct occurred.[189]

Illinois. Illinois criminal law states a person who holds a position of trust, authority, or supervision in relation to the victim commits criminal sexual assault if the person engages in sexual penetration with a child between thirteen and seventeen years of

age and the perpetrator is seventeen years of age or over.[190] The same perpetrator is guilty of aggravated criminal sexual abuse if the act is sexual conduct (which involves superficial contact instead of penetration in Illinois), and the victim is between thirteen and seventeen, with the perpetrator maintaining a position of authority over the victim.[191] Thus, in Illinois, a teacher legally could have sex with a student eighteen or older. Illinois administrative law does not clarify teacher expectations any further, stating only that a competent teacher is required to follow codes of professional conduct and exhibit knowledge and expectations of current legal directives. This includes following school policy and procedures, and respecting the boundaries of professional responsibilities when working with students.[192] The term "respecting the boundaries of professional responsibilities" is not defined.

Indiana. Under Indiana criminal law, a child care worker, which includes school employees, who has sexual intercourse with, engages in deviate sexual conduct with, or fondles or touches a child sixteen or seventeen years old with the intent to arouse either the perpetrator or victim, would be guilty of child seduction, a class D felony. A person eighteen years of age or older who performs or submits to sexual intercourse or deviate sexual conduct with a child fourteen or fifteen years old is guilty of sexual misconduct with a minor, a class C felony. However, the offense is a class B felony if the perpetrator is at least twenty-one years of age. A person eighteen years of age or older who performs or submits to any fondling or touching, with intent to arouse or to satisfy the sexual desires of either the victim or the perpetrator, with a child fourteen or fifteen years of age, commits sexual misconduct with a minor, a class D felony. However, the offense is a

class C felony if it is committed by a person at least twenty-one years of age.[193] It appears that Indiana criminal law, then, does not prohibit sexual relationships between teachers and students if the student is eighteen years old or older. Indiana administrative code does not appear to further restrict such prohibitions. The department of education may suspend or revoke a license for immorality,[194] which is undefined, and shall permanently revoke the license of a person who has been convicted of any of several felonies, including sexual misconduct with a minor, following a due process hearing.[195]

Kentucky. Under Kentucky criminal code, a person in a position of authority or special trust is guilty of rape in the third degree when the person engages in sexual intercourse with a minor under sixteen years old.[196] The same person is guilty of sodomy when the person engages in deviate sexual intercourse with a minor less than sixteen years old.[197] Therefore, apparently a teacher in Kentucky legally can have sex with a student sixteen or older. However, Kentucky administrative code further restricts allowable conduct for teachers. Under Kentucky administrative law, certified educators are prohibited from engaging in any sexually related behavior with a student with or without consent, and are required to maintain a professional approach with students. Sexually related behavior includes rape, threats of physical harm, sexual assault, sexual jokes, sexual remarks, sexual kidding or teasing, sexual innuendo, pressure for dates or sexual favors, or inappropriate physical touching, kissing, or grabbing.[198]

Louisiana. Louisiana criminal code defines molestation of a juvenile as when a perpetrator seventeen years old or older performs lewd or lascivious acts upon a victim sixteen years of age or younger, if there is at least two years' age difference between

them, and the perpetrator has a position of supervision or control over the victim.[199] It appears, then, that a teacher in Louisiana could have sex with a student seventeen years or older. Under Louisiana administrative code, a person applying for a teaching certificate must be denied if the person has been convicted of a variety of sexual or violent offenses listed in the Louisiana code, or any felony offense.[200] Furthermore, current certificate holders must have their credentials suspended and revoked if convicted of any of those same crimes.[201]

Maine. A person is guilty of gross sexual assault under Maine criminal law if the person engages in a sexual act with a student younger than eighteen years old enrolled in a private or public elementary or secondary school or institution, if the perpetrator is a teacher or other employee with instructional, supervisory, or disciplinary authority over the student.[202] Thus, a Maine teacher legally could have sex with a student eighteen or older. Maine administrative code does not restrict a teacher's behavior any further. However, a Maine teacher will have a license suspended or revoked if a court record exists that the teacher has injured the health or welfare of a child through physical or sexual abuse or exploitation.[203] Moreover, harassment on the basis of sex, including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, shall be grounds for revocation or suspension of a certificate if submission is made a condition or basis for decisions on educational benefits for a student. A teacher's certificate may also be revoked if the unwelcome sexual advances towards the student has the purpose or effect of substantially interfering with the

student's academic performance or creates an intimidating, hostile, or offensive educational environment.[204]

Maryland. According to Maryland criminal code, sexual abuse of a minor student by a person in a position of authority occurs when a person in a position of authority engages in a sexual act, sexual contact, or vaginal intercourse with a minor who is a student enrolled at a school where the person in a position of authority is employed.[205] Thus, it appears to be legal for a Maryland educator to have sexual relations with a student eighteen years old or older. Maryland administrative code does not appear to restrict educator behavior further. Under the code, a Maryland educator's certificate must be suspended or revoked by the state superintendent if the certificate holder pleads guilty to or is convicted of a crime involving contributing to the delinquency of a minor or moral turpitude if the offense bears directly on the individual's fitness to teach.[206]

Michigan. Several Michigan criminal laws forbid sexual relationships between teachers and students, depending on their ages. A person commits criminal sexual conduct in the first degree if the person engages in sexual penetration with another person and the victim is at least thirteen but less than sixteen years of age and the actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.[207] The crime would be in the second degree if sexual contact took place instead of penetration.[208] A person in Michigan commits criminal sexual conduct in the third degree if the person is a teacher, substitute teacher, or administrator of a public or nonpublic school and the person engages in sexual

penetration with a student enrolled in the school who is at least sixteen years of age but less than eighteen years of age.[209] That crime would be in the fourth degree if sexual contact took place instead of penetration.[210] So, it appears legal in Michigan for a teacher to have sexual relations with a student eighteen years old or older.

Michigan administrative code does not seem to further restrict expectations of teachers regarding sexual relationships with students. The state superintendent may suspend an educator's certificate based upon evidence that the educator engaged in any felony, criminal sexual conduct in the fourth degree, or an attempt to commit criminal sexual conduct in the fourth degree.[211] Moreover, if a person who holds a Michigan teaching certificate has been convicted of criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, or an attempt to commit criminal sexual conduct in any degree, the superintendent must order an immediate summary suspension of the person's teaching certificate.[212]

Minnesota. Under Minnesota criminal law, a person in a position of authority over a victim between thirteen and fifteen years old who engages in sexual penetration with the victim is guilty of criminal sexual conduct in the first degree if the actor is more than forty-eight months older than the victim. Neither mistake as to the victim's age nor consent to the act by the victim is an allowable defense.[213] If the person engages in sexual contact instead of penetration, the crime would be in the second degree.[214] Also in Minnesota, a person who engages in sexual penetration with somebody at least sixteen but less than eighteen years of age is guilty of criminal sexual conduct in the third degree if the actor is more than forty-eight months older than the victim and is in a position of

authority over the victim. Again, neither mistaking the victim's age nor the victim's consent to the act is a defense.[215] The same crime would be in the fourth degree if sexual contact took the place of penetration.[216] So, in Minnesota it appears to be legal for a teacher to have sex with a student if the student is eighteen years old or older. Also, it would be legal to have sex with a younger student if the teacher were less than four years older than the student. In practical terms, that means a twenty-one year old teacher could have sex with a seventeen year old student. While a twenty-one year old teacher may be uncommon, it is not unheard of.

Minnesota administrative code does not clarify the criminal law any further. The Minnesota standards of professional conduct state a teacher shall not use professional relationships with students, parents, and colleagues to private advantage,[217] but they do not define the meaning of "to private advantage." Nonetheless, the Board of Teaching may impose one of several penalties when it has found a teacher violating the code of ethics: censure the teacher; place the teacher on probation; suspend the teacher for a period of time; or revoke the teacher's license.[218]

Mississippi. Mississippi criminal law declares a person is guilty of sexual battery if the person engages in sexual penetration with a child under the age of eighteen years if the person is in a position of trust or authority over the child, including being the child's teacher.[219] So, it is apparent that a teacher could have a sexual relationship with a student eighteen years old or older. The state's administrative code does not restrict teacher behavior any further, only allowing the state board of education to deny an application

for any teacher or administrator license if the applicant has been convicted of a sex offense as defined by federal or state law.[220]

Missouri. Under Missouri criminal law, a person commits the crime of statutory rape in the second degree if the person is twenty-one years of age or older and has sexual intercourse with another person who is less than seventeen years of age.[221] Moreover, a person commits the crime of sexual contact with a student while on public school property if the perpetrator is a teacher, a student teacher, any other employee of the school, a volunteer of the school or of an organization working with the school on a project or program, or a person employed by an entity that contracts with the public school district to provide services, and has sexual contact with a student of the public school while on any public school property.[222] Therefore, under Missouri criminal statute, a teacher legally could have sex with a student if the student was seventeen or older and the sexual activity took place off school property. Missouri administrative code does not appear to restrict teacher behavior any further, only granting the state board of education permission to discipline or refuse to issue or renew a certificate of license to teach of an educator who has pled guilty or been found guilty of a felony, such as statutory rape in the second degree, or any crime involving moral turpitude.[223]

Montana. Under Montana criminal statute, sixteen years old is the age of consent for sexual relations.[224] A person who supervises the welfare of children in Montana would be guilty of endangering the welfare of a child if the perpetrator assists, promotes, or encourages a victim younger than sixteen years old to engage in sexual conduct.[225] A person who subjects another person to sexual intercourse when the victim is less than

sixteen years old is guilty of sexual intercourse without consent.[226] A perpetrator who subjects a victim younger than sixteen years old to sexual contact commits the offense of sexual assault.[227] Apparently, a teacher in Montana legally could have sex with a student sixteen years old or older. Montana administrative code, however, more clearly restricts teacher-student sexual relationships. The board of public education in Montana can reprimand an educator or suspend or revoke the certificate of any educator for immoral conduct related to the teaching profession.[228] This includes sexual contact, or sexual intercourse between a teacher, specialist, or administrator and a person the teacher, specialist, or administrator knows or reasonably should know is a student at a public or private elementary or secondary school.[229]

Nevada. In Nevada criminal law, a school employee or volunteer in a position of authority who is twenty-one years old or older who has sexual conduct with a student sixteen or seventeen years old is guilty of a Class C felony.[230] The same perpetrator would be guilty of a Class B felony if the victim were fourteen or fifteen years old.[231] A Nevada educator, then, could legally have sexual relations with a student eighteen or older. Under state administrative code, if the background check of an educator shows that the applicant has been convicted of a felony or an offense involving moral turpitude, the Superintendent may refuse to grant the license or may determine that the conviction is unrelated to the position for which the applicant applied and grant the certificate.[232]

New Hampshire. Under state criminal law, a person in New Hampshire would be guilty of aggravated felonious sexual assault if the person engaged in sexual penetration with another person between thirteen and seventeen years of age, was in a position of

authority over the victim, and used that authority to coerce the victim to submit.[233] Thus, it appears legal in New Hampshire for a teacher to have sex with a student eighteen years old or older.

New Hampshire administrative code does not appear to further restrict teacher behavior regarding sexual relationships with students. However, the code allows the state board to deny an application for certification if the educator was convicted of a felony that might place students in physical or emotional jeopardy and the board determines that either the nature or circumstances of the offense, or the moral turpitude associated with the crime, render the educator unfit for licensure based on the educator's inability to perform assigned duties and loss of respect within the community.[234] The state board may also deny an application of a prospective educator for misconduct or unprofessional conduct, on or off duty, that might place students in potential physical or emotional jeopardy if the board determines that the nature or circumstances of the conduct so detract from the educator's professional standing as to render the educator unfit for licensure based on the educator's inability to perform assigned duties and if there is a nexus between the off duty misconduct or unprofessional conduct of the educator and the educator's ability to carry out assigned duties.[235] An educator currently holding a certificate shall have the certificate suspended or revoked for the same reasons.[236] It is not stated in the code whether or not a teacher engaging in a consensual sexual relationship with a student would be unfit for licensure.

New Jersey. In New Jersey, criminal code makes it illegal to commit an act of sexual penetration with another person if the victim is between thirteen and fifteen years

old and the perpetrator has supervisory or disciplinary power over the victim due to the perpetrator's legal, professional, or occupational status. This crime is aggravated sexual assault.[237] Sexual assault occurs in New Jersey when a person performs an act of sexual penetration with another person who is at least sixteen but less than eighteen years old, and the actor has supervisory or disciplinary power of any nature or in any capacity over the victim.[238] Thus, it appears permissible under New Jersey criminal code for a school employee to have sexual relationships with a student eighteen years old or older. New Jersey administrative code does not speak to sexual relationships between teachers and students, only stating that a person shall be permanently disqualified from employment or service if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree.[239]

New Mexico. Under New Mexico criminal law, criminal sexual contact of a minor occurs when a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider, or a school volunteer engages in any sexual contact with a child thirteen to eighteen years of age when the perpetrator is eighteen-years-or-older, is at least four years older than the child, is not the spouse of that child, and learns while performing services for a school that the child is a student in a school.[240] Thus, it appears legal in New Mexico for a small number of teacher-student sexual relationships to be legal; for example, a twenty-one year old teacher seemingly could have sex with a seventeen or eighteen year old student.

However, New Mexico administrative code more clearly restricts such relationships. According to the code, educators in New Mexico are prohibited from

engaging in inappropriate touch with students, whether or not on school property. This includes all forms of sexual touching, sexual relations, dating, embracing, petting, hand-holding, or kissing that is unwelcome by the student or is otherwise inappropriate given the age, sex, and maturity of the student. The code further prohibits any open displays of affection toward mostly-boys or mostly-girls. The administrative code also prohibits educators from interfering with a student's right to a public education by sexually harassing a student, making sexual advances towards a student, requesting sexual favors from a student, making repeated sexual references to students, or engaging in any other verbal or physical conduct of a physical nature with a student even where the teacher believes the student consents or the student actually initiates the activity.[241]

North Dakota. In North Dakota, criminal law dictates that a person who knowingly has sexual contact with another person is guilty of an offense if the victim is between fifteen and seventeen years of age and the perpetrator is responsible for general supervision of the other person's welfare, or the victim is between fifteen and seventeen years of age and the actor is an adult.[242] Thus, under North Dakota criminal law, a teacher could have sex with a student eighteen years old or older. However, North Dakota administrative law further restricts a teacher's ability to have sex legally with a student, mandating that the North Dakota educator does not engage in physical abuse of a student or sexual conduct with a student and requiring educators to report to the education standards and practices board if they become aware of any other educator participating in such behavior.[243]

South Carolina. A person in South Carolina is guilty of criminal sexual conduct with a minor in the second degree if the person engages in sexual battery with a victim who is at least fourteen but less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit, or is older than the victim.[244] Also, a person eighteen years of age or older in South Carolina is guilty of criminal solicitation of a minor if the person attempts to persuade, induce, entice, or coerce a person younger than eighteen years old to engage in sexual activity, including penetration, or touching of genitalia or other erogenous areas, whether clothed or unclothed.[245] Thus, it appears legal for a teacher in South Carolina to have sexual relations with a student younger than eighteen years old. South Carolina administrative code appears to be more restrictive, however. Under the administrative code, the South Carolina state board of education has the authority to deny, revoke, or suspend a teacher's certificate, or publicly reprimand a teacher for immorality or any conduct involving moral turpitude. The administrative code declares that South Carolina educators have had disciplinary action taken on their certificates for pursuing a personal, inappropriate relationship with a student, touching a student inappropriately, and sending or receiving prurient e-mails.[246]

Tennessee. Tennessee criminal law forbids sexual battery by an authority figure, which is a felony consisting of sexual contact between a victim and perpetrator whereby the victim is thirteen to seventeen years of age and the perpetrator is in a position of trust or has supervisory or disciplinary power over the victim due to the perpetrator's legal, professional or occupational status, and uses the position of trust to accomplish the sexual

contact.[247] Thus, it would appear legal for a teacher to have sexual relationships with students eighteen years old or older. The state's administrative code does not seemingly restrict such relationships further, stating only in general terms that the Tennessee state board of education must automatically revoke the license of a teacher or administrator who has been convicted of a variety of violent, nonconsensual sexual, or drug related offenses.[248] The state board of education may also revoke, suspend, or refuse to issue or renew a license for conviction of a felony[249] or other good cause.[250]

Vermont. Under criminal statute, no person in Vermont is allowed to engage in a sexual act with a child who is under the age of eighteen and is entrusted to the perpetrator's care by authority of law or is the child, grandchild, foster child, adopted child, or stepchild of the perpetrator.[251] Thus, Vermont criminal law would appear to permit sexual relationships between teachers and eighteen-year-old students. Vermont administrative code is clearly more restrictive, however. Under Vermont administrative code, an educator must maintain a professional relationship with all students, both inside and outside the classroom, and make reasonable efforts to protect students from conditions that are harmful to their health and safety. A Vermont educator will be considered to be engaging in unprofessional conduct if the educator commits sexual acts with or solicits sexual acts from any minor who is not a student, or any elementary or secondary student regardless of age. It is also considered unprofessional conduct for an educator in Vermont to solicit, encourage, or participate in a romantic or sexual written, verbal, or physical relationship with a student, use offensive language with a student, or take offensive digital, photographic, or video pictures of students.[252]

Virginia. Under Virginia criminal code, a perpetrator eighteen years old or older in a supervisory or custodial relationship with a victim seventeen years old or younger is guilty of taking indecent liberties with a child by a person in a custodial or supervisory relationship if the perpetrator proposes the victim fondle the perpetrator's genitalia, fondles the victim's genitalia, invites intercourse with the victim, exposes himself or herself to the victim, asks the victim to expose himself or herself to the perpetrator, or asks the victim to have intercourse with another person.[253] Thus, a teacher could apparently have sex with a student eighteen years old or older. Virginia administrative law does not seem to restrict such relationships any further. However, a license issued to a Virginia teacher may be revoked for conviction of any felony or conviction of any misdemeanor involving moral turpitude.[254]

Washington. According to Washington criminal law, a school employee is guilty of sexual misconduct with a minor in the first degree when the person has sexual intercourse with a registered student of the school who is sixteen or seventeen years old and not married to the employee, if the employee is at least sixty months older than the student.[255] Under the same age conditions, a school employee engaging in sexual contact with the student would be guilty of sexual misconduct with a minor in the second degree.[256] Thus, apparently a Washington teacher can have sex with a student who is sixteen or seventeen years old if the teacher is twenty-one or twenty-two, respectively. Washington administrative code appears to be more restrictive than criminal law, however. Under administrative code, an educator would be displaying unprofessional conduct if the educator committed any sexually exploitive act with or to a student,

including any verbal or physical sexual advance, sexual intercourse, indecent exposure, and sexual contact, including the intentional touching of the sexual or other intimate parts of a student.[257] The behavior would not constitute unprofessional conduct if it were necessary and appropriate for the hygienic or health needs of the student.[258]

West Virginia. Under criminal law, a person in West Virginia is guilty of sexual abuse when the person is in a position of trust and engages or attempts to engage in sexual intercourse, sexual intrusion, or sexual contact with a child under the person's care.[259] It appears, then, that a West Virginia teacher could have sexual relations with a student eighteen years old or older. West Virginia administrative code does not seemingly restrict such relationships any further. The code vaguely states that all West Virginia school employees must maintain a safe and healthy environment, free from harassment, and demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral and ethical behavior.[260]

Wyoming. Under Wyoming criminal code, a person commits the crime of sexual abuse of a minor in the first degree if a perpetrator eighteen years old or older inflicts sexual intrusion on a victim who is less than sixteen years old and the perpetrator is in a position of authority over the victim.[261] The same perpetrator commits the crime of sexual abuse of a minor in the second degree if the person engages in sexual contact with a victim who is less than sixteen years old.[262] The crime is sexual abuse of a minor in the third degree if the perpetrator is twenty years old or older and engages in sexual intrusion with a victim who is either sixteen or seventeen years old, the victim is at least four years younger than the perpetrator, and the perpetrator is in a position of authority over the

victim.[263] Finally, the crime would be sexual abuse of a minor in the fourth degree if the same perpetrator engages in sexual contact with a victim who is either sixteen or seventeen years old, and the victim is at least four years younger than the perpetrator.[264] In short, Wyoming criminal code does not prohibit a teacher from having sex with a student eighteen years old or older. Wyoming administrative code is more restrictive than criminal code however, allowing a teacher's certificate to be suspended or revoked for immorality, which includes misdemeanor convictions for sexual misconduct or an immoral act, or engaging in any type of sexual relationship with a student.[265]

States that forbid sexual relations between adults and minors, nonspecific to teachers. Criminal codes in fourteen states do not specifically forbid sexual relationships between a teacher or other person in a position of authority and a student: Alabama, California, Florida, Georgia, Hawaii, Idaho, Massachusetts, Nebraska, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, and Utah. Nonetheless, these fourteen states have statutes that prohibit certain sexual relationships between adults and minors that would apply to adults in any profession, even teachers and other school employees.

Alabama. Alabama criminal code states that rape in the second degree occurs when a person sixteen years old or older engages in sexual intercourse with a member of the opposite sex between thirteen and fifteen years old, provided the perpetrator is at least two years older than the victim.[266] Furthermore, sexual abuse in the second degree is when a person nineteen years old or older subjects another person to sexual contact who

is between thirteen and fifteen years old.[267] Alabama criminal law sets sixteen as the legal age of consent for sexual relations.[268] Thus, it appears to be legal under Alabama criminal law for teachers to have sexual relationships with students sixteen or older. Alabama administrative code, however, seems to forbid all teacher-student sexual relationships. The administrative code declares that an educator should always maintain a professional relationship with all students. The code defines unethical conduct as any behavior that includes soliciting, encouraging, or consummating an inappropriate written, verbal, or physical relationship with a student.[269] A teacher's license may be revoked if the teacher has been proven guilty of immoral conduct or unbecoming or indecent behavior in Alabama or any other state or nation.[270]

California. California criminal statute defines unlawful sexual intercourse as an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. A minor is a person under the age of eighteen years and an adult is a person who is at least eighteen years of age.[271] Thus, it appears to be legal in California for a teacher to have sex with a student who is eighteen years old or older. California administrative code does not appear to further restrict teacher-student sexual relationships. Under the administrative code, the Commission for Teacher Preparation and Licensing must admonish, reprove, or revoke or suspend the license of educators who engaged in immoral or unprofessional conduct.[272] If the educator has been convicted of a sex offense, the commission immediately must suspend the credential.[273]

Florida. Florida criminal law forbids a person twenty-four years of age or older from engaging in sexual activity with a person sixteen or seventeen years of age.[274] So,

under Florida law, a teacher could have a sexual relationship with a student eighteen years old or older, and a teacher younger than twenty-four could have sex with students who are sixteen to seventeen years old. Florida administrative code does not appear to further restrict teacher-student sexual relationships. Under the code, teachers may not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicap, sexual orientation, or social and family background and must make reasonable efforts to assure that students are protected from harassment and discrimination. Teachers also may not exploit a relationship with a student for personal gain or advantage,[275] but it is not clear if "personal gain or advantage" includes sexual relationships.

Georgia. Georgia criminal code declares a person commits statutory rape when the person engages in sexual intercourse with any person under the age of sixteen years, if the victim is not the perpetrator's spouse.[276] The same perpetrator would be guilty of child molestation if the person does any immoral or indecent act to the same aged victim, if the intent is to arouse or satisfy the sexual desires of either the victim or perpetrator.[277] Thus, criminal law in Georgia seems to permit sexual relationships between teachers and students sixteen years old or older. Georgia administrative code more greatly restricts an educator's ability to have sex with students, though. Under the code, an educator in Georgia is considered to engage in unethical conduct if the educator is convicted of a felony or of any crime involving moral turpitude.[278] An educator also is considered to engage in unethical conduct if the educator commits or solicits any unlawful sexual act[279] or solicits, encourages, or consummates an inappropriate written, verbal, or physical

relationship with a student.[280] Certificated employees are subject to discipline, including reprimand and license suspension or revocation, if they engage in unethical conduct as outlined in The Code of Ethics for Educators.[281]

Hawaii. Hawaii criminal statute declares a person commits the offense of sexual assault in the first degree if the person has sexual penetration with a person fourteen or fifteen years old, the perpetrator is more than five years older than the victim, and the two are not married to each other.[282] The crime would be sexual assault in the third degree if the victim and perpetrator met the same conditions described above but sexual contact happened instead of sexual penetration.[283] It appears as though a teacher in Hawaii could have legal sexual relations with a student sixteen years old or older. Hawaii administrative code may prohibit such relationships, but it is vague. Under the code, Hawaii educators must maintain a respectful, professional relationship with students,[284] though those terms are undefined. The state department of education may refuse to employ, may refuse to issue a teaching certificate to, may terminate the employment of, and may revoke the teaching certificate of any educator with a background involving a sex offense or any other circumstance which indicates that the educator may pose a risk to the health, safety, or well-being of children.[285]

Idaho. In Idaho, criminal law defines rape as any penetration of the oral, anal, or vaginal opening of a female by the perpetrator's penis if the female is under the age of eighteen years.[286] Thus, in Idaho, it appears a female teacher legally can have sex with a male student of any age, and a male teacher legally can have sex with a female student eighteen or older. Idaho administrative code is more restrictive towards teacher-student

sexual relationships, however. A professional educator in Idaho is prohibited from committing any act of child abuse, soliciting any sexual act from any minor or any student regardless of age, harassing any student, or soliciting, encouraging, or consummating a romantic or inappropriate relationship with a student, regardless of age. Educators are also prohibited from using improper sexual comments, taking inappropriate photos or videos of students, or having inappropriate contact with any minor or any student regardless of age using electronic media.[287]

Massachusetts. Under Massachusetts criminal law, a perpetrator who induces a victim under eighteen years of age to have unlawful sexual intercourse shall be punished by imprisonment, a fine, or both.[288] Thus, a teacher could conceivably have sex with a student eighteen years old or older. Massachusetts administrative law does not appear to place further restrictions of teacher-student sexual relationships. However, a teacher's license may be suspended or revoked if the licensee has pleaded guilty to or been convicted of a crime involving moral turpitude, which has discredited the profession or has shown the educator to lack good moral character.[289]

Nebraska. Under Nebraska criminal statute, a perpetrator who is nineteen years old or older who subjects a person between twelve and fifteen years old to sexual penetration is guilty of sexual assault in the first degree, a Class II felony.[290] A person twenty-five years old or older who has sexual penetration with a child between twelve and fifteen years of age would be guilty of sexual assault of a child in the first degree, a Class IB felony.[291] A perpetrator who encourages or contributes to the delinquency of a person less than eighteen years of age so that the juvenile becomes or will tend to become

a delinquent child is guilty of contributing to the delinquency of a child, a misdemeanor.[292] While this statute does not specifically address the question of sexual relations between an adult and a child, Nebraska case law has found that an adult who requests a child under the age of eighteen meet the adult for sexual encounters in the evening or early morning hours will be in violation of this law.[293]

It is unclear whether Nebraska administrative code places greater restrictions on teacher-student sexual relationships. The code declares the Nebraska educator must exhibit good moral character, must not exploit professional relationships with students for personal gain or private advantage, and must not sexually harass students.[294] The code does not define "personal gain or private advantage" and does not specify if the prohibition against sexual harassment includes the parameters set forth under Title IX. Nonetheless, teachers who violate the standards may be subject to the suspension or revocation of their certificate, or may be admonished or reprimanded by the commissioner of education. The standard of proof for these situations is by a preponderance of the evidence.[295]

New York. Under New York criminal law, a person may legally consent to sexual activity at seventeen years old.[296] A person in New York may be guilty of a criminal sexual act in the third degree if the person is twenty-one years old or older and engages in oral or anal sexual conduct with a person less than seventeen years old.[297] The same perpetrator may be guilty of rape in the third degree if the person engages in sexual intercourse with another person less than seventeen years old.[298] Thus, it appears legal in New York for a teacher to have sexual relations with a student seventeen years old or

older. State administrative code does not appear to further restrict a teacher's ability to have sex with a student. However, the code requires the chief school administrator of a district to report to the state professional conduct officer any information gathered that indicates a licensed educator has committed a crime or acted in a way that raises questions about the educator's moral character.[299] After a due process hearing, an offending educator may have the license revoked or suspended, be ordered to undergo additional training, or be fined.[300]

Oregon. Under Oregon criminal code, a person commits rape in the third degree if the person has sexual intercourse with a victim younger than sixteen years of age.[301] A person commits sexual abuse in the third degree if the person subjects another person to sexual contact and the victim is incapable of consent due to being less than eighteen years of age.[302] Thus, it appears a teacher could legally have sex with a student eighteen years old or older in Oregon. State administrative code, however, clearly prohibits all teacher-student romantic relationships. The code states educators must maintain an appropriate professional student-teacher relationship by not demonstrating inappropriate interest in a student's personal life, not exchanging romantic or overly personal gifts or notes with a student, reporting to the educator's supervisor if the educator has reason to believe a student may be becoming romantically attached to the educator, and honoring appropriate adult boundaries with students in conduct and conversations at all times.[303] The Teacher Standards and Practices Commission will deny, revoke, or deny the right to apply for a license or charter school registration to any applicant or educator who has been convicted

of rape in the third degree, sexual abuse in the third degree, and several other sexual, violent, or theft crimes.[304]

Pennsylvania. Under Pennsylvania criminal law, a person who has sexual intercourse with someone less than thirteen years old is guilty of rape of a child, a first degree felony.[305] A person who engages in vaginal or anal penetration with a person less than sixteen years of age commits aggravated indecent assault if the perpetrator is four or more years older than the victim.[306] Thus it would appear a teacher could legally have sex with a student sixteen years old or older. However, Pennsylvania administrative code clearly restricts such relationships. Under the code, a professional educator may not sexually harass or engage in sexual relationships with students.[307] Those who do engage in such relationships may be subject to public or private reprimand or suspension or revocation of their license.[308]

Rhode Island. Under criminal law, a perpetrator is guilty of third degree sexual assault in Rhode Island if the person is nineteen years old or older and engages in sexual penetration with another person who is fourteen or fifteen years old, the age of consent being sixteen in Rhode Island.[309] Thus, a teacher could legally have sex with a student who is sixteen or older in Rhode Island. State administrative code does not appear to restrict such relationships any further. State code does require any person seeking employment with a private or public school in Rhode Island to undergo a national and state criminal background check. If an educator has a criminal record with a conviction of one of several sexual or violent crimes, including third degree sexual assault, the person will be disqualified from teaching in Rhode Island.[310]

South Dakota. South Dakota criminal code sets sixteen years old as the legal age of consent for sexual activity. A person sixteen years old or older who knowingly engages in sexual contact with another person other than that person's spouse is guilty of a felony, if the victim is fifteen years old or younger.[311] A perpetrator who causes or permits a person seventeen years old or younger to engage in an activity that involves nudity is guilty of sexual exploitation of a minor, a felony.[312] Thus, it would appear South Dakota teachers could have sexual relationships with students eighteen years old or older. However, administrative law in South Dakota clearly prohibits such conduct. The code states that teachers in South Dakota must maintain professional relationships with students without exploiting them for personal gain or advantage. They also shall engage in no act that results in a conviction and commit no act of moral turpitude or gross immorality.[313] Finally, educators are expressly forbidden from engaging in any sexual activity with students, including intercourse, sexual contact, sexual photography, or sexual communications.[314]

Utah. Utah criminal statute states that a person commits unlawful sexual conduct with a minor if the perpetrator is ten or more years older than the minor, and: has sexual intercourse with the victim; engages in a sexual act involving the genitals of one person and the mouth or anus of the other person; causes the penetration of the genital or anal opening of the victim by any object, substance, or part of the body, with the intent to cause pain to either person or with the intent to arouse or gratify the sexual desire of either person; touches the anus, buttocks, or any part of the genitals of the victim; or touches the breast of a female victim.[315] Moreover, a person in Utah commits unlawful

sexual activity with a minor if the perpetrator: has sexual intercourse with the victim; engages in any sexual act with the victim involving the genitals of one person and the mouth or anus of the other person; or causes the penetration, however slight, of the genital or anal opening of the victim by any object, substance, or part of the body, with the intent to cause pain to either person or with the intent to arouse or gratify the sexual desire of either person.[316] Thus, under Utah code, it seems permissible for a teacher to have sex with a student eighteen or older, or sixteen or seventeen years old if the teacher is not more than ten years older than the student.

Utah administrative code, though, clearly prohibits sexual relationships between teachers and students. The code states that educators in Utah must maintain a professional and appropriate relationship and demeanor with students and not solicit, encourage, or consummate an inappropriate written, verbal, or physical relationship with a student or minor.[317] Teachers failing to adhere to the code may have their licenses suspended or revoked, more quickly so if they have received prior documented warning for similar behaviors from their employer.[318]

Federal Law

Title IX

Title IX as it relates to sexual harassment. Title IX of the Education Amendments of 1972 prohibits gender-based discrimination and abuse of students in federally funded education programs.[319] All programs of all educational institutions, private or public, that receive any federal financial assistance are subject to the

requirements of Title IX. This includes educational, athletic, and extracurricular programs that are sponsored by the institution, even if the programs do not take place on the institution's property or during school hours. Title IX protects students of both sexes from harassment and abuse, even if the perpetrator is the same sex as the victim.[320] Title IX does not prohibit harassment based solely on sexual orientation, however. For example, if homosexual students were taunted by a teacher or peers for their sexual orientation, that would not be a violation of Title IX.

Prohibitions under Title IX include sexual harassment of a student by a teacher or other school employee,[321] which may take the form of quid pro quo or hostile environment harassment. Quid pro quo harassment occurs when a school employee bases an educational decision, such as a student's grades or a student's acceptance to participate in a school program, on the student's submission to the school employee's sexual advances, whether the conditioning was implicit or explicit.[322] Hostile environment harassment occurs when a student's ability to benefit from or participate in an educational program or activity is severely, persistently, or pervasively limited by a school employee's sexual advances or verbal, nonverbal, or physical sexual conduct.[323]

Liability under Title IX. The Supreme Court has ruled that schools are liable for quid pro quo and hostile environment sexual harassment of students by employees based on the application of agency principles.[324] Thus, if a teacher used authority over a student to force the student to submit to sexual demands, the school would be responsible for this quid pro quo harassment by its employee.[325] A school also could be liable for

hostile environment harassment if the employee acted with apparent authority or was aided in carrying out the harassment based on his position of authority in the school.

In situations not involving quid pro quo or hostile environment harassment (i.e., in situations where the sexual conduct between the employee and student is consensual), a school will be liable under the same standards that would apply to peer or third party harassment. That is, a school will be liable if the school had actual notice of the harassment and failed to take immediate and appropriate corrective action. However, under this standard of liability, a school may be in compliance with Title IX if it takes immediate corrective actions upon learning of the harassment.

In peer-to-peer harassment, a violation of Title IX occurs where the conduct includes unwelcome sexual advances; unwelcome sexual conduct; or harassment that is severe, persistent, and pervasive, and based on the victim's gender. Sexual conduct or advances are unwelcome if the victim regards the conduct as undesirable or offensive.[326] When harassment occurs between a school employee and a student, however, the conduct does not have to be unwelcome, particularly for younger students.[327] As students are unable to consent to sex with school employees in criminal law, it would be incongruous to say they can welcome sex in a civil context. Furthermore, requiring a victim to prove the conduct was unwelcome would allow perpetrators to take advantage of impressionable youth and subject victims to intense scrutiny regarding their degree of fault at trial.

While it is unlikely that a relationship between an elementary student and teacher would ever be viewed as consensual, several factors may be considered before making a

similar judgment about sexual relationships between older secondary students and school employees. Among these factors are the type of conduct, the amount of power or authority the harasser has over the student, whether the student was legally able to consent due to the student's age, and whether the student had a disability that would prevent the student from being able to consent.[328] Where states prohibit sexual relationships between students and teachers, either through criminal law or administrative code, such relationships are by definition unwelcome.

When determining whether conduct is sufficiently severe, persistent, or pervasive to be harassment, courts will consider the conduct from both subjective and objective perspectives.[329] In making the determination, courts will consider several factors, including: the degree to which the conduct affected the student's education; whether there was injury, either tangible or intangible;[330] the type, frequency, and duration of the conduct; and the relationship between the harasser and the victim. A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the relationship between the alleged harasser and victim. For example, due to the power that a teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.[331]

If a school has actual notice of a sexually hostile environment and does not take immediate corrective action, it will be violating Title IX.[332] A school is considered to have notice if a responsible employee of the school actually knows about the harassment,[333] or if a responsible employee of the school should have received notice

from another employee. Under federal law, all education programs receiving federal financial assistance must designate at least one "responsible employee" to investigate complaints of sexual harassment and must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of harassment.[334] Thus, school employees who are aware of another employee sexually harassing a student are at the very least required to contact the school's designated responsible employee, assuming the school is in compliance with the regulations.[335] Not doing so could cause the employee to be liable.

A school may actually know about harassment through many means. Perhaps a victimized student filed a written complaint. Perhaps a student or parent verbally told a principal or other employee at school. An employee of the school may have witnessed the harassment. Other students may have witnessed the harassment and told a responsible school employee. Or the school may have gotten reports of the harassment from the media or community members.

"Constructive notice" occurs when a school official did not actually know about the harassment but should have known, perhaps by noticing changes in patterns of behavior or becoming aware of symptoms of abuse of a victim. The Supreme Court has ruled in *Gebser v. Lago Vista Independent School District* that a school district will not be responsible for damages if it has constructive notice only.[336] Instead, a district must have actual notice and show deliberate indifference to ameliorate the problem.

Responding to complaints of harassment. When a student or parent files a complaint to a school about harassment, the school should explain the grievance

procedures to the student and parent. Even if the student does not wish to file a formal complaint, the school is responsible for investigating what happened and making immediate steps to stop the harassment and resolve the situation. This may include the school taking interim steps such as transferring the student out of a harassing teacher's classroom, assigning a teacher to home pending an investigation, and alerting police if the harassment may have been criminal in nature.

If the school determines after the investigation that the student was sexually harassed, it should take appropriate and effective corrective action. Of utmost importance is ensuring that the harassment stops. This may include disciplinary action against an employee based on the severity of the harassment or a record of prior misconduct. If a school does not respond to reports of harassment immediately and appropriately, Title IX allows for the victim to collect monetary damages to remedy the effects of the harassment that would have been prevented if the school acted appropriately when it learned of the harassment.

42 U.S.C. § 1983

History of 42 U.S.C. § 1983. The Civil Rights Act of 1871, also known as § 1983 of Title 42 of the United States Code, was enacted by Congress as Section 1 of the Ku Klux Klan Act of April 20, 1871. Section 1983 states:

> 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…

The primary purpose of § 1983 was to offer a way to enforce the Fourteenth Amendment, which, until then, had been unenforceable.[337] As the title implies, the Ku Klux Klan was the main group of focus of § 1983, but in practice it served to protect all citizens whose constitutional rights were infringed by state actors.[338]

Section 1983 itself is not a source of substantive rights. Rather, it provides a vehicle for those whose rights have been violated under other federal laws to be made whole through monetary compensation. For example, a student who feels she has been sexually harassed by her teacher may sue under Title IX or the 14th Amendment, attaching a § 1983 claim for damages.

While few lawsuits were filed under § 1983 in its first hundred years of existence, it became a more popular basis for a complaint in the 1960s. In *Monroe v. Pape*,[339] the Chicago police broke into the Monroes' house one evening and searched it without a warrant. The police found drugs in the house and arrested the occupants, who were later released after the search was determined to be improper. The Monroes sued the City of Chicago and the officers, arguing their Fourth Amendment protection from unreasonable search and seizure had been violated. The United States Supreme Court ruled that the officers were liable under § 1983 for abusing their power. However, the claim against the City of Chicago was dismissed, as the Court ruled that a municipal corporation is not a "person" within the meaning of the statute.

That theory changed in *Monell v. Department of Social Services*.[340] In *Monell*, a group of female employees sued under § 1983, claiming they were forced as a matter of civic policy to take unpaid maternal leaves of absence. The appellate court ruled for the respondent agencies, but the Supreme Court overruled the lower court's decision, thus overruling *Monroe v. Pape*. The Court determined in its ruling that a governmental agency could be held liable for an infliction of injury if the injury occurred as the result of a governmental policy.

Personal liability and damages under § 1983. In some cases individuals are not considered persons acting under color of state law and are not found liable for § 1983 violations as individuals. In *Will v. Michigan Department of State Police*,[341] a police employee was denied a promotion for what he thought were illegal reasons. He filed suit against the Michigan Department of State Police as an administrative body and the Director of State Police in his individual capacity. The Supreme Court ruled against the plaintiff, reasoning that:

> the legislative history of 1983 did not indicate a clearly expressed congressional intent that the word 'person' include the States of the Union; and…that the Michigan Director of State Police was a not a 'person' subject to liability under 1983, because a suit for nonprospective relief against a state official in his or her official capacity is a suit against the official's office and, as such, is no different from a suit against a state itself.[342]

Contrastingly, in *Hafer v. Melo*,[343] the Supreme Court held that state officers' actions completed in their official capacities might cause them to be personally liable for damages under § 1983. When several members of the Pennsylvania Auditor General's office were dismissed, they filed suit against the Auditor General as an individual. In the majority opinion, the Supreme Court held that the Auditor General could be held personally liable to the employees for damages under § 1983 because, notwithstanding the court's holding in *Will* that state officials acting in their official capacities are not "persons" subject to liability under § 1983, the phrase "acting in their official capacities" is meant as a reference to the capacity in which an official is sued rather than the capacity in which the person causes the injury. The Court further reasoned that state officials are "persons" under § 1983, and that the Eleventh Amendment, which immunizes states from suits in federal courts, does not bar suits brought against state officials in their individual capacities under § 1983.

In *Hafer*, the court determined that the defendant could be personally liable for any actions done in her official capacity. The Court determined that only a small number of people, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions, have complete protection from suit. The Court reasoned that state executive officials do not have absolute immunity for their official actions.[344]

Other case law has emerged that confirms a petitioner's ability to file successful claims against a state actor individually, particularly if the individual demonstrated callous indifference for the rights of the petitioner and violated a clearly established law.

In *Mitchell v. Forsyth*,[345] for example, the Court ruled that even though the Attorney General was due qualified immunity for violations involving an illegal wiretapping in this particular situation, he was not guaranteed absolute immunity as an individual performing duties of the government. Similarly, in *Davis v. Scherer*,[346] the Court ruled in favor of the respondent because the petitioner could not show that the respondent had violated rights that were clearly established at the time of the alleged misconduct. The Court made it clear, however, that the respondent would have been held individually liable if the petitioner met his burden of proof.

The Supreme Court held in *Carey v. Piphus*[347] that students deprived of their rights could sue for damages under § 1983. The students, who were suspended without being given due process, asked for actual and punitive damages. The appellate court ruled that the students were able to receive substantial nonpunitive damages, even if they were unable to prove actual injury. The Supreme Court reversed the decision, though, stating that without being able to prove actual injury, the students could only be awarded nominal damages not to exceed one dollar. The Court reasoned that the basic purpose of § 1983 is to compensate people for injuries caused by the deprivation of their constitutional rights, and the students in *Carey* did not meet their burden of proof of actual injury.

Other relief is also available through § 1983. In *Millikin v. Bradley*,[348] a school desegregation case, the Court ruled that § 1983 provides for equitable relief, which includes injunctive relief. In *Smith v. Wade*,[349] a petitioner was awarded punitive damages when he claimed a state prison guard should have known that another inmate

who had a history of violent conduct was likely to assault the petitioner when the two were placed into the same cell. The Court agreed and ruled that punitive damages are available under § 1983 if the defendant's actions were conducted with evil motive or intent or they involved reckless or callous indifference to the federal rights of others.[350] The Court also held that this threshold applies even when the standard of liability for compensatory damages is recklessness.

In *Maine v. Thiboutot*,[351] the Court ruled that plaintiffs suing under § 1983 also could be compensated attorney's fees. In this case involving welfare recipients suing the State of Maine regarding concerns about the computation of their benefits, the Court ruled that § 1983 encompasses claims based on purely statutory violations of federal law. It further ruled that that the Civil Rights Attorney's Fees Awards Act[352] applies to an action properly brought in either state or federal court under § 1983 to redress purely statutory violations.

Immunity from § 1983 liability. Clearly individual persons and municipalities are subject to liability under § 1983. However, some individuals are immune from liability under § 1983. For example, judges and legislators acting in their official roles are always immune from liability under § 1983.[353] Too, most state and local government officials can be granted qualified immunity if they act in good faith. In *Wood v. Strickland*,[354] the Supreme Court ruled that school board members could be immune from liability under § 1983 unless the school board members knew or should have known that their actions would violate an individual's constitutional rights or they acted with malicious intent to deprive individuals of their constitutional rights or injure them. In

Wood, school board members clearly violated the due process rights of students being disciplined for an alcohol infraction, rights the school board members should have known in their official capacity. Thus, in this case, the board members were held liable.

Giving support to those filing § 1983 claims, *Gomez v. Toledo*[355] clarified that it is a defendant's responsibility to plead qualified immunity when challenged in a § 1983 suit. In this case involving a police officer discharged by his superior without a due process hearing, the Court ruled that the petitioner only needs to allege that somebody acting under color of state law deprived him of a federal right. It is not the responsibility of the petitioner to anticipate the respondent's defense and allege that the respondent violated the petitioner's right while acting in bad faith.

Two other Supreme Court rulings solidified the rights of state officials being sued under alleged § 1983 violations. The ruling in *Davis v. Scherer*[356] stated that a person seeking damages under § 1983 can rebut a defendant's claim of qualified immunity only by showing that the rights claimed to be violated were clearly established at the time of the conduct at issue. In *Harlow v. Fitzgerald*,[357] a case dealing with aides and advisors to the President, the Court ruled that government officials performing discretionary functions of their jobs could claim qualified immunity and be shielded from damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[358]

CHAPTER FOUR

CASE LAW SUMMARIES OF EMPLOYEE CHALLENGES

Introduction

Case law is judge made law. Judges determine case law, or common law, through their rulings in particular decisions. In making decisions, judges use binding and persuasive authority to interpret constitutions, statutes, regulations, and other case law. Judges write their decisions, which then may be used as binding or persuasive authority, as applicable, for future cases. Even though the judges write their opinions, only those that are "published" can be cited as authority.

This chapter will summarize fifty cases in which school employees brought action against a school district or state department of education alleging wrongful employment actions. Most involve a school employee discharged for having a sexual relationship with a student filing suit alleging wrongful termination. Some other relevant cases involve employees who were not discharged but were given other adverse employment actions, such as denial of tenure or suspension of licensure. Still other cases will involve employees who engaged in inappropriate conduct short of a sexual relationship with students, but are relevant to the discussion nonetheless.

School employees who file claims arguing wrongful employment actions cite state or federal statutes or case law that supports their contention that they were treated

wrong. Often they will cite several causes of action in the hope that if the judge or jury does not accept one, they will accept another. For example, a teacher who files a claim for wrongful termination against a school district may allege being denied due process, argue the act did not constitute immorality, and say the behavior was outside the statute of limitations. If the due process claim fails, the teacher may still be successful on the immorality or statute of limitations claim. In organizing this chapter, the fifty briefs will be grouped by the issue most significant for each case. However, most case summaries will present a variety of issues determined by the respective court.

Due Process Challenges

School administrators are well advised to follow due process when removing employees, even those who are guilty of sexual relationships with students. *Cleveland Board of Educ. v. Loudermill*[359] is the landmark case providing due process rights for public school employees who are to be dismissed. In *Loudermill*, the U.S. Supreme Court determined that a public school security guard with a prior conviction for grand larceny should have received a pre-termination hearing as required under the Fourteenth Amendment's Due Process Clause. The Court held this even though plaintiff misrepresented on his job application that he had never been convicted of a felony. The finding for Loudermill was based partly on Justice Powell's consenting opinion in *Arnett v. Kennedy*[360] that governmental deprivations of property interests must be accompanied by some procedural safeguards, among which are notice and a hearing. Justice Marshall concurred with the decision and stressed his belief that when the result is an employee losing wages, mere notice and an opportunity to be heard are not enough due process. He

wrote that employees subject to wage deprivation should be able to confront, call, and cross-examine witnesses before wages are cut off to prevent financial damage to a wrongfully accused employee.

The following fourteen briefs reveal how courts have ruled on due process challenges filed by school employees.

Vanelli v. Reynolds School District No. 7.[361] A high school English teacher was dismissed in the middle of his one year contract after female students complained of his staring at them lasciviously and making sexual overtones towards them. The school board did not hold a pre-termination hearing for the teacher. It did hold an evidentiary hearing a month after his dismissal, in which the board agreed that his dismissal was proper. The teacher filed suit under § 1983, alleging both his liberty and property interests were damaged because the evidentiary hearing was insufficient without a pre-termination hearing. The trial court ruled the teacher's dismissal was sustainable because the evidentiary hearing was adequate, but awarded damages for the district's failure to hold the pre-termination hearing, ruling the teacher's property interests were violated.

The court of appeals agreed that the teacher's dismissal was proper, but differed in its opinion of damages due the teacher. It concluded that because the dismissal was proper the teacher could not claim a property interest violation. However, the court of appeals ruled that the school district could be liable for liberty interest damages for not holding the pre-termination hearing and remanded the case to the trial court. The court of appeals reasoned no property right violation existed because the evidence, even though it

was presented at a post-termination hearing, supported the teacher's dismissal. However, the teacher's liberty rights were violated when he was not afforded his due process rights. Therefore, upon remand, the court of appeals directed the trial court to consider damages based on the teacher's mental anguish at having been denied his due process rights, not the anguish he may have suffered for losing his job, as losing his job was determined to be appropriate. Thus, even though the school did not violate the teacher's property interests, it did violate his liberty interests.

Casada v. Booneville School District No. 65.[362] Near the end of the school year, the plaintiff teacher was given notice by the superintendent that his contract would be terminated for making sexual advances towards students. The teacher wrote to the superintendent asking him for a list of the students making the allegations, a description of the alleged advances, and the dates of the alleged acts. The attorney acting on behalf of the school district refused to provide the teacher with the requested information. Later a hearing was held at the teacher's request, but the teacher was not permitted to view documents the administrators had used in determining to terminate his contract and was not permitted to cross examine witnesses who testified to sexual acts the teacher had committed with some of his female students. The teacher was permitted to testify himself and call his own witnesses; however, after the hearing, the board voted to terminate his contract.

The teacher filed suit, claiming violations of the Due Process Clause of the Fourteenth Amendment. While the teacher and district both conceded that the teacher had a property right that could not be denied without due process, the

parties disagreed as to what process was due. The district argued that *Loudermill* did not require an elaborate pre-termination hearing and that something less than a full evidentiary hearing was permissible. The court agreed that the plaintiff teacher was granted the requirements of *Loudermill*, but the court went on to say that the affected employee in *Loudermill* was afforded a full post-termination hearing, something the teacher in this case was not given. Therefore, the court was not able to rely only on *Loudermill* to make its ruling.

Instead, the court relied on *Brouillette v. Board of Directors of Merged Area IX*,[363] which held that employees are entitled to minimal requirements of fair play before being terminated, which include: clear and actual notice of the reasons for termination in sufficient detail to enable him to present evidence relating to them; and notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges. Because the teacher was not given the names of his accusers or detailed accounts of the accusations, the court granted his motion for summary judgment.

Elvin v. City of Waterville.[364] A female fourth grade teacher maintained a sexual relationship for several months with her neighbor, a male high school sophomore who was a student of a different school district. The boy was fifteen years old at the time the relationship began, and sixteen when the relationship ended. After the relationship came to light, the boy exhibited psychological damage and the teacher was arrested, eventually pleading *nolo contendere* to assault stemming from sexual contact. The teacher was dismissed from her

teaching job for being unfit to teach and being disruptive to the school. In making its decision, the school board determined the teacher was unfit for duty based on her poor judgment, her lack of concern for the welfare of a public school student, and her impaired ability to deal with other sexually exploited students. Furthermore, the board determined the teacher was disruptive to the school district because the media scrutiny of the case was undermining the public's trust in her ability to deal with students and parents.

The teacher filed suit for wrongful termination, arguing that she was fit to teach and was not disruptive to the district. She further alleged that her due process rights were violated because she never had the opportunity to cross examine the victim. The trial court ruled in favor of the school district, reasoning the district's decision was rational, and that the teacher was granted her due process rights because the victim had provided an affidavit that was corroborated by police and the teacher's own testimony. The court of appeals affirmed the ruling.

***Hall v. Board of Education of the City of Chicago*.**[365] A male high school teacher was alleged to have invited one of his male student aides (D.S.) to his home; to have provided D.S. and his juvenile friend (L.P.) with marijuana and alcohol and watch them consume the alcohol and smoke the marijuana; to have engaged in sexual activity with D.S. at his home; to have watched the teacher's adult male friend engage in sexual activity with the L.P.; and to have engaged in sexual relations with L.P. at a later date. Upon learning of the allegations, the superintendent suspended the teacher without pay and notified the teacher the

board would be seeking his dismissal. The teacher asked for a hearing with the state board of education, which ruled that the teacher had engaged in illegal sexual activity with the boys and denied his appeal of the board's decision for dismissal. The trial court upheld the ruling of the state board of education, reasoning the manifest weight of the evidence supported the board's decision. The plaintiff teacher appealed the trial court's ruling on three prongs: the decision of the hearing officer was against the weight of the evidence; the teacher was denied due process because he was unable to effectively cross examine one of his accusers; and the court failed to consider newly discovered evidence when the teacher was acquitted of the criminal charges facing him for his alleged actions.

The court of appeals affirmed the ruling of the trial court. Regarding the plaintiff's contention that the evidence did not support the ruling, the court ruled that the testimony by L.P. and the male friend of the teacher was credible and the decision was not contrary to the preponderance of the evidence. Regarding the plaintiff's claim that he was denied due process because he was unable to cross examine D.S., the court of appeals reasoned that the teacher could have called D.S. as a witness if he so chose, but did not, and the testimony of L.P. was sufficient to prove the teacher had sexual conduct with students and juveniles. Finally, regarding the plaintiff's claim that new evidence should have been considered by the court following the teacher's acquittal in his criminal case, the court reasoned that criminal charges are not material in the termination proceedings and need not be considered.

***Board of Directors of Fairfield Community School District v. Justmann*.**[366]

A driver's education teacher and his female student had a close personal relationship for several months, from the fall she enrolled in his driver's education class until the next spring, when the couple allegedly engaged in sexual intercourse at a hotel. At a hearing before the board of education, the student graphically detailed the events of the night in question. The teacher admitted being at the hotel that evening, but claimed he was with a friend, not the student. The superintendent presented the case against the teacher, and after hearing witnesses from both sides, the board voted to terminate the teacher's contract. The teacher appealed the board's decision to the trial court on three tenets: the board's decision was not supported by a preponderance of the evidence; the board's procedure did not follow state due process law; and the board failed to follow the proper procedure for conducting its investigation and reporting its findings of fact.

The trial court ruled the board properly accepted the student victim's testimony as credible, thereby discrediting the testimony of the teacher and his friend. All other witnesses for each side were able only to offer hearsay. The court further ruled that the teacher was given adequate due process. The court reasoned that the mere fact that the superintendent, the board's chief employee, conducted the investigation and made the recommendation for termination to the board did not overcome the presumption of objectivity on the board's behalf. Indeed, the court reasoned that exposure to evidence during an investigative process is not enough in itself to question the board's fairness at a later hearing. Finally, the

court ruled that the board did follow proper procedures in conducting the investigation and hearing. The court of appeals affirmed the ruling of the trial court.

***Strain v. Rapid City School Board*.**[367] A female high school sophomore was called into the counselor's office to discuss her attendance problems. The student confided in the counselor that a popular teacher-coach had touched her inappropriately over the course of several months. He started by touching her knee, later moving to her breasts, and eventually pulling his penis out of his pants and having the student touch it. The counselor reported the incidents to the principal, who reported them to the authorities and suspended the teacher with pay pending an investigation and hearing. During the course of the investigation, the board reviewed transcripts of witness statements provided by the sheriff's office.

At the board's hearing the student further testified that the teacher had intercourse with her in the computer room, but that she had not told the sheriff or principal because she was afraid she would not be believed. The teacher denied any wrong doing, asserting the student was falsifying the claims against him to take attention away from her attendance problems. Other witnesses corroborated the student's claims, including her friends who said the student had told them of the events as they happened, and a faculty member who witnessed the teacher and student alone in a classroom multiple times. Also, a graduated student testified at the hearing that the teacher had made similar advances towards her years earlier.

After hearing the evidence and deliberating, the board voted to terminate the teacher's contract.

The teacher appealed to the trial court. He argued the board withheld exculpatory evidence from him, but the trial court disagreed, reasoning the evidence in question was not exculpatory, and therefore did not violate the teacher's due process by being withheld from him. The teacher also claimed his due process rights were violated when the board reviewed the sheriff's reports regarding the matter. The trial court disagreed with this assertion as well, reasoning that pre-decision involvement is not enough to overcome the presumption of fairness of the board. The teacher's third objection was the admission of the testimony of his former student. The trial court ruled the testimony was admissible, particularly because the testimony between the teacher and victim was in such great dispute. The former student's testimony was relevant in determining the teacher's intent in past incidents of touching students. Finally, the trial court disagreed with the teacher's contention that the evidence did not support the school board's decision. The state supreme court affirmed all of the trial court's rulings.

***Dohanic v. Commonwealth of Pennsylvania, Department of Education*.**[368] Over the course of his sixteen year teaching career, a male seventh grade teacher wrote personal letters to female students that parents of the girls found to be "strange, peculiar, disgusting, disturbing and upsetting."[369] The teacher also allegedly lied to his principal when he told the principal that several parents had

requested their daughters be placed into the teacher's class. After an investigation and hearing, the teacher was terminated by the local board, whose decision was upheld by the state board of education.

The teacher appealed to the trial court, arguing that his due process rights had been violated, that the evidence did not support the decision for dismissal, that his procedural rights under the collective bargaining agreement were violated, and that the secretary of education failed to provide a proper review when she did not allow into evidence an article from an education journal which encouraged teachers to form personal relationships with students. The court affirmed the ruling of the secretary of education on all counts, stating that she properly determined the district followed due process and collective bargaining procedures. The court also found that the teacher both writing the letters and lying to his principal met the standard of immorality as a basis for discharge.

***Sauter v. Mount Vernon School District*.**[370] One summer day, a high school math teacher riding his bicycle past the apartment of a student he had in his class as a freshman the previous school year stopped to chat with her. They soon developed a relationship in which they met often to talk about personal issues, including the student's strained relationship with her boyfriend and the teacher's strained relationship with his wife. When the new school year began, the student and teacher met frequently in his office. The teacher told the student he found her attractive, that he had a vasectomy, and that he wanted to have sex with her. Both the teacher and student expressed to each other why they knew they could not have

a sexual relationship. One morning the teacher gave the student a note in which he alluded to a fantasy he had about the student the night before and said that he did not trust himself to keep their relationship at a friendly level. The student gave the note to a school authority. The teacher was suspended with pay for the remainder of the school year and, after a hearing, was discharged.

The teacher appealed the school board's decision to the trial court, arguing that the evidence did not support his discharge and he was denied due process when he was not permitted to depose the student's psychologist. Regarding the teacher's complaint of insufficient evidence, the hearing officer found the note to be a clear attempt to seduce the student, despite the teacher's attempt to portray his note as an effort to explain to the student why they could not have a sexual relationship. The hearing officer also found credible the school administration's testimony that the teacher's continued employment would cause a substantial disruption to the operation of the school. The trial court and court of appeals agreed with the hearing officer and affirmed his ruling. Regarding the teacher's contention that he was unfairly denied the opportunity to depose a witness, the hearing officer held that even though an exception to psychologist/patient privilege exists in the case of child abuse, it could be used only when the psychologist would prevent further abuse by disclosing the confidential information. In this case, the threat of harm to the student no longer existed, so the psychologist was not required to discuss the details of the therapy sessions. The trial court and court of appeals again affirmed the hearing officer's ruling.

Fisher v. Independent School District No. 622.[371] Robbi Jon Olson was called to the principal's office once or twice a month from second grade through fifth grade, where the principal would engage in sexual contact with the student. Twelve years after the sexual contact ended, Olson reported the abuse to a counselor, who advised him to report the incident to police. Olson reported the incidents to police and then met with the school superintendent, who recommended the principal's termination to the board. At the due process hearing, former teachers and a secretary could not recall the frequency of Olson's visits to the principal's office. However, the principal was unable to show that private visits to his office were impossible, and the secretary testified that she never interrupted the principal when his door was shut. The board hired an independent examiner to conduct a hearing, make findings of fact, and make a recommendation to the board.

Relying mainly on the testimony of Olson, the hearing officer recommended the board dismiss the principal. Upon learning of the hearing officer's recommendation, the principal tendered his resignation to the board. The board rejected the resignation and instead voted to terminate the principal's contract. The principal challenged his dismissal in court, arguing that his dismissal for immoral conduct was unsubstantiated and that his due process was denied through the loss of relevant evidence and the impairment of witnesses' memories. The court reasoned that the hearing officer properly found Olson to be more credible than the principal and that due process was not denied because even if former classmates could be found, they were unlikely to testify differently than the teachers who said

they could not remember how often Olson visited the principal's office. Because Olson's testimony was credible, the court upheld the board's termination of the principal.

In Re the Proposed Immediate Discharge of Lester Etienne from Independent School District No. 241.[372] A student who had graduated twelve years earlier sent a letter to her former school complaining that a teacher had engaged in a sexual relationship with her during her senior year and beyond graduation. The school board suspended the teacher with pay pending an investigation and hearing with an independent hearing officer. The hearing officer issued findings of fact and recommended the teacher be suspended for one year. The board rejected several of the hearing officer's findings and voted to terminate the teacher. The teacher appealed on the counts that he was denied due process in termination proceedings and that the board improperly rejected the hearing officer's findings. The court ruled that due process required the teacher be provided with an impartial hearing with the opportunity to respond to allegations against him; due process did not require the board to follow the recommendations of the hearing officer, as long as the board did not act in a fraudulent, arbitrary, or unreasonable manner that was not supported by substantial evidence. Because the board had substantial evidence that the sexual relationship between the teacher and student existed, the court affirmed the board's termination of the teacher.

Purvis v. Oest.[373] One spring Gina Purvis, a female high school biology teacher, was rumored to be engaged in a sexual relationship with a male fifteen-year-old student.

Both Purvis and the student denied the rumors when questioned by the principal, Patricia Lunn. When the rumors persisted the following fall, Lunn and Superintendent Daniel Oest decided Oest and dean of students Gary Vicini would investigate. Lunn did not tell Oest that Purvis had previously accused Vicini of sexually harassing a student the year before. Upon investigation the student continued to deny a relationship, but Vicini allegedly told the student he would be expelled if he did not admit to a relationship with Purvis. The student then changed his story and told Vicini and Oest that he had sex with Purvis on several occasions. The administrators notified police, who charged Purvis with sexual assault against the student. The district notified Purvis that a hearing would be held to determine whether she should be terminated; before the hearing, the board and Purvis reached a $43,000 settlement whereby Purvis voluntarily resigned. Later, Purvis was acquitted of all criminal charges. She then filed suit against the school district, superintendent, dean of students, and principal, alleging several violations.

The district court dismissed the school district from the claims, but declined the other defendants' motion for summary judgment. In doing so, the court reasoned that the school officials lacked qualified immunity and that a reasonable jury could find enough evidence to support the teacher's claim she was denied due process. Upon appeal, the circuit court agreed that Vicini was biased against Purvis, and his bias may have caused him to report her to the police. Moreover, the court agreed a reasonable jury could find Vicini's bias initiated the investigation by the police and Department of Child and Family Services (DCFS) that caused the teacher to lose her liberty right of pursuing her chosen

career and her property right in maintaining her job. Nonetheless, even though the circuit court agreed that the teacher's due process rights were violated, the defendants were entitled to qualified immunity. The superintendent was entitled to such because he was unaware of any conflict between Vicini and Purvis; Vicini and Lunn were entitled to qualified immunity because no federal law clearly establishes that a biased person who causes a teacher to be reported to police or DCFS violates the teacher's rights if the police or DCFS will conduct an independent investigation. The circuit court reversed the district court and granted summary judgment to the remaining defendants.

Sertik v. School District of Pittsburgh.[374] A police officer came upon a car in which a man and a woman he believed to be a prostitute were engaging in sexual intercourse. Upon questioning the couple, the police officer determined the woman was a recent graduate who had been a student of the man several months earlier. The couple was taken to the police station for questioning, where both waived their Miranda rights and admitted that the sexual relationship had started while the girl was a student of the teacher during her senior year. The police informed the school district, which conducted its own investigation, held a hearing, and terminated the teacher. The teacher appealed to the state secretary of education, who dismissed his appeal. He then appealed to court, arguing that the evidence used against him was the product of an illegal stop, arrest, search, and interrogation. He also argued that his alleged admission to the relationship was involuntary. In denying the teacher's appeal, the court ruled that even if the evidence of the teacher's misconduct was obtained through illegal police activity, the

school district's interest in protecting its students and insuring an appropriate school environment outweighed any wrongful actions by the police, particularly because the police did not charge the teacher with a crime. The court also found no evidence that the teacher's admission to the affair was involuntary. The court affirmed the decision of the school board to terminate the teacher.

Crosby v. Holt.[375] A male high school teacher met a female student when she was enrolled in his sophomore world geography class. The teacher owned a private business and hired the student to work for him. The student's father forced her to quit after allegations of a sexual relationship between the teacher and student surfaced. The father, not believing the allegations, allowed his daughter to resume working for the teacher. Allegations surfaced a second time, and the student again was forced to quit. The teacher employed the student again under the guise that she was working for the teacher's mother. However, the teacher's house, which was attached to his business, was near his mother's, and he left the door unlocked so the student could come and go as she pleased.

Later, the student participated in a job shadowing program in which she listed the teacher as the employer she was shadowing. It was during this time that a classmate saw the student and teacher kissing and hugging. The teacher and student both denied the relationship was sexual, but the teacher's son reported to school officials that he believed his father was having an affair with his classmate. At a subsequent hearing, four different classmates and a teacher testified that the student had admitted to them that the relationship was sexual. The investigation into the matter also uncovered sexually graphic emails between the teacher and a colleague. The teacher was discharged, but

appealed his termination under claims of state law violations. The trial court upheld his termination, and the court of appeals affirmed. The courts reasoned that due process was followed, that the teacher was given a full, complete, and impartial hearing, and the evidence supported his discharge.

Crump v. Board of Education of Hickory Administrative School Unit.[376] A superintendent notified a tenured driver training instructor that he was going to be dismissed for immorality, neglect of duty, failure to fulfill the duties and responsibilities of a teacher, and insubordination. The instructor was alleged to have, on occasion, touched the breasts, necks, and legs of female students and to have engaged in inappropriate personal conversations with them. The instructor also allegedly had defied a directive never to be alone in a training vehicle with a female student. At a hearing with the board the instructor denied much of the behavior and justified grabbing the legs of students as a safety precaution. The instructor also admitted to engaging in personal conversations with students, but argued the conversations were an effort to relax the drivers and had been misconstrued. Finally, the instructor testified that he thought the directive not to be alone with female drivers only applied to the school year in which the directive was given, not subsequent school years. After hours of deliberations, the board voted to terminate the contract of the instructor. The instructor submitted to the trial court a petition for judicial review of the board's decision to terminate him, alleging the evidence presented was insufficient to sustain the board's findings. The trial court ruled, and the court of appeals affirmed, that the evidence was in fact sufficient to support the termination.

However, the instructor also filed with the trial court a claim alleging the board denied him a fair and impartial hearing, based on the disparity between the pre-hearing involvement of some board members and their disavowal of knowledge of the matter at the hearing. According to witnesses, several board members openly discussed with community and staff members the allegations against the instructor. At least one board member asked a colleague of the driving instructor to convince the driving instructor to resign before the hearing. However, at the hearing several board members denied having any knowledge of the case, stating that they did not even know the name of the teacher involved until the day before the hearing. The court ruled that a board member's involvement in matters related to the case, including conducting a pre-hearing investigation, does not necessarily demonstrate a board member shows a disqualifying bias. In this case, however, the board's clear involvement in the matter before the hearing coupled with the subsequent denial of the matter at the hearing was sufficient to demonstrate a disqualifying personal bias. A jury awarded the teacher actual damages under § 1983, the trial court entered judgment in accord with the verdict, and the court of appeals affirmed the judgment.

Procedural Challenges

The following seventeen case summaries involve some type of procedural challenges. These may include debates regarding statutes of limitations, arguments over jurisdiction, or disagreements about procedures related to investigations, hearings, evidence, testimony, and so forth.

Waisanen v. Clatskanie School District No. 6J.[377] A male metal-shop teacher had sexual intercourse with a female sixteen-year old student three or four times in the school's gym in 1978. Upon hearing the teacher was being investigated for alleged sexual harassment in 2005, the former student reported her past relationship with the teacher to the school district. The teacher was made aware of the allegations, an investigation was conducted, and a dismissal hearing was held. As part of the investigation, the now-adult woman submitted to a polygraph exam, which helped the examiner conclude the woman was telling the truth about the sexual relationship twenty-seven years earlier. Finding the evidence against the teacher credible, the board voted to dismiss him for immorality and neglect of duty. The teacher appealed to the Fair Dismissal Appeals Board (FDAB), asking for the FDAB to exclude the report from the polygraph test. The FDAB denied the teacher's request and affirmed the board's termination of him, stating that the polygraph test was only a portion of the evidence it considered. Indeed, the FDAB said that the live testimony of the student was credible as it provided specific details regarding important events and descriptions of the new gym in which the acts took place.

The teacher next appealed to the court. He argued that the board erred in considering evidence collected after the superintendent's recommendation to terminate him. The court disagreed, reasoning the board properly made its decision based on the entire evidentiary record. The teacher also argued the results of the polygraph test should not have been considered. The court disagreed with that contention as well, stating that this case was essentially one person's word against another's, and determining the

credibility of the witnesses was crucial. Finally, the teacher argued the decision to terminate him was not based on substantial evidence. The court disagreed, reasoning that the findings of fact clearly showed the teacher acted in an immoral manner. The court upheld the termination.

St. Charles Community Unit School District No. 303 v. Adelman.[378] In this case not involving a teacher-student sexual relationship, a male tenured teacher was arrested and charged with public indecency after making improper sexual advances to a male, plain-clothes deputy sheriff in a forest preserve. The teacher later was dismissed by the local school board. A directed verdict of not guilty was made in the criminal case, and a hearing officer for the state board of education ordered the teacher to be reinstated to his position. The hearing officer reasoned the evidence did not support the clear and convincing level of proof standard of review. The school board appealed, claiming the proper standard of review was preponderance of the evidence, notwithstanding the criminal charges against the teacher. The trial court ruled in favor of the school board, which was affirmed by the court of appeals. The court of appeals then remanded the case for a new determination at the administrative hearing level in accordance with the proper standard of review.

Libe v. Twin Cedars CSD.[379] A female high school student alleged that she developed a personal relationship with one of her male teachers that eventually included one instance of sexual intercourse. The teacher was terminated, and his termination was affirmed by the trial court. The teacher argued that there was a genuine issue of material fact regarding whether he and the student had actually engaged in sex. The results of a

polygraph test taken by the student concluded that she was telling the truth. The court of appeals ruled the test results were admissible, affirming the trial court.

Carroll v. Kentucky Education Professional Standards Board.[380] A male elementary physical education teacher participated in a program whereby a female high school student volunteered in his class for service learning. A particular female high student was assigned to his class, and after a few weeks the teacher asked his principal to assign her to a different teacher because he had heard rumors that people thought he and the student were talking too much and too close. The student was reassigned, and a few months later the superintendent heard a rumor that the teacher and student were involved in a romantic relationship. The superintendent investigated, and the teacher and student both denied the rumors. The student graduated the following spring, and two months afterwards the teacher resigned, telling the principal that he was going to marry the former student, who he believed was pregnant with his baby. The student wrote a letter to the school district stating the relationship did not begin until after she graduated. The baby boy was born six months after her graduation, and paternity tests showed the teacher was the father.

The school district notified the state teacher standards board, which held a hearing and permanently revoked the teacher's license. The teacher appealed, arguing no evidence existed that he and the student had a sexual relationship before her graduation and that the standards board overestimated the baby's gestation period. Reasoning that

the 7 pound 12 ounce baby could not have been born three months premature, the court affirmed the revocation of the teacher's license.

***Parker v. Byron Center Public Schools*.**[381] A school superintendent received a letter from a woman claiming that while she was a student in the district sixteen years earlier she had engaged in a sexual relationship with a tenured teacher. The woman had the teacher as a fifth grader, but the sexual relationship began when she was in high school and he was still teaching in an elementary school. She babysat his children, and on one New Year's Eve he kissed her after driving her home. The woman reported that the teacher would kiss and fondle her almost every time he drove her home from babysitting, which was once or twice monthly, and that she protested the activity often.

The teacher soon began engaging in oral sex and vaginal intercourse with her in the student's home. The school in which he taught was only a few hundred yards from her home, and her parents left for work early in the morning. The teacher asked the student to leave the backyard light on when it was safe for him to come over for sex before work, often four or five times per week. The relationship ended after several months when the student stopped making herself available to the teacher. She did not come forward sooner because she was afraid she was to blame for the relationship, but she wanted to prevent the teacher from harming other children.

The board investigated and pursued termination of the teacher, who requested a hearing before the state tenure commission. At the hearing, the teacher denied ever having had any sexual relationship with the student and testified that he only visited her

house from time to time to borrow things from her. The hearing officer, relying mainly on the testimony of the former student, ordered the teacher's discharge. The teacher appealed to the court, arguing that the charges should have been dismissed because the alleged activity took place sixteen years earlier and the hearing officer did not allow testimony regarding the alleged sexual activity of the student with the teacher after she graduated from high school. The teacher argued that if the student was lying about her sexual activity after graduation, she was likely lying about the relationship with the teacher, an issue the teacher claimed showed the student's lack of credibility. The court affirmed the tenure commission's decision to dismiss the teacher. In doing so, the court reasoned that no statute of limitations exists under state law for bringing charges of sexual misconduct towards a teacher. The court also ruled that the woman's sexual history after high school was irrelevant to the woman's charges that the teacher acted inappropriately with her when she was a student.

Linden Board of Education v. Linden Education Association, on behalf of John Mizichko.[382] A school hosted a dance recital one evening, and many classrooms were used by dancers as changing rooms. The custodian working night shift at the school was directed to knock, announce he was entering, and immediately leave any classroom he found was being used as a changing room. When he entered a certain room, he continued to clean glass panes despite the pleas of dancers to leave. The custodian later denied knowing that students were changing in the room while he was there and acknowledged he was reluctant to leave when asked by a teacher. The custodian was placed on suspension and eventually terminated. The custodian's association filed a grievance on

his behalf, which eventually went to binding arbitration under the terms of the collective bargaining agreement, which prohibited employee discipline without just cause, though the collective bargaining agreement (CBA) did not define "just cause." The arbitrator ruled the board did not have just cause to terminate the custodian and instead ruled the custodian be suspended for ten days, which was affirmed by the trial court. The court of appeals reversed the trial court's decision, reasoning that if the arbitrator found just cause to administer some type of punishment, he was bound to uphold the termination. The state supreme court reversed the decision of the court of appeals and remanded the case for reinstatement of the arbitrator's ruling, reasoning that both parties had agreed to let the arbitrator determine if discipline was to be imposed and, if so, to what extent.

***Barcheski v. Board of Education of Grand Rapids Public Schools*.**[383] A tenured driver's education instructor invited two fifteen-year-old students to a party on a summer Friday night before a raft race. At the party, the students drank beer and smoked marijuana in front of the teacher. The teacher drove one of the girls home, stopping to park along the way. The evidence was inconclusive whether the teacher and student had sexual intercourse in the car or had only engaged in "kissing and other improprieties."[384] The board of education voted to discharge the teacher. He appealed to the tenure commission, who voted to reinstate the teacher. The board appealed to the trial court, which reversed the tenure commission's order. The court of appeals affirmed the trial court's ruling, but the state supreme court reversed the judgments of the trial and appeals courts and remanded the case to the tenure commission for reconsideration.

By this time, the tenure commission had turned over four of its five members. Upon reconsideration, the tenure commission did not hold new fact finding hearings; it only reviewed previous testimony. This time, however, the tenure commission ruled the discharge of the teacher was based on reasonable and just cause. The teacher appealed again, arguing the tenure commission exceeded the scope of the state supreme court's remand instructions and the tenure commission's decision was not based on reasonable and just cause. However, the court affirmed the tenure commission's ruling, ending an eleven year legal process.

Shipley v. Salem School District.[385] On eleven separate occasions, a middle school teacher touched the genitals of a twelve-year-old boy and forced the boy to touch the teacher's genitals. On one other occasion the teacher rubbed the boy's body under his clothing, but did not touch his genitals. The boy was not a student in the teacher's school, though he was enrolled in the same district, and the conduct did not occur on school grounds. Nonetheless, when the superintendent became aware of the allegations against the teacher, he sent a notice to the teacher that he was going to recommend the teacher's dismissal for immorality and gross unfitness to teach. After a hearing, the board dismissed the teacher. The teacher appealed his dismissal to the Fair Dismissal Appeal Board (FDAB), which reversed the school district's decision and reinstated the teacher. The district then appealed to the court. In reversing the FDAB's ruling, the court held that while the superintendent's notice of intended dismissal to the teacher did not expressly detail the relationship between the teacher's actions and his ability to teach, the nexus could clearly be inferred.

***In the Matter of the Tenure Hearing of Wolf*.**[386] A principal received one anonymous note and one note signed by several students alleging that a fifth grade teacher often felt the backs of female students to see if they were wearing bras and touched female students' buttocks. After discussing the allegations with the teacher, the principal decided the teacher could handle the matter by talking to the students in class. Later students complained that the teacher had yelled at them about the incident, and the students continued to make allegations of improper conduct by their teacher to other faculty members. The principal eventually notified the Division of Youth and Family Services (DYFS) of the allegations and after receiving the report form DYFS the board notified the teacher of its intention to terminate his contract.

An administrative law judge conducted a hearing which lasted nine days. The administrative law judge thought the teacher had a menacing appearance, so when the students were called to testify, the teacher was made to leave the hearing room and watch the proceedings on closed-circuit television, where he had no contact with his attorney.[387] Following the hearing, the state board of education accepted the administrative law judge's opinion and removed the teacher from his position with the school. The teacher appealed successfully. The court ruled that the administrative law judge's exclusion of the teacher from the hearing room was so fundamentally unjust that it had no choice but to remand the case back to the state board of education for a new hearing with a different hearing officer.

Queen v. Minneapolis Public Schools, Special School District No. 1.[388] Six years after graduation, a former high school student contacted her alma mater to report that as a student she had a sexual relationship for nearly two years with a teacher. The teacher and student had sexual intercourse in a coach's office, the teacher's classroom, and the teacher's van. After conducting an investigation, the school board gave the teacher notice if its intention to discharge him for conduct unbecoming a teacher and immorality. After hearing the teacher's case, a hearing officer concluded that the teacher was not immoral but did engage in conduct unbecoming a teacher. The hearing officer recommended the teacher be suspended without pay for one year. Despite the hearing officer's recommendation, the board voted to discharge the teacher, adopting the hearing officer's findings of fact but altering the sanction. The teacher appealed to the court system, complaining of numerous procedural defects.

In affirming the teacher's termination, the court ruled that the hearing officer was not bound by the civil rules of procedure and that the standard of proof was not proof beyond a reasonable doubt but substantial and competent evidence. The testimony of the former student, her mother, and the teacher's cousin provided the substantial evidence to support conduct unbecoming a teacher. Furthermore, the court ruled the board was not bound to accept the recommendation of the hearing officer. Finally, the court ruled that the board's attorney did not cause unfair prejudice against the teacher simply by playing multiple roles in the matter, including presenting the board's case against the teacher,

advising the board to reject the hearing officer's recommendation, and preparing documents supporting the board's decision to terminate.

Deloney v. Thornton Township School District No. 205.[389] A male school truant officer had a sexual relationship with a female high school student. He pled guilty to aggravated criminal sexual abuse, but successfully defended a civil suit brought by the student's parents. The truant officer then filed suit against the school district seeking attorney's fees, alleging the school had an obligation to defend him against civil suits arising from his conduct during the scope of his employment. The trial court granted summary judgment to the school district, reasoning that the sexual relationship occurred outside the scope of the truant officer's employment. The court of appeals affirmed.

Cisneros v. State Board for Educator Certification.[390] A male high school teacher allegedly had a romantic and sexual relationship with one of his female students over the course of several months. The teacher denied the allegations, and a contested case hearing was held before an administrative law judge (ALJ). The ALJ found the teacher had engaged in an inappropriate relationship with a student, but did not find the board had demonstrated the teacher lacked good moral character or was unworthy to teach. The ALJ recommended the state board of education not revoke the teacher's license. The state board accepted some of the ALJ's findings of fact but added additional findings and ordered the teacher's license to be permanently revoked. The teacher filed a motion for rehearing, arguing, among other things, that the board failed to exercise discretion regarding the ALJ's decision and issued an order without considering the

substantial evidence in the record. The board granted the motion for a rehearing, withdrew the original order, and issued a new "Order on Rehearing."

The new order simply accepted the ALJ's findings of fact and its recommendations, with two important modifications. First, the board removed the word "not" from the ALJ's recommendation that "the board did not demonstrate by a preponderance of credible evidence that [the teacher] lacks good moral character and is unworthy to instruct the youth of this state."[391] Second, the board changed the word "denied" to "granted" in the statement, "Based upon the foregoing findings of fact and conclusions of law, [the Board's] petition to revoke the teaching certificate . . . of [teacher] should be granted."[392] Thus, the board effectively revoked the teacher's certificate again. The teacher received a copy of the new notice, but did not file a motion for rehearing. Instead, he filed a petition for review in the court system. The board filed a plea stating the teacher failed to exhaust his administrative remedies by taking the matter to court instead of asking for a rehearing with the ALJ. The trial court agreed with the board and dismissed the teacher's case. The court of appeals affirmed the trial court, thus maintaining the revocation of the teacher's certificate.

***In re Chadwick v. Superior Court of Arizona*.**[393] A male elementary teacher was charged with six counts of sexual conduct with a minor, one count of sexual abuse, and one count of sexual molestation that happened five years earlier with a student who was in the teacher's class at the time. Following the criminal charges, the school district conducted its own investigation and found the teacher had engaged in sexual

relationships with two additional students who were not named in the criminal charges. The board scheduled a hearing with the intent of dismissing the teacher, but the teacher sought an injunction from the trial court to delay the hearing until the criminal matter against him had been settled, citing his Fifth Amendment right of protection against self-incrimination. The trial court denied the injunction, reasoning that state law gave the district discretion in deciding whether to stay the hearing pending the criminal proceedings and that the district had assured the teacher his silence would not be held against him in the administrative proceedings. The court of appeals affirmed.

Ashurst v. Monterey Peninsula Unified School District.[394] One evening a fifteen-year-old student and her mother were watching television at the home of a custodian of the student's school. The mother said it was time to leave, but the student asked if she could stay longer, and the custodian volunteered to driver her home after the program had ended. After her mother left, the student and the custodian had sexual intercourse in his bedroom. A few months later the student and her mother moved to another state, and two years later the student recalled the incident with a therapist. The therapist told the mother, who questioned her daughter and the custodian. They both admitted to the act. The mother contemplated for a year what to do, eventually reporting the incident to the custodian's employing school district. The district reported the incident to police and started its own investigation. The custodian, despite his Miranda rights, admitted the relationship to the police. The district held a hearing, after which the hearing officer recommended the custodian be dismissed.

The custodian appealed to the trial court, arguing the only evidence against him was hearsay evidence, including the therapist's and mother's reporting of the story to authorities and his own admission to police. The trial court agreed that the statements of the therapist and mother may not be admissible as evidence, but stated that the admission of the custodian to the police was not a declaration against interest but instead a true admission of his role in the relationship. The custodian also argued that the sex act was consensual, but the court ruled that consent is not a defense to unlawful sexual intercourse with a minor. Finally, the custodian argued the two-year statute of limitations should have prevented the school from going forward with its intention of dismissing him. However, the court disagreed, reasoning that the two-year statute of limitations did not begin tolling until the school became aware of the allegations, not when the actual incident happened. Having dismissed the custodian's claims, the trial court upheld his discharge. The court of appeals affirmed.

School District of New York v. Hershkowitz.[395] A male high school teacher and a female student exchanged email messages whereby the teacher expressed his desire for the student, asked her if she masturbated or engaged in oral sex, and asked whether she would consider having sex with him. The teacher arranged for the student to have a new email account so their communications could be surreptitious, and he sometimes called her on the phone to be reminded of the sound of her voice. The relationship ended when the student's mother intercepted one of the phone calls. During the district's

investigation, the teacher submitted a statement in which he admitted much of the activity without admitting he had actually asked for sex from the student.

A hearing officer found the statement was taken in violation of the collective bargaining agreement and dismissed all charges against the teacher. On the district's appeal, the court allowed the statement, and the court of appeals affirmed, and at a new hearing the hearing officer suspended the teacher's license for one year without pay. The school district appealed the suspension, arguing the hearing office was biased. The state supreme court vacated the hearing officer's ruling and remanded the issue to be heard before a different hearing officer. The court found the hearing officer's ruling to be irrational, stating that he had exceeded his powers. Merely a suspension considering the seriousness of the teacher's actions defied logic, according to the court.

In re Tenure Hearing of Young.[396] A male former high school student visiting his alma mater reported to the school nurse that he had engaged in sexual activity twice with his male teacher approximately two years earlier. The nurse told the vice principal, who called the Department of Children and Families (DCF). After conducting an investigation, DCF stated not enough evidence existed to corroborate the allegations and that the teacher's actions did not place the student at risk of harm or rise to the legal level of sexual abuse. The prosecutor declined to press charges because at the time of the incidents the student was not assigned to the teacher and the student was sixteen years old, of age to legally consent to sexual relations with an adult. Nonetheless, the school district sought to have the teacher removed from employment for conduct unbecoming.

Reasoning the district conducted an investigation independent of the DCF, the commissioner of education adopted the administrative law judge's recommendation to terminate the teacher. The court of appeals and state supreme court affirmed. In doing so, the court reasoned that a determination from DCF that allegations of abuse are unfounded does not preclude a school district from seeking to terminate the teacher's employment.

Joyell v. Commissioner of Education.[397] A high school English teacher retired from a school district shortly after a female student alleged he had engaged in sexual misconduct with her. Almost two years later the school superintendent learned the teacher was seeking employment in another district. The superintendent wrote to the state commissioner of education requesting revocation of the teacher's certificate. Following an investigation, the commissioner found probable cause to initiate a hearing against the teacher. The commissioner found the teacher had sexual relationships with three students throughout his career, attempted to have a relationship with another student, and made sexually suggestive comments to four additional students. The hearing officer issued findings of fact and recommended the state board revoke the teacher's certificate, which it did.

The teacher appealed to the trial court, arguing his due process rights were denied, but the court rejected his argument because he had been given a proper hearing. The teacher also alleged the board and hearing officer did not have a thorough and complete investigation. The court rejected that complaint as well, reasoning that even if the

investigation was poor, the teacher had an opportunity to confront witnesses against him and combat their accusations. The teacher next argued that the statute of limitations should have prevented the hearing from ever taking place. The court, though, reasoned that no statute of limitations exists for charges of teacher sexual misconduct with students. Finally, the teacher argued there was no clear and convincing evidence against him. The court disagreed, saying that even though it did not believe the standard of proof for this case was as high as clear and convincing, the hearing officer nevertheless did find all facts to be proven by clear and convincing evidence. Having rejected all of the teacher's claims, the court affirmed the revocation of the teacher's certificate.

Immorality Challenges

Often school employees who are dismissed from employment for inappropriate relationships with students argue that their behavior did not meet the standard of "immorality" that qualifies as a reason for termination in many states. The employee may claim that the student involved in the relationship acted consensually or that the sexual activity involved did not rise to the standard of immorality. The following twelve summaries involve cases in which school employees challenged whether their behavior was immoral.

Sampson v. Sylvania Board of Education.[398] The defendant male teacher was terminated after being accused of having an inappropriate affair with two female students. The board followed termination proceedings, which included a hearing for the defendant in front of a referee appointed pursuant state law. The defendant argued his

due process was violated because the state Superintendent of Public Instruction provided the three referees from whom the defendant and the board were to select. The defendant further argued that the board listened to the opinion of the referee that the defendant's acts were immoral. The state supreme court supported the school district by affirming the trial court's judgment that the defendant was rightly terminated under state law and that his due process was met.

Duncan v. Greenhills-Forest Park City School District.[399] In this case that did not involve a teacher-student sexual relationship, a state court of appeals examined the gross immorality clause of teacher dismissal in a ruling that seems to favor school districts. The teacher plaintiff was convicted of public indecency, a crime that entails exposing oneself, engaging in sexual conduct, or masturbating in public.[400] The plaintiff's school district followed proper procedure in his termination, but the plaintiff challenged whether the act should have been considered "immoral" and whether he should be judged for an act that was not job related. In ruling for the defendant district, the court made several substantial statements.

First, the court ruled that the common meaning of the word "immorality" as found in a variety of popular dictionaries supported the district's interpretation under state law. The court also held that a person of average intelligence would have known that one act of public indecency would put his teaching contract in jeopardy. Next, the court ruled that the standard of proof for a board to terminate an employee guilty of immorality is a preponderance of the evidence, not clear and convincing evidence. Finally, the court stated the board was not required to prove the immoral act was job related.

Sellers v. Logan-Hocking City School District.[401] A state court of appeals affirmed the trial court that ruled a board established immorality due to a teacher's sexual relationship with a student and was justified in his termination under state law. The plaintiff was a male high school music teacher who gave private lessons to students. The plaintiff began a sexual relationship with one of his female students and was terminated after the board discovered the relationship after the student's graduation. Like the plaintiff in *Duncan v. Greenhills-Forest Park*, the plaintiff in this case challenged the charge of "immorality." Interestingly, the court did not address whether the plaintiff's conduct was immoral. Rather, it stated that its scope of review was simply to determine whether the trial court abused its discretion in its ruling of immoral conduct. The court of appeals ruled that the trial court followed proper procedure and affirmed the teacher's termination.

Flaskamp v. Dearborn Public Schools.[402] A female high school teacher challenged her school district after she was denied tenure based, she believed, on her intimate relationship with a former female student. The plaintiff began a relationship with Jane Doe I during Jane Doe I's senior year in high school. The relationship continued when Jane Doe I went away to college. When Jane Doe I's mother became curious about the relationship, she confided in the mother of Jane Doe II, who also expressed concerns that the teacher might have had a relationship with her daughter while in high school. After an investigation by the principal, the board voted not to give the teacher tenure. The plaintiff claimed the school system violated her rights to intimate association, privacy, and to be free of arbitrary state action under the Fourteenth

Amendment. The district court granted summary judgment to the defendants, and the teacher appealed.

The appellate court ruled that it did not have to decide if the relationship was a protected intimate association. The court reasoned that to prevent teachers from engaging in inappropriate relationships with students, a school board could prohibit those relationships within a year or two of graduation. Indeed, teachers could still date a wide range of adults of a wide range of ages. Furthermore, the principal was within his rights inquiring into the nature of the relationship before graduation and in the months after graduation, and his conclusion that the relationship started before graduation was reasonable. After all, the principal learned of the intimate relationship from the student's mother and through the teacher's own lack of confidentiality.

The court ruled it did not need to address the claim regarding the teacher's right to privacy as her ability to engage in intimate relationships was not directly and substantially impacted. Moreover, there were no privacy violations because the results of the investigation were not disseminated publicly. In conclusion, the court ruled that the denial of tenure was not irrational and did not constitute arbitrary state action.

***Madril v. School District No. 11, El Paso County*.**[403] A high school Spanish teacher was dismissed by the school board for neglect of duty, immorality, and other good and just cause. The teacher was alleged to have left his students unattended periodically both at school and on a field trip to Mexico, and to have made immoral sexual advances towards female students. Among the allegation of sexual advances

towards female students, the teacher was alleged to have spent time before, during, and after school in a locked classroom with a female student; to have told a female student that he preferred green eyes to blue; and to have put his arms around a female student who came to his classroom to meet a friend while telling her that he knew she was there for him, and then blocking the door temporarily as the student tried to leave.

On appeal, the teacher argued that the immorality standard should have been proof beyond a reasonable doubt, not merely a preponderance of the evidence. The court disagreed. However, the court ruled that the school failed to prove immorality on the teacher's behalf even at the lower standard. The actions and words of the teacher, the court ruled, did not constitute sexually provocative or exploitive conduct. The court set aside the teacher's dismissal and remanded the case back to the board for further proceedings consistent with the court's ruling.

Lile v. Hancock Place School District.[404] A tenured fourth grade teacher began dating the mother of two girls, one of whom was a student in his class, and the other who was also a student in the district. The teacher moved in with the mother and daughters, staying with them for nearly four years, at which time the mother became hospitalized and the children were sent to live with their father. The father soon filed charges of sexual abuse against the teacher. Allegedly, during the time the teacher lived with the family, all four individuals walked around the house nude. The teacher often used the toilet while the girls were bathing and took nude photographs of them. The teacher bathed with the girls and slept with them while the mother was in the hospital, touching

the breasts of one of the girls. The teacher called one of the girls by the nickname "blackie," so chosen for the color of her pubic hair. When the superintendent learned of the criminal charges against the teacher, he conducted an investigation. After a hearing, the board of education terminated the teacher's contract for immoral conduct.

Upon appeal, the teacher did not challenge any of the facts. Rather, he argued that his behavior did not constitute immoral conduct as defined under Missouri law. In affirming the board of education's ruling, the court held that the teacher did in fact engage in immoral conduct. The court reasoned that the age of the victims made them particularly susceptible to psychological harm, that the teacher's conduct would have an adverse impact on other teachers and students in the district, and that the teacher was likely to engage in similar behavior in the future. The court also struck down the teacher's argument that the board could not control his behavior outside of the school, finding that other courts have found a district can terminate a teacher's contract if it can find a nexus between the teacher's conduct and the district's interest in protecting the community from harm. Finally, the court did not accept the teacher's argument that he was denied privacy rights, reasoning the teacher's illegal conduct was not protected under the Fourth Amendment.

Downie v. Independent School District No. 141.[405] A junior high school counselor was accused of immoral conduct and conduct unbecoming a teacher. He was alleged to have engaged in several incidents of inappropriate behavior, including: making a weight loss bet with two freshmen girls that included a stipulation for sexual activity

with the students; telling other teachers about the bet; repeatedly administering a survey to students inquiring about their sexual activity; harassing students by staring at them and commenting about their bodies; and breaching the confidentiality of students. The teacher was suspended pending a hearing, at which he denied or justified all allegations of misconduct. Several witnesses, however, contradicted the teacher's contentions, and an educational psychologist testified to the harm that the teacher was likely to have caused the students.

The hearing examiner recommended the teacher's termination, and the board adopted the recommendation. The teacher appealed to the trial court, arguing the evidence did not support the allegations against him and that his termination was improper. The court found that substantial evidence supported the allegations against the teacher, and that the counselor should have known his behavior was improper because it violated the very code of ethics he was supposed to follow as a counselor. The court further ruled that the counselor's actions were not isolated incidents and therefore not remediable. The court affirmed the counselor's discharge, indeed stating that the school would have been remiss if it did not immediately dismiss the counselor.

Andrews v. Independent School District No. 57.[406] A female high school special education teacher had a romantic relationship with a seventeen-year-old boy who was a student at the school in which she worked but not one of her students. She was warned by the student's attorney and school administrators to stay away from the boy and to avoid contacting him through telephonic, written, electronic, or other means. Despite the

warnings, the police found the student at the teacher's house, and evidence suggested the two had engaged in public hugging and kissing after the warning letter had been sent.

The teacher was recommended for termination, and a hearing was held. At the hearing, a transcript of telephone conversations between the student and teacher surreptitiously recorded by the boy's mother was entered into evidence. Also admitted into evidence was the testimony of a man who reported that he had a sexual relationship with the teacher when he was a fourteen-year-old student approximately fifteen years earlier. The board voted to terminate the teacher. She appealed the ruling with the court system.

The teacher initially challenged the recordings, but later waived her objection. However, she claimed a due process violation in the district's allowing the former student to testify. The court, however, found that the evidence was permissible because it was admitted for the purpose of discrediting the teacher, not for proving another count of immoral activity. The teacher also argued that the relationship was not sexual in nature and therefore did not involve moral turpitude. In rejecting this argument, the court reasoned that the romantic relationship between the thirty-nine year old teacher and seventeen year old boy that had endured for years was contrary to good morals if the act was intentional. Because the act was intentional, the trial court upheld the teacher's termination, and the court of appeals affirmed.

Clark v. Board of Education of Ann Arbor.[407] A tenured female high school drama teacher worked at a nontraditional school designed to provide services for at-risk

students. Teachers were required to spend time outside of school with their students. The drama teacher also ran a support group in which students would discuss personal problems. At one point the principal warned the teacher about her conduct with male students. The teacher denied any wrongdoing. Nearly two years later two boys walked into the basement of their seventeen-year-old friend, a student of the teacher, and found the teacher and student lying in bed engaged in a kiss.

The superintendent recommended the teacher's termination, and a hearing was held with the board. The student admitted to being naked under the blankets but denied kissing the teacher. The teacher denied kissing the student but admitted she had spent the night at his house. The teacher also admitted to having allowed the student to drive her car even though she knew he did not have a license. The board voted to terminate the teacher, who appealed to the tenure board. The tenure board could not find evidence that a sexual relationship existed, but nonetheless agreed that the termination was proper because the teacher's conduct showed a serious breach of duty to her employer and students.

The teacher appealed to the trial court, which reversed the tenure commission's ruling. The trial court agreed the teacher had acted inappropriately but could not find that the school district suffered any adverse effects as required by *Beebee*, a state supreme court decision.[408] The court of appeals disagreed with the trial court and reversed its ruling. In doing so, the court of appeals reasoned that the fact pattern of the *Beebee* case dealt with curricular matters and not matters of sexual relationships between teachers and

students. Therefore, it would be wrong to assume that all tenure cases require proof of adverse consequences. Because the tenure commission determined the teacher in this case had maintained an unprofessional relationship with a student, which was supported by substantial evidence, the termination of the teacher was upheld.

Mondragon v. Poudre School District R-1.[409] A student had a sexual relationship with her teacher for a period of two years, starting when she was thirteen and ending when she was fifteen, two years prior to the student reporting the incident to her church youth counselor. The counselor reported the incident to the police, but the charges were eventually dismissed as having been outside the statute of limitations. During the criminal investigation, however, the police hypnotized the student to help her remember specific dates of the relationship, to present a detailed description of the teacher's home, and to identify distinguishing marks of the teacher's body. The teacher was administered a polygraph test as part of the criminal investigation.

Following a hearing, the board voted unanimously to accept the superintendent's recommendation to dismiss the teacher for immorality and neglect of duty. The teacher appealed to the court on several counts: that the student should not have been permitted to testify because the hypnosis rendered her incompetent; that the hearing officer's findings of fact were not supported by evidence; that the comments made by the school board's attorney to the board prior to its vote were inappropriate; that the hearing officer improperly entered into evidence the results of the teacher's polygraph test; and that the student was not available for cross examination. The court disagreed on all counts and

affirmed the ruling of the board to dismiss the teacher. In making this ruling, the court reasoned that the rules of evidence in a hearing such as this are somewhat relaxed, and that the evidence clearly supported that the teacher engaged in immoral conduct.

Lehto v. Caesar Rodney School District.[410] A male elementary school teacher became involved in a sexual relationship with a female high school student who attended a different school district. The teacher had been the student's teacher years earlier; they became reacquainted when the student came to pick up her sister. They began to talk on the phone, and a few months later the relationship became sexual. Once the teacher called off work and had the student over to his house to watch movies, at which time he fondled and licked her breasts and dry humped her. The teacher and student often met in a Wal-Mart parking lot, where the teacher would again fondle the student's breasts and digitally penetrate her vagina. The student eventually told of the relationship to a friend, who told a parent, who contacted police.

When the school board became aware of the allegations, it conducted an investigation and hearing before terminating the teacher. The teacher appealed, arguing there was no substantial evidence to support his termination because he was not the student's teacher, the student was of legal age of consent, and the relationship did not affect his professional duties. The trial court, court of appeals, and state supreme court all ruled in favor of the school district. In doing so, the courts reasoned that even though the teacher did not have a direct connection with the student in the classroom, a nexus existed between the teacher's position as a role model and the parents' ability to trust the

safety of their children to the school. The courts reasoned that the teacher's relationship with the student constituted immorality under state law and affirmed his termination.

Weissman v. Jefferson County School District No. 1.[411] A high school teacher in an alternative program chaperoned a three day field trip. On the way to their destination, the teacher sat in the back of a van with several female students, and engaged in touching and tickling them on various parts of their bodies, including between their legs near their genitalia. The teacher and students also engaged in conversations consisting of much sexual innuendo, and the teacher was found lying on a bed with a female student in the motel room. Upon returning to school, colleagues complained about the teacher's actions, and after an investigation and hearing, the school board dismissed the teacher for immorality and neglect of duty.

The teacher filed suit, claiming the term "immorality" is impermissibly vague and that he was denied due process. The court disagreed, ruling that even if the term "immorality" is vague, most persons of ordinary intelligence would know that tickling female students near their genitals is improper. Also, the court confirmed that the due process granted the teacher by the school district was adequate. The court of appeals and state supreme court affirmed the ruling.

Remediable Action Challenges

Some employees who engage in inappropriate relationships with students admit their behavior was wrong, but argue that the relationships are not so wrong as to warrant

termination. Instead, they argue their behavior is rehabilitative and that they should be given a second chance. A review of the following cases will show that generally courts will determine inappropriate touching of students is not remediable because the victims suffer psychological damage, the school suffers damage by losing the trust of its community, and a mere warning to a teacher not to engage in similar behavior in the future does not remedy the damage already caused. Five case summaries in which school employees argue their misconduct is remediable follow.

Board of Education of Argo-Summit School District No. 104, Cook County v. State Board of Education.[412] Sometimes when three second grade girls would have something to say to their physical education teacher, he would pull them near him under the auspices that he could not hear them and then pinch them on the buttocks. Following an investigation and hearing, the local school board voted to dismiss the teacher for unprofessional and immoral conduct. The teacher appealed to the state board of education. The hearing officer found the testimony of the students to be credible and the pinching to be improper, but could not find evidence that the teacher acted in a way to be sexually provocative and ordered his reinstatement, reasoning the conduct was remediable and deserved a warning before dismissal. Hearing the district's appeal, the circuit court ruled that the behavior was not remediable because even though remediation may correct the teacher's future behavior, the pinching caused traumatic psychological harm to the students and damage to the reputation of the school that could not be corrected by a warning. The court of appeals affirmed the trial court's ruling, stating that

it could not foresee any circumstance in which a reprimand would be just punishment for a teacher's immoral conduct.

Mott v. Endicott School District No. 308.[413] A band teacher had on at least three occasions tapped a total of at least five male students on the genitals: once during band class, once at a band concert, and once at a party for the band at the teacher's house. Two of the strikes were alleged to be disciplinary, while three of the strikes were alleged not to be done in anger but rather in a playful manner that did not cause lasting pain. After completing an investigation, the superintendent recommended the teacher, who had earlier been placed on probation for poor classroom discipline, be dismissed. The board's hearing officer found that the board was not able to dismiss the teacher for violating his probation notice because the notice did not specifically forbid the teacher from using corporal punishment. However, the hearing officer determined the genital striking constituted unprofessional behavior and, while the behavior may be considered remediable in a larger district, the small size of this school district would necessarily cause the students to be in contact with the teacher, which would be detrimental to the school district. Therefore, the board dismissed the teacher.

The teacher appealed to the trial court, which affirmed the ruling of the school board. The court of appeals, however, ruled that the teacher's behavior was simply a remediable teaching deficiency related to student discipline technique and reinstated the teacher. The district then appealed to the state supreme court, which overturned the court of appeals and upheld the teacher's termination. The high court ruled that not all of the teacher's genital tapping was disciplinary in nature. However, even if it were disciplinary, such

misconduct is so patently unacceptable that the school board was well within its rights to discharge the teacher without prior warnings.

Fadler v. State Board of Education.[414] A teacher was charged with immoral conduct for allegedly fondling two of his third grade female students. The teacher reached down the pants and grabbed the buttocks of one student. He grabbed and squeezed the breasts of another. The board of education voted to terminate the contract of the teacher without prior notice. The state board of education's hearing officer sustained the teacher's dismissal, which was later sustained by the trial court. The teacher then took his case to the court of appeals, arguing that the trial court erred when it ruled the teacher's conduct was irremediable and that his due process rights were denied because the court did not use an objective standard to determine if certain conduct is immoral. Because the teacher had only just raised his due process claim on appeal, the court refused to consider his argument. Considering the issue of irremediableness, the court relied on a two prong test. First, has damage been done to the school or students? Second, could the conduct causing the damage have been corrected if the teacher was warned? The court reasoned that the students and school were damaged by the teacher's actions and the damage would not have been remedied by a simple warning. The court opined that a teacher who inappropriately touches students causes psychological damage to the children and a breach of trust in the community. Therefore, the court of appeals affirmed the teacher's discharge.

Wright v. Mead School District No. 354.[415] Administrators in the Mead School District received a report from the state superintendent that its middle school music teacher allegedly had a sexual relationship with students between seven and ten years earlier when he was a high school teacher in the Spokane City School District. The teacher had developed a relationship with one student that began with backrubs and love notes written in code and eventually led to oral sex and intercourse. The teacher allegedly kissed and fondled another student several times, engaged in sexually explicit conversations with her at his home, and provided her with alcohol on a school trip. Following its investigation, the Mead board voted to terminate the teacher for his conduct as a teacher in another district with students from the other district, which had happened several years earlier. The teacher appealed, asking the court to consider whether his actions were remediable, and whether a district could terminate him for conduct that happened so long ago when he was an employee of a different district.

In affirming the board's termination of the teacher, the court ruled that sexual misconduct is not an action that can be remedied. Because the teacher's conduct served no positive educational aspect or legitimate professional purpose, the district had sufficient cause to discharge him. Furthermore, the court found no statute of limitations for a district to consider sexual misconduct charges against a teacher, reasoning that the possibility of harm to students outweighed the remoteness of the actions. In other words, the risk involved with employing a teacher who had a sexual relationship with a student in a different school district several years prior was not tempered by the time and distance

that separated the teacher from his past actions. Indeed, the court ruled "Past sexual conduct with a student in another district can provide sufficient cause for termination."[416]

Pryse v. Yakima School District No. 7.[417] A male physical education teacher frequently made sexual remarks to his female high school students. He offered them higher grades if they would ride with him in his "love machine."[418] He told them that he was sure they got plenty of exercise "between the sheets"[419] and often inquired about their first sexual experiences. The teacher would touch female students on their knees while they were sitting, would have them in his office where they could see the male students showering, and would hug them and touch them on the buttocks. Upon hearing the allegations against the teacher, the superintendent investigated and a hearing was held. At the hearing, the teacher denied most of the accusations, but the hearing officer found the testimony of the students to be credible and recommended his termination. The teacher appealed his termination to the trial court, which affirmed. He then appealed to the court of appeals, arguing several errors.

First, the teacher argued the standard of review should have been de novo, but the court overruled his objection. The court reasoned that the verbatim transcript was available for the court and upon reviewing the record the court properly found substantial evidence to affirm the termination. Next, the teacher argued that his behavior did not impact his teaching and was remediable. The court of appeals disagreed, stating that the teacher's behavior was inherently damaging to students and deserving of discharge. Finally, the court of appeals rejected the teacher's claim that the district made procedural

errors in reviewing his conduct while he was working under the previous collective bargaining agreement. Having rejected all of the teacher's claims, the court of appeals affirmed the trial court in sustaining the teacher's termination.

Miscellaneous Challenges

The final two wrongful termination case summaries include miscellaneous legal issues, including a First Amendment challenge and a Fifth Amendment challenge.

Clark v. Commissioner of Education.[420] One day during the fall semester school administrators received a report that a high school teacher was involved in an inappropriate relationship with a student. The administration gave the teacher a memo directing him to avoid contact with the female student with a warning that failure to follow the directive might result in discipline. The following spring the parents of the student reported that the teacher and student were involved in a sexual relationship. The student described distinguishing marks on the teacher's body, described where in his bedroom the teacher kept condoms, and described the color and brand of the condoms. Phone records showed 717 phone calls made from the student's house to the teacher's house over the course of nineteen months. The school district proposed termination of the teacher, and a hearing was held. The independent hearing examiner issued findings of fact that a sexual relationship had occurred and recommended the teacher's discharge. The board terminated the teacher, and the state commissioner of education affirmed the

board's action. The trial court affirmed the commissioner's ruling, and the teacher appealed.

The teacher challenged the termination on fourteen points, which the court of appeals re-categorized into five points: that the decision was not based on substantial evidence; that the commissioner had procedural errors; that the trial court should have awarded a jury trial; that the trial court improperly shifted the burden of proof to the teacher; and that the trial court should have abated the proceedings until the completion of his criminal trial. The court ruled that the commissioner had substantial evidence to support the termination based on the student's description of the teacher's body markings, the condoms, and the teacher's bedroom. The court also ruled that it had no jurisdiction over the procedural errors claims. Next, the court said that a jury trial was not appropriate because an appeal under the substantial evidence rule is generally not a trial of fact but a discussion of law. The court further ruled that it was indeed the teacher's burden on appeal to prove that the commissioner erred in finding substantial evidence. Finally, the court of appeals ruled that the trial court did not err in denying his plea in abatement so that he could preserve his right against self-incrimination. The court of appeals reasoned that throughout the civil proceedings the teacher never asserted his Fifth Amendment privilege, and the trial court had denied the jury trial anyway. Therefore, the trial court would only be looking at a substantial evidence review and the teacher would not be expected to testify about any new evidence. Because the court of

appeals overruled all five of the teacher's complaints, it affirmed the judgment of the trial court, which upheld the teacher's termination.

Padilla v. South Harrison R-II School District.[421] At a party, a female student told classmates and community members that she was having sexual fantasies about a male teacher. The student described a sexual encounter she had with a classmate, and then changed her story to include the teacher. She also feigned an orgasm and described a sexual encounter between the teacher and herself. A parent who was at the party reported the incident to the school the next day. The superintendent told the teacher he had nothing to worry about, that he knew the allegations were false. Later, the student filed a complaint alleging sexual misconduct on the part of the teacher. The superintendent investigated and a hearing was held. The board could not conclude that the teacher had engaged in a sexual relationship with the student and renewed the teacher's contract. Meanwhile, the teacher also was charged with a crime for the alleged acts and went to trial. He was acquitted of the charges, but during testimony the teacher said that he thought a sexual relationship with a student would be acceptable if it were out of school and consensual. The following spring the board did not renew the teacher's contract based on the teacher's public statements.

The teacher filed suit, arguing he had a First Amendment right to free speech. At trial, a jury awarded the teacher $385,000 in compensatory damages. The school district appealed. In reversing the jury's finding, the court of appeals reasoned that a two step process must be used to determine if employee speech is protected by the First

Amendment. First, is it a matter of public concern? Second, does it balance the interest of the person in commenting on matters of public concern with the school's ability to promote the efficiency of the public services it performs? The court conceded that the teacher's speech was not offered freely but was instead compelled through examination at trial. Nonetheless, the court of appeals ruled that the teacher's opinion was not a matter of public concern because it did not relate directly to the teacher's legitimate disagreement with the board's policies. Indeed, the board had a duty to prevent student-teacher sexual contact and could be held liable if they did not. Therefore, the school would be hard pressed to be liable for teacher-student sexual relationships and at the same time be liable for not allowing a teacher to show support for such relationships.

CHAPTER FIVE

CASE LAW SUMMARIES OF STUDENT CHALLENGES

Introduction

Chapter five will summarize ninety-nine cases in which a student who engaged in a sexual relationship with a school employee, or an adult acting on behalf of the student, filed suit against a school employee or school district for failure to protect the student from harm. Often victims may file simultaneous claims against many parties: the employee who abused them, other employees who may have known of the abuse, administrators or school board members, municipalities, the school district itself, and other possibilities. Because the focus of this dissertation is how school districts can protect themselves from liability, the case summaries of chapter five will discuss the parts of each claim related to school administrators, school board members, and the school districts themselves. Claims against the abuser or defendants not under the direction of the school board will not be discussed.

Students who file claims against school administrators and districts may file suit in either federal court or state court. First chapter five will present summaries of federal court cases. Summaries of state court cases will follow. Cases will be listed chronologically within each subsection.

Federal Court Case Law Summaries

Commonly a student, or an adult acting on behalf of the student, who has been the victim of a sexual relationship with a teacher and files suit in federal court alleges violations of protections guaranteed under Title IX or the Fourteenth Amendment and seeks relief under § 1983. Title IX is part of the Education Amendments of 1972 and applies to educational institutions that receive federal financial assistance from the Department of Education. It is designed to protect persons from sex discrimination and is sometimes used as a source of challenge by families of students who engaged in consensual sexual relationships with teachers. The U.S. Supreme Court has held that boards of education can be liable for damages if administrators are aware of a school employee's sexual relationship with a student but fail to take steps to stop the conduct.

Reviewing the following case law will show that most federal courts agree for a school district to be liable under the hostile environment sexual harassment provision of Title IX, a school employee who had the power to take corrective action had actual notice that sexual harassment was occurring and was deliberately indifferent to it. Often federal district courts' opinions of what constitutes actual knowledge are more liberal than circuit courts' opinions. Also, federal district courts' opinions of what constitutes deliberate indifference are often less strict than the opinions of federal circuit courts. In most cases, federal circuit courts have ruled to have actual knowledge a school official must actually know the harassment is happening, not simply be aware that a possibility exists that harassment is happening. Most courts have also ruled that deliberate indifference is turning a blind eye to the actual knowledge of harassment. School officials who conduct

an investigation into the reports of sexual harassment are usually held harmless by the courts no matter how inept their investigations and even if the harassment does not stop.

Section 1983 of the Civil Rights Act of 1964 originally was § 1 of the Ku Klux Klan Act of 1871. It stipulates that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate or [t]erritory, 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 or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[422]

The term "person" is not defined in the Act. The Supreme Court has concluded, however, that local governments are "persons" and therefore can be sued under § 1983.[423]

A person cannot file a claim under § 1983 alone. Rather, § 1983 is an attachment law, meaning that a § 1983 claim must be attached to another federal claim that a person's rights have been violated by somebody acting under color of state law. That is, if a person believes somebody acting under color of state law has violated his rights, he can file a claim under § 1983 to receive a damage award for the violation of his rights. Generally, students who have had sexual relationships with teachers file § 1983 claims alleging that a school employee violated their rights under the Fourteenth Amendment Equal Protection Clause or Title IX, although they less frequently attach § 1983 to other applicable federal laws.

Reviewing the following case law will show that the courts take two separate approaches to determining liability under § 1983. One avenue is for the court to determine whether a school official received notice of a pattern of unconstitutional acts committed by an employee, demonstrated deliberate indifference to the acts, and failed to take sufficient remedial action which caused proximate injury to a student. A second avenue in determining a school's liability under § 1983 is for a court to determine three elements: (1) The school showed a continuing, persistent and widespread practice of unconstitutional misconduct by employees; (2) The school showed deliberate indifference to the misconduct by the school's policymakers after being notified of the misconduct; and (3) A student was injured by virtue of the unconstitutional acts pursuant to the board's custom or policy and that the custom or policy was the moving force behind the unconstitutional acts.

The following sixty-seven federal court case summaries are arranged chronologically.

Stoneking v. Bradford Area School District.[424] This case was on remand from the Supreme Court, which ordered the court to further consider the matter of a high school principal's supervision of a male band director with a history of sexual misconduct towards students. At one point the principal received a complaint that the band director attempted to rape a female student. Over time, the principal received still more complaints of sexual abuse from female students about the teacher. The principal met with band members and the teacher to discuss these rumors. The principal filed the complaints and told the teacher not to have any more one-on-one contact with female

students. Later, a graduate came forward to report that she and the teacher had engaged in various sexual acts during her sophomore, junior, and senior years, and for two years after graduation. Some of the acts occurred in the band room, on band trips, in the teacher's car, and in the teacher's house when the student babysat for him.

The student, seeking punitive and compensatory damages, filed a § 1983 suit alleging Fourteenth Amendment violations against the principal, vice principal, and superintendent for not providing her a school environment free from sexual abuse. The court ruled that the principal and vice principal were reckless in their handling of the case because they did not investigate previous incidents of the teacher engaging in misconduct with students. The court noted that an administrator could be liable if the administrator maintains a practice of reckless indifference to incidents of known or suspected abuse involving teachers and students, in concealing student complaints, and in discouraging students from complaining. The court also noted that the principal's excellent performance review of the teacher after having knowledge of allegations against him could be viewed as the principal telling the teacher that he is indifferent to the teacher's conduct and that it would not reflect negatively on him. Thus, the court denied the principal's and vice principal's request for qualified immunity because evidence suggested they encouraged a school climate that allowed sexual abuse of students. The superintendent, however, was granted summary judgment as the court found no evidence that he helped create that negative school culture.

Doe v. Douglas County School Dist. RE-1.[425] A female high school student was required to have weekly meetings with the male school psychologist in his office, at his

home, and at other locations. During the sessions the psychologist performed oral sex on the student and fondled her breasts and genitals. The student never told school officials of the sexual conduct. After the relationship came to light, the student filed § 1983 claims against the district, arguing the district had a constitutional duty to protect her from abuse. The district made a motion to dismiss the claims, arguing that the student failed to show the district was deliberately indifferent to the student's rights, that the district did not maintain a special relationship with the student that gave it an affirmative duty to protect her, and that the student failed to exhaust her state remedies. The court granted the district's motion with respect to the state claims, but denied its motion in respect to the § 1983 claim. While agreeing that an affirmative constitutional duty to protect only arises in a custodial relationship such as a prison or mental institution, the court nonetheless denied the district's request to dismiss the § 1983 claim because the student could be able to show a custom, practice, or policy which caused the deprivation of her rights.

Franklin v. Gwinnett County Public Schools.[426] In this landmark case, the Supreme Court determined that Title IX does provide for financial relief to victims of sexual harassment. A student sought monetary damages in her Title IX suit against a school district and administrators after she was subjected to sexual harassment from a male district teacher/coach. The female high school student was subjected to frequent inappropriate comments from the educator. He would ask the student questions about her sexual relations with her boyfriend and wondered if she would ever consider dating an older man. The teacher forcibly kissed the student, called her on the telephone, and on

three occasions took her out of class to a private office where they had intercourse. It is disputed whether the intercourse was consensual. When administrators became aware of the teacher's conduct, they asked the student not to press charges and allowed the teacher to resign in lieu of termination. In the plaintiff student's suit, she asked for damages under Title IX, but the district court dismissed the claim, stating that Title IX only provides for equitable relief. The circuit court affirmed. The Supreme Court, though, reversed the judgment and remanded the case, holding that Title IX does provide for a damages remedy. The Supreme Court reasoned that there is traditionally a presumption that any appropriate relief is available to a person if his federal rights have been violated, and that assuming Title IX should only provide for back pay and prospective relief defies logic.

Gates v. Unified School Dist. No. 449 of Leavenworth County, Kansas.[427] A school had an issue related to the granting of tenure to a male vocational agriculture teacher. In an executive session with the board the father of a senior expressed concerns that his daughter was having an affair with the teacher. The superintendent reported to the board that he had no evidence of a relationship between the teacher and student other than the student's mother telling him they were engaged in a sexual relationship, and could therefore not offer an opinion. The board granted the teacher tenure, and months later he married the now-graduated student. Three years later, the plaintiff female high school senior was enrolled in the teacher's vocational agriculture class. One spring day after class, the teacher tickled her and touched her breasts. She asked him to stop and he did. She was embarrassed by the incident but did not report it to anyone. Two months

later, the teacher again fondled her breasts after class. The student told her friend, who told a teacher, who filed a report with children's services but did not inform school officials. The school became aware of the incident months later when told by law enforcement.

The student filed suit under § 1983, alleging the board acted with reckless disregard and deliberate indifference in allowing the teacher to remain employed after the alleged affair with his now wife when she was his student. The district filed for summary judgment, which was granted by the trial court. The court reasoned that even though the district may have been negligent for failing to investigate rumors of inappropriate conduct by the teacher, the plaintiff nonetheless failed to show a pattern of persistent and widespread unconstitutional practices which amounted to a school policy or custom of allowing abuse of students. The court of appeals affirmed.

R.L.R. v. Prague Public School District I-103.[428] A superintendent heard a rumor about a male middle school teacher having a sexual relationship with a female student. After completing an investigation the superintendent did not believe the rumors to be true, but warned the teacher that if he had an improper relationship with a student he would be fired. Three years later an eighth grade female student developed a two-month sexual relationship with the teacher, who was serving as her basketball coach. The student and teacher kept their relationship a secret. When the superintendent learned of the relationship, he took immediate action to terminate the teacher.

The student and her parents both filed suit under Title IX and § 1983, seeking more than $50,000 in damages. The parents' Title IX suit was dismissed because only

students can win claims under Title IX, not parents. The court also ruled against the parents' § 1983 claim, reasoning the school board did nothing to cause their familial relationship to be disrupted. Regarding the student's § 1983 claim, the court referenced *Doe v. Taylor Independent School District*,[429] which set four elements to prove deprivation of a constitutional right: that the school received notice of a pattern of unconstitutional acts committed by an employee; that school officials showed deliberate indifference to the acts; that the school officials failed to take action; and that failing to take action caused injury to the student. The court conceded that there was a factual dispute whether a school official had knowledge of the relationship, but the court noted that the only officials who may have had notice of the relationship were not listed as defendants. Indeed, as soon as the defendants learned of the relationship, they acted to terminate the teacher. The court also noted that another possible avenue for relief under § 1983 is if the school maintained a policy, practice, or custom that led to the student's injury. Finding none, the court granted summary judgment to the district regarding the student's § 1983 claim.

Next, regarding the student's Title IX hostile environment claim, the district argued that the sexual advances of the teacher were not unwelcome by the student and argued the *Meritor Savings Bank v. Vinson*[430] Title VII standards should apply in this Title IX case. The student countered that under state law she was legally unable to consent. The court noted that at least one other court refused to apply Title VII standards in a Title IX case. However, rather than consider that argument, the court granted summary judgment to the school district, reasoning that the student failed to show any

school custom or policy that caused her harm and failed to show the school did not investigate or discipline the teacher upon learning of the relationship.

***Doe v. Taylor Independent School District*.**[431] This § 1983 claim was filed in a Texas case in which a high school principal had received complaints about a male biology teacher engaging in inappropriate relationships with female students. The teacher passed love notes to, gave flowers and other gifts to, hugged, tickled, and academically favored girls with whom he held these relationships. Upon hearing the initial complaints, the principal told the teacher that he needed to stop acting too friendly with his students. The principal continued to receive complaints from other staff members about the teacher's behavior with a variety of female students, but he did not document any of the complaints or warn or discipline him. The teacher's performance evaluations showed no indications that his performance was anything less than satisfactory. The principal also did not alert the superintendent about any of the complaints.

Jane Doe was one student with whom the teacher had a romantic relationship. The relationship started in her freshman year with the teacher writing flirtatious notes on her test papers and giving her other attention that made her feel good. She developed a crush on the teacher and the relationship soon evolved to petting and kissing, trips to concerts, and the teacher often providing her alcohol. Eventually, the teacher and student began having intercourse. The day after the community's annual Corn Festival, community members reported to the superintendent the teacher and student dancing together and the teacher's wife storming away. In fact, the teacher and student had sex

the night of the Corn Festival in a field and in the teacher's house. When the superintendent became aware of the rumors about the teacher and student, he contacted the school's attorney to guide the district through the removal of the teacher.

Later, Doe filed the § 1983 claim against the school board, superintendent, and principal. The court held that school officials are liable for violations of students' rights when the official demonstrates deliberate indifference to the student, either by action or inaction. Because of the principal's indifference to the complaints about the teacher and the continued abuse of students by the teacher, the principal was not entitled to a defense of qualified immunity. The superintendent, who investigated the issue soon after hearing of the affair, was entitled to a defense of qualified immunity.

Deborah O. v. Lake Central School Corporation.[432] A male high school band director became sexually involved with one of his female seventeen-year-old students. The teacher claimed the relationship was consensual; the student claimed the teacher stalked, harassed, and raped her. Either way, both parties worked hard to conceal the relationship, denying involvement to school officials and the student's parents. The relationship finally came to light, the teacher resigned, and the student left the school. Later the student filed several claims against the school district, including § 1983 and Title IX claims. The district court granted summary judgment to the school district on the federal claims, and the student appealed. The court of appeals affirmed the district court on all claims. Regarding the § 1983 claim, the court reasoned the student did not show that there was a pattern of constitutional violations in the school. Regarding the

Title IX claim, the student was unable to show the school had actual notice the teacher was harassing the student.

Hagan v. Houston ISD.[433] Three male former high school students filed a § 1983 claim against a school district and a principal for failing to protect the students from molestation by a male coach. This case involved the principal's appeal of the district court's denial of summary judgment for qualified immunity.

One fall the first appellee student complained to the principal that the coach patted his buttocks. Even though the coach admitted the action, he claimed it was a typical coach's gesture, and the principal told the student that because there were no witnesses, nothing more could be done. The coach then drove the student home, where he told the student's mother about the patting and told her the issue had been handled. Later, the principal told the coach to be careful with his gestures.

A month later a second appellee student reported to teachers that he had been having a sexual relationship with the coach. One of the teachers took the student to the principal, who interviewed the student. The principal met with the coach, who denied the relationship. Shortly thereafter, the coach offered the student money to withdraw his allegation. The student did. The principal told the coach that he would continue to be monitored. Days later the student revived his complaint, but the student's mother told the principal to drop the investigation because the relationship between her son and the coach had been consensual.

The next year more rumors surfaced about the coach and a third nonparty student, sparked by the student's brother, who suspected his sibling was having sex with the

coach. The student and coach denied a sexual relationship, and the student's mother and the principal decided not to pursue an investigation. The following year, a fourth student (the third appellee) reported to campus police and several teachers that the coach grabbed his inner thigh, rubbed his penis, and made suggestive comments to him. Criminal charges were filed against the coach, who was removed from his position.

The students' families filed a § 1983 claim against the principal, alleging violations of their civil rights. The principal's motion for summary judgment of qualified immunity was denied by the district court, and he appealed. In granting the principal's motion, the circuit court reasoned that the first plaintiff needed to show the principal knew facts that plainly pointed to a conclusion that the teacher was molesting students and failed to take steps to prevent the molestation. Because the principal could not have been aware of the molestation of the first student before the first student made his complaint, the principal would be successful in his qualified immunity defense. Then, regarding the second and third appellees, the principal had clearly learned of a pattern of behavior that pointed plainly to the conclusion the coach was molesting students, but the principal took steps to prevent the molestation, regardless of how ineffective his actions were. Stating that ineffectiveness is not enough to overcome a qualified immunity defense, the circuit court reversed the district court's ruling, granting immunity to the principal.

***Doe v. Claiborne County, Tennessee*.**[434] Doe brought § 1983 and Title IX claims against a school district, board members, and administrators claiming she suffered damages as a fourteen-year-old freshman who was statutorily raped by a male middle

school physical education teacher and basketball coach. The teacher also coached baseball at the district's high school where Doe attended. Doe worked as a scorekeeper for the baseball team, and the teacher fondled her breasts on the bus during a road trip. This frightened the student, who avoided the teacher. The next school year, however, the teacher asked the girl to serve as a scorekeeper for the basketball team. She agreed, and he fondled her breasts on another bus trip. On a later bus trip he felt her vagina through her pants and made her touch his penis through his pants. The teacher called Doe often and invited her to call him when his wife was not home. Later the teacher expressed his love for Doe and asked her to have sexual intercourse with him. She did so six times, until two of the Doe's aunts discovered her in the teacher's house while the teacher's wife was at the hospital giving birth to their child. Doe soon began counseling.

Doe brought suit against the teacher and ten other defendants. Part of the complaint focused on the fact that the teacher had a history of inappropriate conduct with students for several years of which many school administrators were unaware. The teacher had allegedly fondled an eighth grade girl's breasts years before the relationship with Doe and had four founded cases of sexual abuse towards students as determined by the Department of Human Services (DHS), which advised the superintendent in writing not to allow the teacher to be around children. The teacher was reassigned to the bus garage and his contract was nonrenewed, but after reaching a pre-trial agreement with the school district, he was rehired to teach at a different middle school. Shortly thereafter, the abuse of Doe began. In the meantime, the superintendent was dismissed for

knowingly misusing district funds by allegedly using a district credit card to pay for a prostitute, but was rehired by the district as the principal of the teacher's middle school.

Doe's suit claimed that the defendants had actual notice of the teacher's propensity to abuse female students and showed deliberate indifference by rehiring him to teach in the district. She argued her Fourteenth Amendment right of equal protection was violated, as well as her Title IX right to be free from a hostile environment. The district court dismissed Doe's § 1983 claim, reasoning the school employees were justified in concluding the pre-trial agreement exonerated the teacher of the allegations against him. The court also rejected Doe's contention that the district had a custom of ignoring the misconduct of its employees. Doe offered as evidence the rehiring of the superintendent accused of using the district credit card to pay for prostitutes. The court reasoned even if the superintendent's behavior were true, it is not evidence that the school was deliberately indifferent to molestation of children. The court also dismissed the Title IX claim, based on the idea the administrators could not have known about the teacher's behavior because they believed he was exonerated of previous allegations. Doe then took her case to the court of appeals.

The court of appeals affirmed the lower court's dismissal of the § 1983 claim. In so doing, the court of appeals reasoned that even if it were conceded that board members were reckless in their failure to further investigate the claims against the teacher, there was no board custom that caused them not to investigate. To be a custom, the board's actions would need to be so deliberate as to amount to an official policy of inaction. The court of appeals noted that a school board could be liable if it failed to prevent sexual

abuse if a clear and persistent pattern of sexual abuse existed and the board acted with deliberate indifference. In this case, however, the court found that the administrators did not act indifferently and therefore ruled in the district's favor, dismissing the student's § 1983 claim. However, the court of appeals remanded the Title IX sexual harassment claim with the order to the lower court to apply the standards developed under Title VII.

Bolon v. Rolla Public Schools.[435] A sixteen-year-old female high school student had a sexual relationship with a male teacher, who also coached the football team. Throughout the relationship, which lasted about five months, the teacher told the student she would not need to worry about her grade in class. The teacher and student had sex at school and away from school until the student's parents learned of the relationship. The student's family later learned the teacher had sexual relationships with at least two other former students while they were in high school.

After the relationship came to light, the student's parents filed suit against the district under several claims, including a Title IX claim alleging the school subjected the student to intentional discrimination on the basis of sex. In denying the district's motion for summary judgment, the court reasoned that the Supreme Court was clear in *Franklin v. Gwinnett County* that intentional sexual discrimination by teachers towards students is imputed to the school district under respondeat superior regardless of whether the district knew or should have known about the discrimination. The parents also filed a § 1983 claim against the district, claiming the school denied their daughter of her rights to privacy and to an education free from sexual discrimination under the Ninth and Fourteenth Amendments. The district moved for summary judgment on that claim as

well, and was again denied. In denying the motion, the court reasoned that even though the school did not have actual notice of violations of the student's constitutional rights, it had implied notice that failure to train its employees in recognizing such violations would likely cause a violation of rights. The court stated that it would be for the jury to decide at trial whether the district's training was inadequate and whether the deficiency in training actually caused the student's injury.

Jacobs v. Baylor School.[436] A female student with a history of emotional problems and depression entered a boarding school as a junior. She developed a sexual relationship with her male English teacher and did well in his class academically. She struggled in other classes though, and left the school a year later without graduating. Years later the student told her boss about the relationship, who advised her to investigate her legal rights. The student eventually filed suit against the teacher and the district for mental and emotional harm. The district and teacher filed for summary judgment, arguing the student's suit had come outside the one year statute of limitations for personal injury. The student argued that her statute of limitations should be extended one year due to her minority, and also contended that her mental incapacity should have been tolled until she was of sound enough mind to realize that she had been victimized. The trial court disagreed, ruling that the student's depression and anxiety did not make her of unsound mind. The court of appeals affirmed the trial court's granting of summary judgment to the district and teacher.

Doe v. Rains County ISD.[437] A male high school coach had a sexual relationship with a fifteen-year-old female student, Doe, whom he occasionally hired to babysit his

children. The coach was recommended for hire by the athletic director, despite the athletic director knowing of the coach's sexual relationship with a student at his former school. The principal saw the coach walk Doe to the bus, knew Doe was babysitting for the coach's children, and asked another coach if he thought the two were engaged in an inappropriate relationship. The other coach said he was not aware of any improprieties. Later in the school year a second student reported to the principal that the coach had asked her for a date while he was taping her ankles for a game. The following fall the coach took a third girl out of class to tape her ankles. The principal then directed the coach to stop taking students out of class. A few months later, the principal saw Doe crying and inquired as to the reason. Doe told the principal she was having problems with a man. The principal called Doe's parents to inform them of the incident. A week later, a teacher told a school counselor that she had known for several months that Doe and the coach were having a sexual relationship. The teacher and counselor informed the superintendent, who notified authorities.

The Doe family filed various claims against the school district, which sought qualified immunity. The district court denied the district's qualified immunity, despite the fact that the court did not find the district had cause to believe that the student was being abused. The court of appeals reversed the trial court's ruling and remanded with an order to dismiss the federal and state claims against the district.

Armstrong v. Lamy.[438] In the early 1970s, a male student and his male music teacher had a sexual relationship that lasted for approximately sixteen months, during the student's eighth and ninth grade years. The relationship included both the student and

teacher fondling each other's genitals and performing oral sex on each other. The student resisted the teacher's attempts at anal sex and kissing on the face, with the attempts at anal sex sometimes coming after the teacher had gotten the student intoxicated on beer. The sexual acts took place on and off school property, including in the teacher's house and car and on camping trips.

Nearly twenty years later the student filed several claims against many parties, including a § 1983 claim against the school, principal, and superintendent. The school and its employees argued the claim was barred by the statute of limitations, but the court disagreed, reasoning the statute of limitations does not toll until the victim is aware he has been harmed. Nonetheless, the court granted summary judgment to the defense, finding that no school official had actual notice of the abuse or was deliberately indifferent to the student's rights being violated.

Nelson v. Almont Community Schools.[439] A seventeen-year-old male high school junior was involved in a romantic, nonsexual relationship with his female English teacher for about six months. The teacher had the student for English the previous year and was now both his teacher for his junior English class and supervisor for his independent study hour. She noticed that he was more moody than the previous year and sent him a note saying she was available to talk if he wanted. Soon the two were exchanging notes, journaling to each other, calling each other on the phone, and dining with each other. The relationship attracted the attention of the principal, and both denied to him that the relationship was anything other than teacher-student. The principal was soon promoted to superintendent and a new principal was hired. Later that winter the

teacher and student had been nominated by several students to be the king and queen of the school's "Snowcoming Dance," which the new principal did not find alarming because students often wrote prank nominations. At the dance, a local minister serving as a chaperone was concerned to see the teacher and student slow-dancing together, and the principal talked to both the teacher and student, warning them about perceptions people were starting to have about them. The student wanted to end the relationship and returned a locket the teacher had given him. The teacher pressured the student to maintain the relationship, which he claims led him to an attempted suicide via drug overdose that spring. The relationship came to light at that point. The student's parents searched his room to find what pills he had taken and found love notes from the teacher. The teacher was suspended and eventually resigned. During an investigation into the matter, the student told the principal the teacher had told him of a sexual relationship she had with another student ten years earlier. The former student admitted the affair took place but that he had never reported it to anyone.

The student filed a Title IX claim against the school for sex discrimination. The defendants filed a motion for summary judgment, which the district court granted. In doing so, the court stated that absent evidence that the district itself or any of its administrators had directly engaged in sexual harassment of the student, the only way the student could win the claim was to show the district had actual knowledge of the harassment and failed to take corrective action. Because the student could not do so, the court dismissed the claim.

Kinman v. Omaha Public School District I.[440] A female high school special education student and her female sophomore English teacher were involved in a romantic relationship. The teacher courted the student, who initially denied she was gay and rebuffed the teacher's advances. At one point the student attempted suicide and started drinking alcohol due to her discomfort of being courted by another woman. The teacher nonetheless continued her pursuit, discussing with the student personal details of the student's childhood sexual abuse, and inviting the student to an Alcoholics Anonymous meeting. The student did not realize the meeting was a gay AA meeting until her arrival. Eventually the relationship turned sexual, lasting for several years after the student's graduation, though school administrators unsuccessfully investigated rumors of the relationship while the student was still in school. After the student graduated and the relationship came to light, the student again denied that the relationship was consensual. The teacher was then terminated.

The student sued the teacher, principal, assistant superintendent, and district for Title IX and § 1983 violations, and the district court granted summary judgment to the school officials on both claims. On appeal, the circuit court affirmed the district court's grant of summary judgment for the school officials regarding the § 1983 claim, finding evidence did not show deliberate indifference on the part of the school officials or widespread practice on behalf of the school of ignoring complaints of sexual harassment. The district court ruled the school officials might have been able to act sooner, but doing so did not constitute deliberate indifference. However, the circuit court reversed the district court's summary judgment for the school officials on the Title IX hostile

environment sexual harassment claim and remanded to the district court. The circuit court reasoned there remained a genuine issue of fact whether the relationship was consensual and ruled that same gender harassment was actionable under Title IX.

Doe v. Berkeley County School District.[441] A male student teacher was assigned to a high school, where a counselor and assistant principal warned him to be careful around female students because many found him attractive. At one point the assistant principal talked to the student teacher about allegedly flirting with a student, but the student teacher finished the year without incident, was given an excellent recommendation, and was hired by the district as a substitute teacher the following year. Early that fall the stepfather of a female sophomore reported to the assistant superintendent that his daughter claimed to have had sexual intercourse with the teacher. The assistant superintendent investigated immediately and learned the student and teacher had intercourse six or seven times, most often at the teacher's house on days when he was not substituting. A second student had been involved also, when the teacher asked the first student to arrange a ménage a trois. The first student invited the second student to the teacher's house, but the second student ended up not having intercourse with the teacher.

The parents of both students filed Title IX and § 1983 claims against the school district. The court granted the district's summary judgment motion for the § 1983 claim in a prior decision, and now the district moved for summary judgment on the Title IX claim. Regarding the Title IX claim, the court stated that it was clear the students were victims of sexual harassment, but the district could not be liable because no school

official was deliberately indifferent to actual knowledge of the harassment. The court dismissed the claim against the school district.

Rosa H. v. San Elizario ISD.[442] A school employed a male karate instructor to provide after school lessons to students. A fifteen-year-old female student enrolled in the class because her two sisters had enrolled. Within weeks the instructor was paying special attention to her, often giving her rides home, and complimenting her on her hair and breasts. Other students perceived the teacher was attracted to the student, and a school social worker may have seen the teacher kiss the student on school grounds. Soon the relationship became sexual, and for three months the teacher and student had intercourse in the teacher's car and home. One day the student's mother found her daughter at the teacher's house and became suspicious. They met with the school counselor and principal, but the student denied a sexual relationship existed. A little more than a month later, the mother listened to phone conversations between her daughter and the teacher which confirmed her suspicions. The student became depressed and threatened suicide. She later told the details of the relationship to school officials, who did not investigate, did not inform police, did not inform the district's Title IX coordinator, and did not discipline the teacher. The teacher was fired a year later for repeatedly failing to provide a valid photo identification to the district's personnel office.

The student's family sued the district under both Title IX and § 1983. The school district moved for summary judgment, which the court granted on the § 1983 claim but denied on the Title IX claim. After the plaintiff presented her case, the district again moved for summary judgment on the Title IX case, arguing a school district cannot be

liable under Title IX unless it intentionally discriminates. The court denied the motion, reasoning that under agency law the school district could be vicariously liable for intentional torts of an employee if the district acted negligently. The jury then awarded the student $300,000 in compensatory damages. The circuit court, however, reversed and remanded. In doing so, the circuit court determined the district court gave faulty instructions to the jury. In a teacher-student sexual harassment claim, the circuit court stated, mere negligence is not enough to win a Title IX claim; indeed, a student cannot win a claim unless the school district actually knew there was a substantial risk that sexual abuse would occur. Furthermore, while Title VII makes reference to the agents of employers, thus opening the possibility for damages based on the negligent actions of one's employee, "Title IX does not instruct courts to impose liability based on anything other than the acts of recipients of federal funds."[443]

Smith v. Metropolitan School District Perry Township.[444] Beginning her freshman year, a female high school student was coached in swimming by a male teacher at her school. By her junior year the student thought of the teacher as a good friend with whom she could talk. In the fall of her senior year, the student began serving as a classroom assistant for the teacher. He made his first sexual advance at that point, asking if she wanted a kiss. She paused, and he gave her a Hershey's Kiss, and then kissed her. Over the ensuing weeks the kissing continued, the teacher began to put his hand up her skirt, and they eventually had intercourse in the school bathroom. Throughout the year the teacher and student had intercourse once or twice weekly, all but twice on school premises. The student never resisted, except for oral sex, to which she eventually

complied with the teacher's request. The relationship continued until after the student graduated. A few months later, the student told the teacher she wanted the relationship to stop. He agreed to end the relationship after one more session of intercourse. A month later, the student told her friend about the relationship. The friend encouraged her to tell her parents. Soon the police and school officials were involved and the teacher resigned his position.

The student and her parents sued the school and administrators under Title IX and § 1983. The defendants filed for summary judgment, which the trial court granted on the § 1983 claim but denied on the Title IX claim. The court of appeals dismissed the Title IX claim against the administrators as individuals, reasoning that Title IX applies to federal programs or activities receiving federal grants. Because the administrators were people, not activities, and did not receive grants themselves, the Title IX claim against the individuals could not stand. The court of appeals also dismissed the Title IX case against the district, reasoning that to be liable a district must have actual knowledge of the abuse, have the power to stop it, and fail to do so. Because the student and teacher did their best to hide the relationship from the school, the school could not be held liable for the Title IX claim.

Ominski v. Tran.[445] The families of two female middle school students filed a § 1983 claim and several state claims against a school district and several faculty members, alleging they were aware of sexual relationships between the girls and their male music teacher. One student told her social studies teacher about her relationship with the music teacher; the social studies teacher offered to take the student for an

abortion if she ever needed one but did not report the relationship to other school personnel. At about the same time, the music teacher had a conversation with a colleague that caused the colleague to believe that the music teacher was having sex with students. The colleague reported his concerns to more colleagues, with the information eventually making its way to the principal. The principal conducted an investigation but could not reach the conclusion that the teacher was engaging in misconduct. The sexual relationships with the two plaintiff students continued for an undisclosed time. They filed a § 1983 claim nearly five years later, alleging the school violated state child abuse reporting laws. In dismissing the claims against all parties except the music teacher, the district court reasoned that the faculty did not display deliberate indifference because they clearly responded to the allegations of a sexual relationship. The court stated that a sloppy or negligent investigation is not equivalent with deliberate indifference. Finally, the court reasoned that whether a state employee's breach of a state law duty to act gives rise to § 1983 liability is a question of federal law, not state law. Thus, § 1983 did not attach, and the district was granted summary judgment.

Mary M. v. North Lawrence Community School Corporation.[446] A thirteen-year-old female eighth grade student went through her school cafeteria line and met a worker, a twenty-one-year-old male cashier and fry cook. The cashier began flirting with the student each day, eventually passing her suggestive notes, which led to the cook and student phoning each other. A month after meeting, the two were seen dancing together at the school dance. Soon the employee began giving the student rides home from school. Three weeks after the dance, the student and worker feigned illness, called off

school and work, respectively, and had sexual intercourse at the girl's friend's house. Curious school officials questioned the student at school the next Monday, where she denied having a relationship with the cafeteria worker. However, the same day the girl told her mother of the relationship. The mother reported the incident to school officials and the police.

On behalf of her daughter, the mother filed Title IX and § 1983 claims against the school. The district court judge granted summary judgment to the district and dismissed the § 1983 claim but refused to dismiss the Title IX claim. The case then went to a jury trial. The jury reached a verdict in favor of the mother on the issue of liability, but did not award any compensatory or punitive damages, reasoning the student welcomed the sexual conduct with the cafeteria worker. The mother appealed, and the court of appeals reversed the jury's finding and remanded for a new trial. In doing so, the court of appeals reasoned that a thirteen-year-old was not legally able to consent to sexual intercourse with a twenty-one-year-old and directed the trial court judge to properly instruct the jury on the requirements for successfully pleading a hostile environment claim under Title IX.

Doe I v. CSD 230.[447] A male high school music teacher had separate sexual relationships with two female students. The first relationship began when the student was sixteen-years-old and lasted nearly fifteen months. The second relationship began when the student was fifteen-years-old and lasted nearly seventeen months. The two relationships overlapped for approximately eight months. Both students worked to keep their relationships secret, were unaware that the other was involved in a relationship with the teacher, and were unaware that the teacher was also involved in a sexual relationship

with the color guard director during part of the same time period. Throughout the relationships, school officials were aware that the students were helping the music teacher chart color guard routines at his home after hours, that the music teacher and color guard director were having a sexual relationship, and that the music teacher married one of his former students shortly after her graduation.

After the relationships came to light, the students filed a § 1983 claim against the school. The students argued the school had promulgated policies which fostered sexual abuse of female students. The court found that no direct evidence existed that any of the defendants had actual knowledge of the teacher's relationships with the students. However, the court reasoned a school district could be liable if enough facts supported an inference the district acted with deliberate indifference to evidence before them. In this case, the court stated, a reasonable jury could suspect school officials had enough knowledge to suspect some type of improper activity was going on but did nothing about it. Furthermore, the court said that because the music teacher had married a former student soon after her graduation, a reasonable jury might conclude the teacher had sexual relationships with her before she graduated, yet the district allowed the teacher to retain his employment. Thus, the school district created a policy of deliberate indifference to the teacher having relationships with other students and that he was likely to do the same thing with other students that he had done with his wife. The court denied the school's motion for summary judgment on the § 1983 claim.

Miller v. Kentosh.[448] A female high school student was enrolled in a percussion band program taught by a male teacher. They became romantically involved, and when

the student attempted to end the relationship the teacher refused, telling her she could not be in the band program unless she submitted to his sexual advances. School supervisors were allegedly aware of the relationship between the teacher and student but did not act to end it. One evening the local police found the teacher and student engaging in sexual activity in the teacher's car. The police reported the incident to the principal, who told the superintendent. The teacher was immediately suspended and eventually resigned.

The student filed § 1983 claims against the principal and the superintendent in both their official and individual capacities. The court dismissed the § 1983 claims against the superintendent and principal in their official capacities, reasoning the § 1983 claims are actually claims against the school and are covered under the Title IX claims. The court stated, however, that a reasonable jury could find the principal and superintendent in their individual capacities could have stopped the teacher from committing a violation of the student's rights of which they should have been aware but did not, and therefore refused to dismiss the § 1983 claims against them as individuals. The student also filed a Title IX claim against the school district. However, reasoning the principal and superintendent did not have actual knowledge of the relationship until they were told by the police, at which time they acted appropriately, the court dismissed the Title IX claim.

Doe v. New Philadelphia Public Schools.[449] A fourteen-year-old middle school boy was placed into the severe behavioral handicap class of a female teacher. In the early spring the eighth grade class was out of state on a field trip; the student stayed back at school for disciplinary reasons. One day the teacher offered to take him to the gym to

shoot baskets. While in the gym, the teacher and student kissed. For the next several days while the class was still away, the teacher took the student to lunch. Each day the student and teacher kissed in her car. When the class returned, the student and teacher would kiss and fondle each other whenever they were alone in the classroom. They began taking car rides together, eventually having sexual intercourse on three separate occasions in the back of the teacher's car on a deserted road. The relationship ended when the school year ended, and during the summer the teacher told the student she was pregnant with his baby and intended to have an abortion. The student told his cousin of the relationship. Word eventually made its way to school and legal officials, and the teacher lost her job and was convicted of sexual battery.

The student's mother filed Title IX and § 1983 claims against the school district, alleging the school had reason to believe the teacher was engaging in a sexual relationship with her son and other students before him. The plaintiff referred to a student who had months earlier reported seeing the teacher kissing a student in the classroom, but the matter was handled internally. Next, the plaintiff alleged that a classroom aide reported the plaintiff's son was being given preferential treatment by the teacher and was seen leaving school property with the teacher. In dismissing the plaintiff's § 1983 claim, the court reasoned that case law is well established that shows that a district will not be liable under the theory of respondeat superior; instead, to succeed under a § 1983 claim, a plaintiff must show the school board was itself liable for depriving the plaintiff of his rights through an officially adopted policy or pervasive custom. Because the plaintiff could not do that in this case, the court dismissed the

student's § 1983 claim. However, reasoning that there remained sufficient questions about the appropriateness of the school's response to the reports of possible harassment, the court denied the district's motion for summary judgment and determined the Title IX issue should be heard by a jury.

Doe v. Garcia.[450] A female high school student was involved in a sexual relationship with her male assistant principal for five years, including three years after her graduation. The student alleged the assistant principal made her stay in the relationship through duress. Specifically, the assistant principal often showed her a gun and threatened to kill himself if she reported the relationship. After she graduated high school, the assistant principal became friends with the student's boyfriend, allegedly to maintain control over her. Later the student's boyfriend was mysteriously found dead, and the assistant principal said something to the plaintiff that made her think he may have murdered her boyfriend. Finally, the now-graduated student ended the relationship with the assistant principal and filed a Title IX sexual harassment suit against the principal, superintendent, and school district. The defendants moved for dismissal, arguing the statute of limitations had elapsed, and that the district had no actual knowledge of the relationship in the first place. In denying the defendants' motion, the court reasoned that disputed issues of material fact existed regarding when the plaintiff became aware of her cause of action and if the district acted with reasonable diligence.

Gebser v. Lago Vista Independent School District.[451] *Gebser* is the landmark Supreme Court case regarding a school district's liability for Title IX sexual harassment. A male high school teacher initiated a long-term sexual relationship with a female

student. While they often had intercourse during class time, it never occurred on school property. The student never reported the sexual relationship to school officials. During the time of the relationship the school never distributed the federally required grievance procedure for filing sexual harassment complaints. Also during the relationship, two other students' parents complained of the teacher making sexually inappropriate comments in class, which the principal dealt with accordingly. The relationship ended when local police caught the couple in the act. The teacher was arrested by police and, after an investigation and termination proceedings, fired by the school district.

The student sued the district for damages under Title IX and § 1983. The trial court dismissed the federal claims, reasoning that school districts are generally not liable for teacher-student sexual harassment under Title IX unless a school employee with supervisory power over the offending employee actually knew of the abuse, had the power to stop the abuse, and did not do so. The court of appeals affirmed. The student then appealed to the United States Supreme Court, which found that the student was not allowed to recover damages for sexual harassment by a teacher unless an official of the district had actual notice of and was deliberately indifferent to the misconduct. The Court affirmed the lower courts, noting that damages can only be awarded under Title IX if a school official that has authority to address the misconduct has actual knowledge of the misconduct and fails to respond.

Kinman v. Omaha Public School District II.[452] Upon remand from *Kinman I*, a jury awarded damages under Title IX to a student who had a sexual relationship with her teacher. The school appealed. The circuit court reversed the district court's ruling and

remanded with directions to dismiss the Title IX claim against the school. In doing so, the circuit court stated that the standard for school district liability it held in *Kinman I* was whether a district knew or should have known about harassing behavior. However, since *Kinman I*, the U.S. Supreme Court clarified in *Gebser* that a Title IX claim would require a district official with the power to rectify a situation must have actual knowledge of the harassment. Thus, in light of *Gebser*, the circuit court was compelled to reverse the district court's ruling because the school conducted an investigation as soon as it had actual knowledge of the relationship between the teacher and student.

Doe v. School Administrative District No. 19.[453] The family of a male fifteen-year-old high school sophomore filed several claims, including Title IX and § 1983, against a school district after the student had engaged in sexual intercourse with a female teacher. The student enrolled in the school the same fall the teacher was hired, and rumors soon spread among students, faculty, and community members that the teacher was developing inappropriate relationships with several male students. One particular substitute teacher saw her dancing inappropriately with some boys at a school dance and heard rumors that she was involved in a sexual relationship with one of the boys. The substitute told the principal what she had seen and heard. The principal told the substitute that she could be sued for slander for what she was saying and did not investigate the concerns. As the year progressed, more rumors surfaced of the teacher hosting parties at her home with students and going to movies with students. The principal finally confronted the teacher about the accusations, which she explained as tutoring sessions. The principal directed the teacher to stop having students to her home.

The plaintiff student met the teacher later that winter at a basketball game. The next day the teacher arranged to take a group of boys to a concert, but ended up buying alcohol for the boys, going to one of their houses, and having sexual intercourse with the intoxicated plaintiff student. The student eventually told his girlfriend of the event, who reported it to school officials. After an investigation, the teacher was dismissed from her job and charged with criminal activity.

The student's family filed Title IX and § 1983 claims against the district, in addition to state claims. The district moved for summary judgment, and many of the state claims were dismissed. However, the court denied the district summary judgment regarding the Title IX claim based on its interpretation of the *Gebser* ruling. The court stated that the *Gebser* standard for actual notice requires more than a simple report of inappropriate conduct by a teacher but less than a clearly credible report of sexual abuse from a student. Therefore, the court was not required to find that school officials in this case had actual notice of the relationship between the teacher and student because a substitute teacher had reported rumors of a sexual relationship between the teacher and a different student several months earlier. Thus, a reasonable jury could find that if the teacher was having a sexual relationship with at least one student before her relationship with the plaintiff student, the school district would have been on notice that the educational environment was altered. The court further reasoned that a reasonable jury could find the school was deliberately indifferent to the harassment because it had actual notice of the harassment but did not investigate further. Finally, the court granted the

district's motion for summary judgment on the § 1983 claim because the court reasoned the plaintiffs could not maintain both a Title IX and § 1983 claim.

M.H.D. v. Westminster Schools.[454] The court of appeals affirmed the lower court's granting of summary judgment in favor of a school district that employed a teacher with whom the appellant student had a sexual relationship. The student and two friends had engaged in a group sexual relationship with a teacher during their freshman year of high school, including fondling, oral sex, and intercourse. The relationship came to light at the end of the school year when the plaintiff's father found a note from the teacher requesting sex from the student, and the teacher resigned his position. The plaintiff student experienced several years of psychological harm that caused her to seek therapy for years. Her attendance dropped and she withdrew from extracurricular activities. Eleven years after the relationship ended the student filed suit under Title IX, but the court ruled that the statute of limitations barred her from winning the claim. The court ruled that federal courts of appeals have routinely applied the state's personal injury limitations period to Title IX claims. In this case, the Georgia state limitation period was two years, so the student had forfeited her opportunity to seek Title IX relief.

Davis v. DeKalb County School District.[455] A male seventh grade physical education teacher maintained sexual relationships with at least three female students. He would tell them to meet him individually in classrooms, the teacher's bathroom, the equipment room, or other places where they would not be observed and would kiss the girls, fondle them, masturbate in front of them, and sodomize them. No employee ever witnessed the events, and the girls never told any school official of the events.

Eventually, however, the girls told a police officer who was a guest speaker in a class one day. The teacher resigned his position and faced criminal charges.

The students filed Title IX and § 1983 claims against the district, but the trial court granted summary judgment to the district on both claims. Regarding the Title IX claim, the court reasoned the students did not show any school official had actual notice, knew, or should have known of the abuse. Regarding the § 1983 claim, the court reasoned the students could not show the school officials knew of the abuse or acted with reckless disregard to the possibility that abuse was ongoing. The court of appeals affirmed the ruling.

***Wilson v. Webb*.**[456] A male high school teacher was alleged to have been involved in several isolated sexual interactions and ongoing sexual relationships with several female students. Once rumors came about that he was having an inappropriate relationship with a female student. The principal investigated and called the student's parents, who thought it was purely a rumor and asked to have the student removed from the teacher's class. Another time the superintendent became aware of an alleged inappropriate conversation between the teacher and two female students. The superintendent asked the principal to investigate, which he did thoroughly and found no evidence of wrongdoing. Nonetheless, the principal informed the teacher to keep his distance from the students. On another occasion the teacher was observed touching the vaginal area of a student. Statements from student witnesses were inconsistent, so the principal issued a reprimand to the teacher and made frequent visits to his classroom during the school day. The principal also began an investigation which uncovered many

more allegations against the teacher, including his having intercourse and oral sex with a student in his classroom and fondling the breasts, digitally penetrating the vaginas, and exposing his penis to two students in their car. The school eventually terminated the teacher.

Two of the students later filed Title IX and § 1983 claims against the principal and superintendent for their alleged deliberate indifference to the abuse the girls suffered. The court, however, granted summary judgment to the principal and superintendent. In doing so, the court ruled the school officials were not aware of the incidents between the teacher and the plaintiffs and adequately responded to other allegations against the teacher. In rejecting the § 1983 claim, the court ruled the students did not show the district had a policy or custom reflecting deliberate indifference. In rejecting the Title IX claim, the court ruled that no reasonable fact finder could determine the school failed to respond properly to reports of the teacher's inappropriate behavior. The court of appeals affirmed.

P.H. v. Kansas City School District.[457] For nearly two years a male high school teacher engaged in sexual relations with a male student. The student and teacher had oral sex almost daily during that time period, both at school and off school grounds. Throughout the course of the relationship the student's attendance became poor, missing nearly twenty-five percent of his classes, and his grades dropped. The student's parents and other teachers expressed concerns about the student's falling achievement and attendance and noticed the teacher and student spending much time together, but no one reported a suspected sexual relationship. When the principal confronted the teacher

about allegations that he spent too much time with students, the teacher attributed it to the student's participation in the many school activities he supervised. Eventually the student's mother reported to the school that she suspected a sexual relationship between the teacher and her son. An investigation commenced, and the teacher was eventually charged with sodomy and resigned from his job.

The student's parents filed suit against the school district on several claims, including Title IX and § 1983. The school district moved for summary judgment, which was granted on all counts by the district court. The parents appealed to the circuit court on the Title IX and § 1983 claims, arguing that there were genuine issues of material fact that needed to be tried. While the circuit court agreed that there was no denying the student was sexually abused and suffered injury as a result, the student could not demonstrate the school district had actual notice of and was deliberately indifferent to the abuse. Even though many in the school were aware of the student's falling grades and poor attendance, this did not give rise to a reasonable inference of sexual abuse. The circuit court affirmed the district court.

Baynard v. Malone.[458] One spring a male former student reported to a middle school principal that fifteen years earlier, when he was a sixth grader, a male teacher in the building had molested him. The former student said he was not interested in pressing charges, only in preventing the teacher from molesting other students, and his mother called the principal the following day to confirm the story. The principal did not report this to anyone. Nor did she report to anyone later that spring when an unidentified woman told her that the teacher had molested a student.

The following fall a new male sixth grader enrolled in the school and was assigned to the teacher's class. The teacher began to molest the student almost immediately and continued doing so until the student entered college. The sexual acts took place on and off school property; before, during, and after school hours; on camping trips and in the teacher's home. One day a colleague reported seeing the student sitting on the teacher's lap to the principal. The principal met with the teacher who said he was having a father-son chat with the boy. The principal directed the teacher to limit physical contact with students. Later that year another colleague told the principal that a community member told her that the teacher abused students.

About a month later the principal told the personnel director about the report from the former student and that the teacher was often physical with students, but did not tell the personnel director about the lap-sitting incident. The personnel director began an immediate investigation into the allegations of the former student and informed the principal to monitor the teacher for any current signs of abuse. The principal never observed the times when the current student stayed after school with the teacher, often for more than an hour, and was given rides home by the teacher. The personnel director, meanwhile, became convinced the teacher had molested the former student, but the police closed the case for lack of evidence. Soon after the police closed the investigation, the teacher resigned. However, he maintained his sexual relationship with the student for several more years, until the student entered college. At this time the student reported the relationship and the former teacher was arrested.

The student filed Title IX claims against the school district and § 1983 claims against the principal, personnel director, and superintendent. The district court granted judgment as a matter of law to the personnel director and superintendent, and a jury awarded verdicts against the school district for $700,000 and against the principal for $350,000. The district court then granted judgment as a matter of law to the school district, reasoning it could not be vicariously liable because the principal lacked the authority to implement corrective measures against the teacher. The court denied the principal's motion for summary judgment, stating a reasonable jury could conclude the principal was deliberately indifferent to the student's injury. The principal then appealed, and the student cross appealed, both arguing the district court erred.

The circuit court affirmed the district court on all claims. In ruling against the principal, the court of appeals reasoned that evidence suggested she had acted with deliberate indifference. The court stated the principal knew a former student had been abused, knew the current student sat on the lap of the teacher, and knew the student and teacher had gone on camping trips together. Therefore, the principal was deliberately indifferent to the potential the teacher might be abusive of other students, which the court reasoned was enough to meet the standard under § 1983. In addition, because the principal's attempts at monitoring the teacher had been unsuccessful, the trial court had ruled correctly.

The court of appeals also affirmed the ruling of summary judgment for the personnel director, the superintendent, and the school district. In doing so, the circuit court reasoned the two employees were not liable under § 1983 because they had acted

appropriately as soon as they learned the teacher may have molested a former student. Furthermore, the school district could not be liable under Title IX because the school did not have actual knowledge the student was being abused. In fact, the court opined, not even the principal had the required actual knowledge that the student was being abused. Instead, the principal only had knowledge of the potential a teacher might abuse a student, which the court reasoned might cause the principal to be liable under § 1983, but was not enough for the school to be liable under Title IX.

***Shrum v. Kluck*.**[459] In an interesting and seemingly misguided 2001 case from the Eighth Circuit U.S. Court of Appeals, a school district was not held liable when it "passed the trash" by allowing a male grades 7-12 teacher who had been accused of inappropriate conduct with female students to quietly resign and seek employment elsewhere. When the superintendent learned that the legal fees for a termination hearing would cost between $3,000 and $4,000, he proposed to allow teacher to voluntarily resign, provide him with a positive letter of recommendation, remove all reprimands and investigative documents from his personnel file, and promise confidentiality. After only a few months at his next school district, the teacher had inappropriate relations with a male student. The new school district testified that it would not have hired the teacher had it known his conduct in his prior district.

For the most recent offense, the teacher pled guilty to indecency with a child. The mother of the victim filed suit, claiming a violation of the student's Fourteenth Amendment liberty interests pursuant to Title IX and § 1983. The Eighth Circuit affirmed the district court's ruling that neither the superintendent nor the district were

liable for damages because the plaintiff failed to show that the administration's actions "shocked the conscience" for § 1983 purposes, or constituted deliberate indifference for purposes of supporting a violation of Title IX.

Nelson v. Lancaster ISD No. 356.[460] A male school bus driver's parents were both agents of the school board, his father a board member and his mother a bus driver. One fall the driver began flirting with a fourteen-year-old female freshman who rode his bus. After a few phone conversations, the student and driver arranged to meet with each other, where they engaged in physical contact including kissing. Over the next year and a half the student and driver surreptitiously engaged in sexual intercourse many times, at the driver's house, his parents' cabin, on school vehicles, and in the student's home and barn. The bus driver's mother asked her son about the large number of long distance phone calls he was making to the student's house, and he assured his mother that he and the student were just friends.

The relationship began to come to light in the spring when the student was taken to the hospital after her parents discovered she was drunk. The student's mother reported the incident to the school principal, mentioned the girl was talking often to the bus driver, and reported the principal was shocked to learn the twenty-five-year-old bus driver was calling her daughter; however, the principal denied the mother had ever told him that the bus driver was calling her home, stating that he would have reported the information to the superintendent if he had known. Later that spring, when the student was involved in a car accident, the bus driver visited her at the hospital with her parents present. Finally the next fall, the driver and student broke off their relationship. After the relationship ended,

the student told her parents the details of the affair. The driver was charged with several crimes.

The student's mother filed Title IX and § 1983 claims against the school district. She alleged the school should have known about the relationship because the bus driver's parents knew of the relationship and were agents of the board; in addition, other board employees should have been aware of circumstances over the year and a half long relationship that would have alerted them to the relationship. The court stated that to be successful in a Title IX claim, the student would need to show that an official of the school district who had authority to institute corrective measures had actual knowledge of the harassment and was deliberately indifferent to it. The court found that those individuals who may have had actual knowledge in this case did not have corrective authority, and those that had corrective authority did not have actual knowledge. Thus, the court granted summary judgment on the Title IX claim to the school district.

The court also granted summary judgment to the school district regarding the § 1983 claim. In doing so, the court reasoned that the evidence could not prove the driver's father, a school board member, had actual knowledge of the relationship. Furthermore, even if he did have actual knowledge, his failure to act did not constitute a policy decision because he was a single board member. The court also reasoned that the principal not starting an investigation after allegedly learning the bus driver had been calling the student was not egregious enough to shock the conscience as required in a § 1983 claim.

Kurtz v. Unified School District No. 308.[461] A female speech pathologist and a female paraprofessional worked together in a special education classroom. The paraprofessional introduced her son to one of her male fifth-grade students. The boys became friends and spent much time together, including sleepovers at the paraprofessional's house. The next fall the student entered sixth grade in another building but continued to spend time at the paraprofessional's house with her son. One day the paraprofessional told the speech pathologist that the student had made inappropriate sexual conduct towards her. The paraprofessional told the pathologist that she was going to talk to the boy's mother. The pathologist alerted two of her coworkers about what the paraprofessional had reported, but other than the pathologist, no other school employee spoke with the paraprofessional about what had happened with the student.

The paraprofessional later reported to the pathologist that she had indeed spoken with the student's mother and they determined that they would not spend any more time together. Later, the mother denied the conversation ever happened. Instead, when the mother went into the hospital for a surgical procedure, she arranged for the paraprofessional to stay with her son during her recovery period. According to the student, that is when he and the paraprofessional first had sexual intercourse. The student and paraprofessional engaged in sex several more times until her arrest months later after being caught in the act by her husband.

The student's mother sued the district, alleging negligent retention and supervision of the paraprofessional. In granting summary judgment to the district, the

court reasoned that as compelling as the case was, liability results only if the employer had reason to believe that risk of harm existed because of the paraprofessional's employment. Because the boy's mother was unable to show that any school official had reason to believe an affair was taking place, the court ruled for the school district.

Gonzalez v. Esparza.[462] In the summer following his sophomore year, a fifteen-year-old male student began a sexual relationship with his female teacher. The student and teacher had sexual relations both on and off school property during most of the next school year until an argument ended their relationship. A little more than a year later the student told the school of the relationship, and the teacher was charged with rape and other crimes. The student filed a Title IX claim against the school district. In dismissing the claim, the court reasoned that to be successful in a Title IX claim against an educational body, a plaintiff would need to prove that the school had actual knowledge of the harassment and was deliberately indifferent to it. Because the school acted responsibly as soon as it learned of the harassment in this case, it could not be held liable for the student's injuries.

Steven F. v. Anaheim Union High School District.[463] A female high school student had a sexual relationship with a male teacher for longer than a year, never telling her parents or school officials. Throughout the relationship the teacher and student had sex in many places, and the teacher gave the student flowers, a gift card to Victoria's Secret, and sexually explicit notes. The items were sometimes delivered to the student by staff members, though it was never determined if the other staff actually read the pornographic notes. The teacher also joked about the student being his girlfriend and

showering with her in front of other staff members, and staff members saw the teacher giving the student rides on many occasions. None of these incidents caused a staff member to report a suspected sexual relationship between the teacher and student. Indeed, the relationship came to light only when the student's mother found the teacher's sexually explicit letters in her daughter's closet. The student and her parents filed suit against the district seeking monetary damages for emotional distress. The trial court jury awarded more than $3 million in damages, of which $640,000 was apportioned to the parents. The district appealed.

During the course of the appeal, the district reached a settlement with the student. However, the court of appeals reversed the jury's verdict in favor of the parents. In doing so, the court reasoned that the district showed no negligence in hiring or retaining the teacher and that the district had no knowledge of the sexual relationship, even though some employees may have been inclined to believe the relationship was more than platonic and the student testified that when she was having sex with the teacher in the back of his van she saw another teacher walk by. Furthermore, the court stated that even if the district had negligently hired and retained the teacher and knew of the relationship, the parents' emotional distress was only a byproduct of the relationship and not concomitant to the relationship. The court reasoned the parents were not direct victims and therefore not entitled to any damages.

Bostic v. Smyrna School District.[464] A fifteen year old female high school student and her male track coach developed a sexual relationship that lasted for nearly a year. The student's parents became concerned about the relationship when they found

their daughter alone with the coach in a car one night and reported their concerns to the high school principal. The principal met with the coach, who said that he was discussing his marital problems with the student. The principal warned the coach to avoid contact with the student. Later, a colleague saw the coach and student conversing twice in the hallway in such a way as to make the colleague uncomfortable. He reported what he saw to the principal, who reprimanded the coach and directed him to avoid contact with the student. The principal also met with the student, who denied an inappropriate relationship was ongoing.

A few months later the coach's wife, also a teacher at the school, reported to the principal that she found her husband and the student alone in her classroom. The next day the student's mother told the principal she had bought a device to monitor the pages between the teacher and student. Later, the student's mother asked the principal to allow a private investigator she had hired to install video cameras in the school to monitor her daughter and the teacher. The principal refused the request, and the mother spoke to a school board member about her concerns. The school board member called the police, who arrested the teacher and charged him with crimes stemming from his sexual relationships with both the plaintiff student and one of her classmates.

The student's family filed Title IX and § 1983 claims against the district, and the district moved for summary judgment. The court denied summary judgment because it concluded there were material issues of fact related to school officials having actual knowledge of the relationship and being deliberately indifferent to it. However, a jury found for the school district, and the trial court denied the plaintiff's motion for a new

trial. The plaintiff then appealed to the circuit court under the auspices that the trial judge gave faulty instructions to the jury regarding who an appropriate official is and what actual notice means in Title IX cases. In determining that the trial court's directions to the jury were sound, it affirmed the ruling. Indeed, the circuit court reasoned that the plaintiff's contention that the *Gebser* standard for actual notice is met if a principal has information sufficient to alert him to a mere possibility that a relationship existed was taking *Gebser* out of context. The circuit court emphasized that *Gebser* clearly stated that Title IX is violated when a recipient of federal funds is deliberately indifferent to known acts of teacher-student discrimination.

***Craig v. Lima City Schools*.**[465] A female high school student had a male math teacher during her freshman and sophomore years. Because math was her weak subject, she would often attend tutoring sessions after school with the teacher, either alone or with other students. During a tutoring session her freshman year, the student reported the teacher kissed her. She did not respond. Within two weeks, she and the teacher had sexual intercourse during one of the tutoring sessions. Thereafter, the teacher and student had sexual intercourse about four days each week throughout the rest of her freshman year, all of her sophomore year, and the beginning of her junior year, at school and in the teacher's car. At one point the student became pregnant with the teacher's baby and had an abortion. According to the student, she, the teacher, and a counselor who was not a school employee conspired to blame the pregnancy on a fictitious student. The teacher denied ever having intercourse with the student but did admit to digitally penetrating her. The student told her best friend of the relationship but never any teachers, though she

claimed teachers knew she was alone with the teacher in his classroom with the lights out and often saw her and the teacher leaving in his car together. She also alleged that she served as team statistician for the basketball team the teacher coached, and staff members would see them sitting under a blanket together during bus rides and falling asleep on each other's shoulders. The relationship eventually came to light during the student's junior year when the superintendent was told by a school board member of rumors she had been hearing. The teacher resigned at the end of the school year.

The student filed Title IX and § 1983 claims against the district. In the § 1983 claim, the student argued the board was deliberately indifferent to the student's Fourteenth Amendment right to be free from sexual abuse by a school employee. The board moved for summary judgment, arguing that it cannot be held liable under respondeat superior; instead, the board argued, the student needed to show the board itself was the wrongdoer. The court was not willing to conclude there was no possibility for liability on the part of the board and denied its motion for summary judgment. The board also moved for summary judgment against the student's Title IX hostile environment claim, arguing that no school official had actual notice of the teacher's conduct and was deliberately indifferent to it. Reasoning that there were material factual disputes related to the Title IX claim, the court denied the board's request for summary judgment in this claim as well.

Tesoriero v. Syosset Central School District.[466] Twin sisters began receiving extra attention from their high school history teacher. He called them at home, offered free tutoring, attended off-campus track meets, and bought them birthday gifts, including

body lotion. The girls' parents were upset about the birthday gifts, and the father called the school to express concerns. The principal told the teacher to be careful how he was interacting with the girls. One sister began avoiding the teacher, but the other sister continued to interact with him. She served as his classroom aide during eighth period each day, talked to him on the phone often, and received romantic notes from him. When the teacher sent her a romantic good-bye note at the end of the school year, she went to another teacher to discuss her feelings of confusion regarding the relationship. The teacher reported the student's concerns to the principal, who took no action. The interaction between the one student and the teacher continued. During the summer the student talked to the teacher on her cell phone almost nightly. She asked if he loved her. He said that it would be her decision if they were to have sex. When the father received a large cell phone bill, noticed the number of calls made to the teacher, and heard a romantic voice mail message left by the teacher, he again called the school. The teacher was reassigned immediately and eventually was suspended for a year.

The family filed suit against the school and the teacher under Title IX and state laws. The court dismissed the Title IX suit against the teacher because individuals cannot be found liable under Title IX. The court denied the district's claim for summary judgment in regards to the Title IX suit, though, reasoning that it should be for a jury to decide whether the principal had actual notice that the teacher had been harassing the students and acted with deliberate indifference. On at least two occasions the principal was made aware of the history teacher's unusual actions but the behavior continued on throughout the summer.

Sauls v. Pierce County School District.[467] The court of appeals affirmed the trial court's granting of summary judgment to a school district against a family's Title IX and § 1983 claims stemming from a sexual relationship between their high school son and his female teacher. The teacher and student met during his freshman year when he was in a course next to her classroom. The following year the boy was in the teacher's science class, where their relationship remained strictly that of a student and teacher. The summer after the student's sophomore year, however, the relationship became more personal. The teacher was the flag corps advisor of the student's sister, and the two often would talk when she dropped his sister off at home. The teacher's second grade daughter was taught by the boy's mother, and they frequently talked about the young girl's progress. Soon, the boy's teacher and mother became friends, spending much time together with each other's families.

By the middle of his junior year, the student and teacher had developed a sexual relationship. She would frequently call him out of his other classes to have sex on school grounds. The boy would stay with the teacher when her husband was on fishing trips, and they met once at a hotel for sex. The teacher provided the student with prescription drugs, paid his speeding tickets, and gave him money, clothes, and a cell phone.

During the spring of the student's junior year, the assistant superintendent received an anonymous email alleging the teacher was involved in sexual relationships with many named prior students who had graduated or dropped out of school, though the student in this case was not mentioned by name. The teacher denied the details of the

email to the assistant superintendent, who warned her to avoid even the appearance of impropriety with students.

During the course of the investigation, the assistant superintendent learned the high school principal had received a similar complaint years earlier regarding the teacher and a student. The principal had investigated but found no evidence of an inappropriate relationship.

More rumors of the relationship surfaced in the fall of the student's senior year, but investigations could prove no illicit relationship. Finally, in December of the student's senior year, a substitute teacher discovered a note from the student to the teacher demanding money, sex, and the return of his cell phone in exchange for him remaining silent about their relationship. The teacher continued to deny the relationship, but she tendered her resignation.

The student's family filed Title IX and § 1983 claims against the school district. In affirming the district court's granting of summary judgment for the Title IX claim to the school district, the circuit court stated that the district court reached the proper conclusion, even though it applied the wrong standard. The trial court applied the student-to-student sexual harassment standard, which was more rigorous than the teacher-to-student sexual harassment standard governed by the *Gebser* decision. The court reasoned that for a school to be liable for a Title IX complaint under the *Gebser* standard, a district official who has the power to institute corrective measures must have actual notice of a teacher's misconduct and be deliberately indifferent to it.

The circuit court ruled the district did not act with deliberate indifference because it responded promptly to each complaint filed against the teacher. Furthermore, the fact the district was ineffective at stopping the relationship does not necessarily mean it was deliberately indifferent to it. The circuit court also affirmed the district court's granting of summary judgment to the school regarding the § 1983 claim, reasoning because the student could not show the school was deliberately indifferent, he could not show the school had a custom of responding to reports of abuse with deliberate indifference.

Doe v. Coats.[468] Three mothers (Doe, Roe, and Doe 2) brought Title IX and § 1983 claims against a school district and individual employees for sexual molestation of their sons (A.W., J.B., and A.L.) by a male school bus driver. Each mother claimed that the bus driver had sexual conduct with their sons at various locations over the course of two years in exchange for tobacco, alcohol, money, and pornography. A.W. was molested in the driver's home, office, and school bus during the school year. J.B. was molested during the school year in the driver's home, office, and other places in the community to which he was driven by the driver in his personal vehicle. A.L. had sex with the driver off school property during the summer. None of the boys reported the sexual relationships with the driver until allegations against the driver became public. In bringing their Title IX and § 1983 claims, the plaintiffs claimed that school officials knew about the molestation and did nothing.

Doe and A.W. each brought a Title IX claim, which were both denied by the trial court. The mother's claim was denied because she was not a participant in the federally funded busing program and therefore had no right to a claim. Her son's claim was denied

because he was unable to show that someone with the authority to institute corrective measures at the district had actual notice of the driver's misconduct and was deliberately indifferent.

Roe, Doe 2, J.B., and A.L. brought § 1983 claims against the district, which filed for summary judgment. In granting summary judgment to the district, the trial court reasoned that the bus driver was not acting under color of state law because the molestation of J.B. and A.L. did not happen on school property or during school hours. Furthermore, because no real nexus existed between the driver's position as a school bus driver and the molestation, the court did not need to consider the issue of the district's alleged deliberate indifference to the misconduct. The school district was victorious against all claims against it.

Bailey v. Orange County School Board.[469] After injuring her eye, a female high school student entered a homebound tutoring program sponsored by a male teacher. The teacher began flirting with the student, and over the ensuing years the couple had intercourse more than thirty times at his home, in the community center, and in the football stadium weight room. The student never told a school employee about the relationship and later testified that she did not think any other school employee knew of the relationship. The relationship continued after her graduation. After graduation, the student sent a letter to the school district disclosing the affair, and the district immediately began an investigation. The teacher resigned, and the student filed suit under Title IX and § 1983 against the district. It later came to light that the teacher had been investigated for other improprieties, including the alleged touching of a female

student's breast. Upon reviewing the district's responses to the prior complaints, the court ruled for the district in the Title IX charge, holding that the district did not display deliberate indifference because no school supervisor with the authority to remedy the misconduct had actual notice of the misconduct. Likewise, the court held for the district in the § 1983 charge because the student was unable to show a district custom or policy that caused her rights to be violated.

***Chivers v. Central Noble Community Schools*.**[470] A female high school student was in the math class of a male teacher and also served as the assistant for the tennis team he coached. One fall they began a series of instant messaging that occurred about every other day. The messaging involved sexual innuendo and cryptic sexual advances from the teacher towards the student. Later that fall the student withdrew from school. That day the student's father told the principal of the inappropriate messaging, and the student confirmed the incidents. The student continued to have electronic communication with the teacher under the watch of her father. The communication continued to contain sexual innuendo, and the student and father provided a printout of the transcript to the principal. The police became involved, but did not file charges against the teacher. The school investigated, and issued a reprimand to the teacher.

The student brought suit under Title IX against the school and principal, but the district court granted summary judgment to the defendants. The court stated that even though the conduct of the teacher might be construed as severe, the principal was not deliberately indifferent to the student's complaint. Indeed, he notified the superintendent and law enforcement and conducted an investigation. The court also noted that the issue

of welcomeness was irrelevant in this case because welcomeness was a matter for the workplace and peer-to-peer harassment, not employee-to-student harassment.

Haynes v. Longview ISD.[471] A male eighth grade student developed a friendly relationship with a female teacher's aide. The friendship continued during the student's freshman year when he would frequently see the aide at high school athletic events. Then, during the student's sophomore year, the relationship turned sexual. The student and aide had sexual intercourse on and off school property. Sometime later a middle school teacher overheard students talking about the aide having a sexual relationship with an unnamed student. The teacher reported this information to the principal, who questioned the aide. The aide denied the report. Thereafter the principal began spending time in areas where he might overhear discussions of the alleged relationship, but nothing ever came to light. Meanwhile, the student denied the relationship to his high school coaches at least three times. The summer following the student's sophomore year, the local police department contacted school officials to alert them the aide had confessed to the relationship. The school board terminated the aide, who pleaded guilty to criminal charges.

The student's family filed Title IX and § 1983 claims against the school district. The court stated that even if the plaintiff could prove the district had actual knowledge of the relationship, it still must prove the district acted with deliberate indifference following learning of the relationship. Even though the principal was not successful, the fact that he conducted an unrevealing investigation into the matter could not cause the court to find he acted with deliberate indifference. Therefore, the court granted summary

judgment to the school district in relation to the Title IX claim, and the plaintiffs then conceded they had no § 1983 claim.

***Kline v. Mansfield*.**[472] A female student maintained contact with her male third grade teacher until seventh grade, when the teacher was transferred to her school to teach sixth grade. The student began to visit the teacher in his classroom, sometimes cutting class to do so. Eventually the relationship turned sexual, but neither the student nor her mother made the school aware of the relationship, nor did any school official have actual knowledge of the relationship. Eventually the teacher was arrested and sentenced to prison for various sexual offenses, and the student's mother filed Title IX and § 1983 claims against the school, alleging sexual harassment and respondeat superior violations. The district court granted summary judgment in favor of the school because the student and her mother conceded that they had not made the school district aware of the illicit relationship, and there was insufficient evidence that the school district was indifferent to the teacher's misconduct.

The mother appealed the court's decision, arguing there were material issues of fact that the school had a custom or policy of deliberate indifference to sexual harassment, particularly in the school ignoring the warning signs of the student spending too much time in the teacher's classroom and, indeed, being in a part of the building she was not supposed to be. The court of appeals disagreed, reasoning that at worst the school was negligent of not recognizing the risk of harm, but that the school was clearly not deliberately indifferent to the student's abuse. The mother also argued the school failed to properly train employees to spot signs of sexual abuse. The court disagreed with

this contention as well, noting that just because further training may have prevented this case of abuse, it does not establish in and of itself a failure to train claim. The court of appeals affirmed the lower court's award of summary judgment to the school officials.

N.B. v. San Antonio ISD.[473] A male police officer was discharged from his job after fondling a seventeen-year-old female. Five years later he was hired by a school district to be a peace officer, though he did not disclose to the school his previous employment and discharge. Five years after working at the school, the officer went to a female middle school student's home at least twice around midnight to give her rides in his car, for which he was suspended fifteen days. Two years later the officer was alleged to be in a sexual relationship with a student. An investigation concluded there was no evidence to support the allegation, and the officer again was directed not to give students rides in his vehicle. A year later a student was overheard telling another student that the officer was touching her inappropriately. Another investigation found no evidence supporting the allegation. Yet another year later the plaintiff student told school officials that she, too, had been inappropriately touched by the officer. The officer was placed on leave and never returned to work for the district.

The plaintiff student filed a Title IX claim against the district alleging the district knew of other students having been assaulted by the officer before her and that the school district was deliberately indifferent to its obligation to protect her. The district filed a motion for summary judgment with the trial court, which denied the motion. In affirming the trial court, the court of appeals reasoned that the number of complaints against the

district raised a factual issue as to whether it was deliberately indifferent in its response to allegation of sexual abuse.

King v. Conroe Independent School District.[474] A female eighth grade student developed a friendship with her female volleyball coach. During the summer after the student's eighth grade year, the relationship became physical. The next fall a parent overheard her son and his friend discussing rumors about a coach and student kissing each other and passing notes. The parent notified the principal, who spoke with the coach and warned her to keep her interactions with students professional. The relationship then evolved into one of greater sexual conduct, eventually coming to an end more than three years later. The coach was sentenced to prison, and the student filed suit against the school district and principal, asserting Title IX and § 1983 claims among others.

The trial court dismissed all state claims and granted summary judgment to the district and principal regarding the federal claims based on qualified immunity. The court of appeals affirmed. In doing so, the court of appeals reasoned that even if the school could have been considered to have actual notice of the relationship early in its infancy when a parent reported the conversation she overheard between her son and his friend, the district and principal could still not be assumed to have acted with deliberate indifference because the coach was met with and directed to maintain professional relationships with students. The court further reasoned that it is not the court's job to determine if the principal did all he could have done or should have done, but only if he acted with deliberate indifference.

***Hansen v. Board of Trustees for Hamilton Southeastern School Corporation*.**[475]

A male assistant band director was hired to teach at a high school after completing a rigorous interview process, passing a criminal background check, and receiving a favorable recommendation from his prior employer. Soon after starting his new job, the teacher began having sexual banter with one of his female students. The banter led to sexual encounters in the band room, music practice room, and band office. The relationship endured during the student's freshman and sophomore years, though she never told school officials, her parents, or her boyfriend. Two years later, when the student was arrested for driving under the influence, she was subsequently admitted to a hospital for substance abuse treatment. There, she told her therapist of the affair with her teacher. The therapist informed the school, which moved to fire the teacher. During termination proceedings, it was discovered that the teacher had sexual relationships with two female students while employed in his former district, one of whom became his wife.

The student's parents sued for damages under Title IX and § 1983, arguing the school negligently hired the teacher and failed to institute corrective measures towards the teacher's misbehavior of which the school knew or should have known. The district court sided with the school officials, reasoning the *Gebser* standard required actual notice and deliberate indifference to sexual harassment. Because the school officials had no actual knowledge of a sexual relationship between the band director and the student during the time of their involvement, they were found not to be deliberately indifferent to her abuse. The court also reasoned that even if the school knew or should have known the teacher had sexual relationships with students in a former district that did not mean

the school knew or should have known that the teacher was having a sexual relationship with one of its students. The school officials were granted summary judgment for the Title IX claim, and the district court retained jurisdiction over the § 1983 claim, staying the proceedings pending the results of the student's appeal. The circuit court affirmed.

Chancellor v. Pottsgrove School District.[476] A female high school student filed suit against her school district under § 1983 and Title IX after having a year-long sexual affair with her male band teacher. The district asked for summary judgment, arguing that the student could not have been the victim of harassment because she consented to the relationship. The court disagreed, reasoning that a high school student assigned to a teacher's class does not have the capacity to engage in a consensual relationship with a teacher. Even if the student willfully participated in the sexual conduct, it was unwelcome as a matter of law, and therefore the student was necessarily the victim of sexual harassment.

The student then moved to exclude at trial all evidence that the relationship was consensual. Her motion was denied also. The court reasoned that to win her Title IX suit she would need to show the harassment was so severe and pervasive that it deprived her of access to educational programs or benefits, and the jury would need the evidence of the consensual nature of the relationship to make that determination. The court also ruled that the student's consent to the relationship was important for the § 1983 claim because it would speak to the student willingly hiding the relationship from school authorities, thus preventing them from protecting her Fourteenth Amendment due process right to bodily integrity. Therefore, even though the court agreed that the student was harassed

due to her inability to consent to sexual activity, the fact the student consented to the relationship could be used by the district to defend the Title IX and § 1983 claims.

***C.T. v. Liberal School District*.**[477] A volunteer weight training coach often had several male wrestlers to his house to lift weights. Afterwards he would massage their nude bodies, including buttocks and groin areas, with an ultrasound machine. The coach also had access to a school office and conducted nude weigh-ins of the boys outside of the wrestling season. He would engage the boys in discussions about sex and provide sexual videos for the boys to watch. The plaintiff students eventually reported the coach's behavior to school authorities and then found themselves subject to harassment from their peers.

The plaintiff wrestlers sued the school district and several other coaches for Title IX violations of deliberate indifference to the harassment from their coach and their peers. The district was granted summary judgment against the claims regarding the coach's harassment of the boys. The court stated it was unreasonable that the district should have known about the coach's behavior, recognizing the district stopped the weight-training program upon first learning of the students' complaints. The court also granted the district summary judgment against the students' claims that the school did not have adequate sexual harassment policies and procedures because the school district's lack of policies and procedures did not establish the requisite actual notice and deliberate indifference.

The wrestlers also filed claims under § 1983, claiming they were denied their Fourteenth Amendment right to due process and equal protection when a coach, who was

acting under color of state law, abused them. The defendant district argued that the coach was not a state actor. The plaintiff's response focused not on whether the coach was a state actor, but on the school district's lack of sexual harassment policies. The court saw the plaintiff's response as a concession that the coach was not a state actor. Instead the students were claiming the § 1983 violation was based on supervisory liability. The court noted that if there was no state actor, there could be no supervisor, and granted summary judgment to the district on the § 1983 claim. However, the court denied the district's motion for summary judgment under the student's state law claim of respondeat superior liability. The court reasoned that it would be for a jury to determine if the volunteer coach was acting within the scope of his employment under this state law allegation.

J.M. v. Hilldale ISD No. I-29 I.[478] A fourteen-year-old female student (J.M.) engaged in vaginal intercourse, anal sex, oral sex, kissing, and hugging with her male band teacher after he had groomed her through compliments and favoritism (e.g., the teacher had made the student a section leader). The sex happened during and after school over the course of several months, both on and off school property, in the band teacher's home and car, and in J.M.'s home. On an out of state band field trip, classmates walked in on the teacher and J.M. alone in a hotel room lying on top of the bed. Rumors started spreading among the student body. Months later a male classmate (M.P.) told J.M. that he thought she was being favored because of her relationship with the band teacher. The band teacher reported this to the assistant principal, who arranged for a meeting between all the parties. M.P. reported to the assistant principal that he believed the teacher and J.M. were having sex and that he knew that the teacher and J.M. were alone together in a

hotel room. M.P. claimed the band teacher was a pedophile. The assistant principal threatened to suspend M.P. if he kept spreading such rumors. The assistant principal also asked M.P.'s parents to teach him to refrain from making false accusations.

The next fall the band teacher began a romantic relationship with another student, S.R. He kissed, touched, and hugged S.R., but never engaged in oral or vaginal sex. A few months later S.R.'s mother monitored her social networking accounts and saw evidence of a relationship between S.R. and the teacher. The mother reported her concerns to the school. The teacher resigned soon thereafter.

J.M. filed both Title IX and § 1983 claims against the school district. Regarding the Title IX claim, J.M. argued the school district had actual knowledge of the relationships because the male classmate reported his suspicions to the assistant principal. Then the assistant principal demonstrated deliberate indifference by not investigating the report, instead threatening discipline if the classmate continued to make accusations about the band teacher. The district court agreed that a genuine issue of material fact remained and denied the school's motion for summary judgment. Regarding the § 1983 claim, the district court stated that J.M. would be required to show that the school district had a custom or policy of not investigating sexual harassment. Because the testimony of the school administrators included each passing the responsibility of investigating harassment onto each other, the court reasoned a jury could logically conclude that no one in the school district was responsible for investigating harassment. Therefore, the custom in the district could be seen to be to ignore reports of sexual harassment. Thus,

the district court denied the school's request for summary judgment on the § 1983 claim as well.

S.R. v. Hilldale ISD No. I-29.[479] S.R., a fifteen-year-old female, and her band director began a romantic relationship that included hugging and kissing. A few months later S.R.'s mother monitored her social networking accounts and saw evidence of a relationship between S.R. and the teacher. The mother reported her concerns to the school. The teacher resigned soon thereafter.

The student's family filed Title IX and § 1983 claims against the school district. The plaintiffs argued that the school gained actual knowledge the teacher would be a danger to students the prior spring when S.R.'s boyfriend, M.P., told the school administration of a sexual relationship between the band teacher and another student, J.M. In making his report, M.P. referred to the band teacher as a pedophile. The assistant principal, however, testified that M.P. admitted to lying to him about J.M., and thus the issue of the band director being a pedophile was questionable due to M.P.'s lack of credibility.

The court agreed that if the band director were a pedophile, there would be reason to believe that he might engage in future harassment. But it would not cause reason to believe the band teacher might do harm to S.R. if he had merely engaged in a romantic relationship with J.M. the prior spring. Therefore, because the credibility of M.P. was questionable, the school district did not have reason to believe the band teacher was a pedophile and only had actual notice when it learned of the teacher's relationship with S.R., at which time it conducted an investigation and obtained the teacher's resignation.

Therefore, the district court granted summary judgment to the school on the Title IX claim. Also, because the district acted appropriately after learning of the relationship between the teacher and S.R., it was clear the district had no policy preventing investigations of harassment. Thus, the school was granted summary judgment regarding the § 1983 claim as well.

Doe v. Morey Charter Schools.[480] A twelve-year-old female seventh grade student had a sexual relationship with her male English teacher. The student contended that other teachers witnessed her in the classroom alone with the teacher after school hours and that school employees perceived the teacher treating the student more favorable than other students during the course of their relationship. Therefore, the student filed several claims, including Title IX and § 1983, after the relationship ended. The court found the plaintiff's pleadings to be unclear, and directed her to amend them to provide a more clear statement of her claim based on the theory of respondeat superior. However, the court did grant summary judgment to the school on the plaintiff's negligence claim.

Doe v. Farmer.[481] A male physical education teacher named Farmer was forced to resign from his job for having a sexual relationship with a student. He was later a candidate for a teaching and assistant basketball coaching position in a new district, and though the relationship issue was probed during his job interview, he did not admit to the relationship and was hired. Farmer soon began an inappropriate relationship with a female sixteen-year-old junior, Janie Doe I. He flirted with her and hugged her often. Later he sent her sexually explicit instant messages and dared Janie I to come to his

apartment. Janie I went to his apartment three times, each time engaging in sexual intercourse with Farmer.

The next school year rumors developed that Farmer had sexual relationships with several female students. This was at least partly true as Farmer was involved in a sexual relationship with Janie Doe II at the same time he was involved with Janie Doe I. A colleague noticed Farmer and Janie II sending text messages to each other, believed they were involved in an inappropriate relationship, and reported her concern to the assistant principal, who told the principal. The principal questioned Farmer, who denied an inappropriate relationship existed. Later at an out of town basketball game the head basketball coach witnessed Janie II enter Farmer's hotel room while he was in the shower. Farmer shaved with his shirt off where Janie II could see and sat on the bed with Janie II rubbing her leg. The principal later banned Janie II from going to the gymnasium during her study hall period. Janie II and Farmer continued to have sexual relations in his office during school and after three basketball games.

The head coach later found sexually explicit love notes on Farmer's desk and received an anonymous email saying Farmer was having sexual relations with students. The head coach told the principal, who disregarded the email. At the end of the school year Farmer resigned to accept a basketball coaching position in another school district. At this point the police launched an investigation into Farmer's alleged sexual misconduct, and he was eventually convicted of sexual battery by an authority figure.

Janie I filed claims against the school district under state law, Title IX and § 1983. The school moved for summary judgment. Regarding the Title IX claim, the court

reasoned that the principal was an appropriate person who had power to take corrective action if he had actual knowledge, and that the principal had actual knowledge Janie I was being harassed by Farmer. Accordingly, the court refused to dismiss the Title IX claim. However, stating that the principal was not the final policy maker of the school district and Janie I did not show the school had a custom of ignoring sexual abuse, the court dismissed the § 1983 claim. Later, however, Janie I agreed to dismiss all claims against the school district.[482]

Hemmer v. Gayville-Volin School District.[483] A male high school teacher and golf coach took several members of his golf team to the state tournament, where they spent the night in a hotel. While there, the teacher had sexual intercourse with one of the members of the team, a sixteen-year-old female. Over the next two weeks the teacher and student had sexual intercourse twice at his home, where the student was babysitting the teacher's children. The student reported the incidents to her friends but not school officials or her parents. Rumors buzzed about the relationship. A teacher, a classmate of the student, and the golf coach's wife (who was also a teacher in the district), confronted the student. She admitted the rumors were true. The teacher and his wife resigned their positions. The student's parents sued the district under several claims, including § 1983, alleging the district was deliberately indifferent to the student's rights to bodily integrity and that the district had a custom or policy of ignoring signs or reports of teacher misconduct.

The student's family argued that evidence developed during discovery that suggested the golf coach had a history of inappropriate behavior, including touching the

buttocks of a colleague, flirting with female students, and touching female students, supported its § 1983 claim. In ruling for the school district, the court ruled that the golf coach grabbing the buttocks of another teacher would not give the district sufficient notice that he might engage in a sexual relationship with a student. Furthermore, the golf coach's flirting with other students did not constitute unconstitutional misconduct. Finally, the court ruled that the failure of the school district to provide sexual harassment training to its employees cannot be cited as the moving force behind the teacher's actions and, therefore, the student's injuries. The court granted summary judgment to the school.

J.M. v. Hilldale ISD No. I-29 II.[484] A school district appealed a jury's award of $600,000, which the district court reduced to $425,000, to a female student who had a sexual relationship with her male band director. The school district argued the district court improperly denied its motion for summary judgment on Title IX and § 1983 claims, improperly denied the student's diary as evidence of her prior sexual history, and improperly ruled the assistant principal's subjective assessment of a student witness's credibility constituted an insufficient investigation. The circuit court affirmed the district court, reasoning it did not abuse its discretion in disallowing the diary considering the sensitive nature of the evidence and the student's age. The circuit court also stated that this case differed from *Gebser* in that the complaints received by the school officials in *Gebser* were different than the ultimate misconduct in which the teacher was found to have engaged. In this case, however, the misconduct the school officials received complaints of and were indifferent to was the same misconduct that was eventually proven to be happening. Furthermore, the jury was correct in concluding the assistant

principal's reaction to the complaint was unreasonable, whereby he threatened to discipline the student making the complaint if he did not cease talking about the incident. The circuit court affirmed the ruling.

Doe v. Flaherty.[485] A principal received many complaints about a male high school basketball coach in his first year of employment. Parents complained they were uncomfortable that the coach was sending text messages to students, some of which were inappropriate in content. One text asked a student if she was drunk yet. Another text told a player the coach would like to have the player's mother sleep in the coach's hotel room on an overnight trip. Later the superintendent's secretary informed him that her cousin, a female freshman, had a crush on the basketball coach and that the student was leaving her home economics class to visit the coach in the gym. The superintendent told the principal to investigate those allegations, but the principal did not find any wrongdoing. The secretary then told the student's parents about her suspicions, and they approached the principal at a school board meeting. The student's parents understood the principal would investigate again, but she never did, instead going on maternity leave for approximately two months.

More controversy arose regarding the coach and text messages, but the coach was able to explain the messages as having in essence been forged by other students who were out to get him. The coach also was alleged to have given students answers for examinations and to have encouraged his basketball players not to shake hands with opponents. Having received multiple complaints about the coach throughout the year, the school made preparations to nonrenew his contract. Before the contract could be

nonrenewed, however, more rumors arose about the coach having a sexual relationship with a student. Now, the student admitted to having engaged in sexual relations with the coach frequently in the school locker room. The coach eventually pled guilty to sexual assault and was sentenced to prison.

The student's parents brought suit against the school and principal under § 1983 and Title IX. The district court dismissed the § 1983 claim against the school, finding no pattern of unconstitutional misconduct. However, the court determined a genuine issue of material fact existed as to whether the principal had actual knowledge of the relationship and denied her motion to dismiss. Moreover, the court found this factual dispute precluded it from dismissing the Title IX claim against the district. The circuit court, though, found the facts alleged by the student's family did not meet the *Gebser* standard of actual notice and deliberate indifference. The circuit court reversed the district court and remanded with instructions to dismiss all claims.

Doe v. Willits USD.[486] A male high school teacher became severely intoxicated at a party attended by a fifteen-year-old female student and cupped her buttocks in his hands. Some parents may have seen this, but none reported it to the school administration. In the months following the party, the teacher and student became involved in a relationship that included frequent sexual intercourse. The school's principal learned of the relationship after about nine months, immediately informed child services, and notified law enforcement shortly thereafter. The student later filed suit against the school and principal under Title IX and § 1983. The defendants moved for summary judgment, which was granted by the court. The court reasoned no official at

the school acted with deliberate indifference after gaining actual notice of the relationship.

Fothergill v. Jones County Board of Education.[487] A male high school student had a sexual relationship with his female science teacher. He filed suit under Title IX and § 1983, claiming the relationship caused him physical, mental, and emotional pain. In dismissing the claims, the court stated the student did not show the school had actual knowledge of the relationship or a custom or policy that caused the school to stop his relationship with the teacher.

Graham v. Ambridge Area School District.[488] A sexual relationship between a fifteen-year-old female sophomore and her male English teacher came to light when the student's brother found on her cell phone sexually explicit messages from the teacher. The student's mother filed a § 1983 claim against the school district, alleging the school violated her daughter's Fourteenth Amendment right to be free from intrusions upon the integrity of her body. The student and school disputed the number of complaints and rumors surrounding the teacher during his employment. Over the years the teacher had allegedly made numerous sexual innuendos in class, including showing photos of condoms, playing songs about masturbation, commenting on the size of students' breasts, and posting a sign-up sheet in his classroom soliciting dances with students at the Sadie Hawkins dance. Rumors also existed that the teacher had engaged in sexual relationships with female students in prior years, but the principal never investigated the claims. Thus, because it found sufficient evidence for a reasonable jury to conclude the school's actions

amounted to a custom that condoned the teacher's sexual misconduct, the court denied the school district's motion for summary judgment.

Henry v. Toups.[489] Two female high school students who had sexual relationship with their male band teacher filed Title IX and § 1983 claims against their principal and school district. The teacher and students had frequent sexual intercourse on and off school grounds. A school counselor was informed by an anonymous third party that the teacher was involved in sexual relationship with a student and told the principal. The principal investigated, including interviewing the student alleged to be involved in the affair, and received denials. Indeed, neither plaintiff student ever informed the principal of the relationships until they filed suit. Therefore, as the principal had no actual knowledge of nor showed deliberate indifference to the relationships, the court granted him summary judgment.

Before the band teacher was involved with the two plaintiff students, three complaints were lodged to prior principals that he had inappropriate sexual relationships with other students. The teacher was never removed from the district, which the plaintiff students claimed allowed them to be harassed by the teacher. However, the current principal was not aware of the prior complaints against the teacher, a fact the court stated showed the school district did not have an adequate procedure in place to prevent the abuse of its students. Therefore, the court denied the school district's request for summary judgment, reasoning the matter must be determined by a jury.

State Court Case Law Summaries

Students who have engaged in sexual relationships with a school employee and later file suit in state court argue claims under various state laws and sometimes federal laws. Often they will cite several causes of action in the hope that if the judge or jury does not accept one, they will accept another. For example, a student who files a claim may argue that the school district negligently hired, trained, supervised, and retained an employee; that the school district did not grant the student its right to be free from sexual harassment; and that the school district violated other applicable state law. A student who fails on the negligent supervision claim may still be successful on the sexual harassment claim.

Defendants frequently will move for summary judgment, whereby they claim the facts of the case, even viewed in the light most favorable to the student, do not create a cause of action under law. The defendants may claim that the suit was untimely filed, the court lacks jurisdiction to hear the case, the school is due qualified immunity, or any of several other defenses. In organizing the state case summaries, the thirty-two briefs will be grouped by the issue most significant for each case. However, most case summaries will present a variety of issues determined by the respective court. Cases will also be organized chronologically within each subsection.

State cases involving actual knowledge and deliberate indifference issues.

The following twelve state court case summaries involve questions of whether school leaders had knowledge of student-teacher relationships and acted appropriately when

learning of the relationships. Generally, courts have ruled in favor of school districts when they can show they either were not aware of an ongoing sexual relationship or conducted an investigation with the goal of stopping the relationship when they did become aware. However, if student victims can show enough genuine issue of material fact exists regarding school leaders' knowledge of the relationship, courts tend to deny districts' motions for summary judgment and allow a jury to hear the case.

Kimpton v. New Lisbon Schools.[490] A male high school teacher initiated a sexual relationship with one of his male students that lasted for nearly three years. After the student informed school authorities of the relationship, the teacher was arrested and removed from his position. The student's family filed negligent hiring and supervision claims and a § 1983 claim against the school district. The trial court granted summary judgment to the school district on all claims, noting the plaintiffs could not establish a sufficient § 1983 claim because they could not show any district policy or custom that resulted in a violation of the student's federal rights. Furthermore, the student could not show the district had any reason to believe the teacher engaged in misconduct with students; the fact the teacher kept a sleeping bag and mattress in his office could be explained away by the teacher's love of the outdoors and his using the mattress for he and his wife to sit on during school activities in the gym. In affirming the trial court, the court of appeals reasoned that for negligent hiring and supervision to be actionable under § 1983, the failure to supervise must be so gross that it shows deliberate indifference.

John R. v. Oakland USD.[491] A male math teacher invited a male freshman student to participate in the junior high school's work-experience program, a program in

which students were paid for helping teachers do managerial tasks like grade papers. Performance of the work at the teacher's home was permitted by the school, and the teacher in this case told the student he would get failing grades if he did not have sex with him. The teacher finally convinced the student to engage in oral and anal intercourse, threatening to retaliate against the student if he reported the incident. The student finally reported the incident to his father ten months later. The student's mother contacted the school, who advised her to report the matter to the police. Criminal charges against the teacher were eventually dismissed as there was a discrepancy between when the student reported the incident happened and evidence that showed the incident could not have happened then.

The student's parents brought suit against the school district, arguing the district was directly liable for its own negligence and vicariously liable for the teacher's acts. The district was granted its motion to dismiss the claim regarding its vicarious liability, but the claims of its direct negligence in hiring and retention went to trial. At the onset of trial, though, the trial court also dismissed the remaining claims against the district, reasoning the statute of limitations to file suit had expired. The court of appeals, however, reversed the trial court's ruling and reinstated all claims against the district, reasoning a reasonable jury might find the district was responsible for the teacher's misconduct because the misconduct was a result of the job-created authority the teacher had over the boy. Furthermore, the court reasoned the teacher's threats towards the student prevented the student from filing a timely claim.

The state supreme court reversed in part and affirmed in part. It allowed the student's family to pursue claims against the district for negligent hiring, reasoning the claim was filed in a timely fashion. However, the student's family was not permitted to pursue its claim against the district for vicarious liability because even though the teacher had district-given power over the student, his sexual conduct with the student was not foreseeable.

Brandt v. Chuba.[492] A male high school history teacher had a sexual relationship with a student, but no record of this relationship was evident in his personnel file. The student with whom he had the relationship was transferred out of his homeroom. Years later, a fourteen-year-old high school freshman began dating the teacher. The relationship turned sexual, with the student and teacher exchanging several sexually explicit fantasy letters and having sexual intercourse approximately fifteen times over the course of the student's high school career. The student told the principal's secretary that she was dating the teacher, and several school officials saw the student and teacher eating dinner together at a local restaurant, leaving together in his car after the meal. The student graduated from high school without having told anyone of the sexual relationship. After graduating, the student filed a § 1983 suit against the district, and the district moved for summary judgment. In denying the motion for summary judgment, the court ruled that there remained a genuine issue of material fact whether the school district was recklessly or deliberately indifferent to the teacher's misconduct, and whether the misconduct was a substantial factor in causing injury to the student.

P.L. v. Aubert.[493] The Minnesota Supreme Court dismissed all claims against a school district brought by a male high school student who had a sexual relationship with a female teacher. The 42-year-old defendant was in her first year of teaching at the plaintiff's school, hired after she was found to have outstanding credentials and references. The student was in three of the teacher's classes. Early in the school year they began confiding their personal problems with each other: the student was struggling with his drinking; the teacher was having marital problems. In the fall of that year, the teacher began kissing the student when they were alone in the classroom. During a Christmas party at the teacher's home, the teacher and student danced together, the teacher resting her hands on the student's buttocks. In the months following the party, the teacher and student repeatedly engaged in kissing, hugging, and fondling of genitals, both over and under their clothing. The sexual contact often occurred in the classroom, sometimes when they were alone and sometimes concealed by the teacher's desk with other students present. The teacher and student never had intercourse, and the student ended the relationship in the spring of the teacher's first year.

Approximately eighteen months later, the student filed several claims of inappropriate contact on the teacher's part, arguing the school district was responsible for her behavior. The trial court dismissed the claims, but the court of appeals ruled for the student. Finally the case made its way to the state supreme court. In reversing the court of appeals, the state supreme court ruled the school was not liable for intentional torts of an employee where the torts were unforeseeable and unrelated to the duties of the employee, even though the torts took place during the employee's work time and on

school property. The court also ruled the school is not liable for negligent supervision when the teacher's behavior could not have been anticipated or discovered through the normal exercise of reasonable care.

Landreneau v. Fruge.[494] A female sophomore student had a history of sexual abuse, consensual sexual relationships with older males and females, drug abuse, and alcohol abuse from an early age. As a high school sophomore she engaged in a sexual relationship with her female physical education teacher and coach. The relationship included kissing, fondling, and exchanges of love notes, all off school property and after school hours, with one disputed exception of kissing in the coach's office. The relationship ended, and ten months later at a party hosted by the teacher the student had sexual activity with a female bus driver. The following morning the student's mother found her daughter at the teacher's house. The student admitted to the sexual relationships, ran away from home, and was later admitted into a drug and alcohol rehabilitation program. The student's mother filed suit approximately one year later under various state claims. However, finding no evidence the school board or principal failed to prevent the relationships from occurring, the trial court dismissed the claims against the school and principal. The court of appeals affirmed.

Colon v. Jarvis.[495] A fifteen-year-old female student engaged in a sexual relationship with one of her male teachers for a little longer than a year. After the relationship ended the teacher was convicted of several crimes, including sodomy and rape. The student filed suit against the school district, alleging negligent hiring and supervision of the teacher. The district moved for summary judgment, arguing that

because the student would not be able to recover damages for a consensual sexual relationship, the district could not be held liable under a theory of respondeat superior. In denying the district's motion for summary judgment, the trial court reasoned that the plaintiff was not looking for damages under respondeat superior, but negligent hiring and supervision. As there remained a genuine issue of fact that the district may have been aware of prior sexual misconduct by the teacher, the court of appeals affirmed the trial court's denial of summary judgment to the school district.

Doe v. Dimovski.[496] A minor female student had a sexual relationship with a male teacher and coach for about six months. Before the relationship began, the teacher allegedly told the student he wanted to see her naked, asked her to perform a striptease for him, followed her home and to work, and made continual sexual advances. Furthermore, the student and her mother alleged that they told two school board members of the coach's actions before the relationship began but the board did not investigate. The student filed several state claims against the board, including claims of negligence, negligent infliction of emotional distress, and willful and wanton misconduct. The trial court dismissed these charges against the board, but the court of appeals reversed and remanded, stating the board had a mandated requirement to report the suspected abuse.

Doe v. Centennial ISD No. 12.[497] A sixteen-year-old female high school junior was touched inappropriately by her male teacher. Some of the touching occurred at school during school hours, and it led to a sexual relationship between the two that lasted for five years after the student's graduation. The student sued the district under negligent retention and supervision and respondeat superior claims. The district moved for

summary judgment, which the trial court granted. The student appealed. The court of appeals affirmed the trial court's granting of summary judgment to the district on the respondeat superior claim, reasoning that even though evidence existed that the district may have known or should have known about the relationship, the student was not able to show the type of foreseeability needed for a respondeat superior claim. However, because a genuine dispute of material fact existed regarding the district's knowledge of the relationship, the court of appeals reversed the granting of summary judgment to the district on the negligent supervision and retention claims and remanded for trial.

Doe v. Clinton Board of Education.[498] The mother of a male middle school special education student brought several state claims against the school district as a result of an inappropriate relationship between the student and a female aide in his classroom. The student and aide engaged in hand holding, kissing, and sexual contact, most frequently at the town library. The teacher may have seen the student and aide holding hands. Notwithstanding, the court granted summary judgment to the school district, reasoning no evidence suggested the school was aware of any misconduct between the student and aide.

Doe v. Pontotoc County School District.[499] Twin girls first met a teacher when he taught them math in sixth grade. The girls often received tutoring from the teacher, which was encouraged by the girls' mother. As the mother had recently been divorced, she also encouraged the teacher to take a personal interest in her daughters' lives, including visiting them at home and taking them to church. The teacher was transferred to the district's high school, where he again was the girls' teacher. By this time the

teacher was married with a young child and another on the way. He coached baseball and asked one of the twins, Jane, to be a batgirl. Jane and the teacher became even closer, exchanging emails, phone calls, and notes. They promised to keep their relationship, which became physical, secret. At least five times the teacher and student touched, though they never engaged in intercourse. The teacher hugged Jane, gave her a back rub, fondled her in the back of his truck, lay in his bed with her, and kissed her after a baseball game.

Later in the year the principal heard rumors about the relationship. He investigated, found nothing amiss, and warned the teacher to be aware of inappropriate relationships with students. The principal heard a similar rumor later, again found nothing in his investigation, and again warned the teacher. Finally, during the summer Jane's twin found love letters the teacher had written to Jane. The teacher resigned, and the mother filed suit against the district. The trial court issued a judgment in favor of the district, finding the district did not know or have reason to know about the relationship and was not negligent in hiring and retaining the teacher. The court of appeals affirmed.

Fayette County Board of Education v. Maner.[500] A jury awarded a female former student $3,700,000 and an additional $241,881 in fees for injury she suffered from engaging in sexual relationships with six educators between her eighth grade and senior years. The student first had a relationship with a female art teacher with whom she spent much time outside of school. Soon the two were having sexual relations. The student confided in her male science teacher, who made arrangements with the art teacher to bring the student to his home, where he gave her drugs and had sex with her. The art

teacher and science teacher continued to "share" the student sexually, and the student told the guidance counselor. The counselor then began calling the student out of class to discuss her relationships with the teachers, and would use the counseling sessions to engage in sexual contact with the student, having her sit on his lap and putting his hands down her pants.

A female principal called the student out of class to discuss the relationships, and soon the principal was buying the student clothes, taking her on trips, and engaging in sexual contact with her. A male fifth teacher became involved shortly thereafter, often having sexual intercourse with the student at school. A male sixth teacher became involved when some of the other teachers took the student to his trailer for marijuana and sex. The student's mother then reported the sexual relationships to the superintendent, who promised to handle the situation but told the mother they would keep quiet about the accusations. However, when he met with the student, he did not discuss the sexual relationships, and his meetings with the teachers did not stop the relationships. After the student's graduation, her mother filed suit against the school, where the jury granted them the large verdict, despite the district's motion for judgment notwithstanding the verdict.

The district appealed on several counts, including that the state court had no jurisdiction to hear the federal Title IX and § 1983 claims. The court of appeals disagreed, reasoning numerous courts have held that state courts have concurrent jurisdiction with federal courts over cases involving § 1983. Furthermore, the court stated, the board was not entitled to qualified immunity because the board of education is a "person" under § 1983. So, having determined the state court had jurisdiction over the

federal claims and the school was not immune from claims under the federal laws, the court of appeals addressed each claim. First, regarding the § 1983 claim, the court found that evidence existed that there was a custom of inaction at the school, evidenced mainly by the superintendent's failure to react appropriately to the allegations of abuse from the student's mother. Second, regarding the Title IX claim, the court of appeals found evidence clearly showed the school had actual notice of the abuse and acted with deliberate indifference. The court of appeals affirmed the trial court on all counts.

Canaday v. Midway Denton U.S.D. No. 433.[501] A male student alleged that a male teacher at his school sexually abused him at least one hundred times between the time the student was twelve and seventeen years old. The student filed an action against the teacher and school. The action against the teacher was dismissed, and the district asked for summary judgment, claiming that the acts of the teacher were not foreseeable. The district court granted summary judgment to the school district after allowing the district's motion to strike several witnesses. Stricken witness included several students who could testify to information generally known about the teacher's conduct and a night custodian who could testify to finding the student and teacher alone in various parts of the building very late many evenings. The custodian was also prepared to testify that the excuses the teacher gave for being with the student were incongruent with where the teacher and student may have been in the building. The trial court struck the witnesses because they were included on an amended witness list that was entered after discovery had closed. In reversing the trial court's decision, the court of appeals ruled that the court had the discretion to allow the witnesses and that the failure to amend the witness list was

merely a technical issue as the school district had been advised of all the information about the witnesses. The court of appeals also ruled the trial court improperly granted summary judgment to the district because a genuine issue of material fact remained as to whether the school could have prevented the abuse. The court of appeals remanded with the order to allow the witnesses to testify.

State cases involving statute of limitations issues. The following eleven state court case summaries involve students who brought suit some extended length of time after having been involved in a relationship with a school employee. States have statutes of limitations regarding the time in which a person who has been injured can bring a claim against the injuring party. However, regarding students who suffered injury through a school employee's abuse, courts tend to interpret laws more favorably to the victims. Many courts have ruled that the period in which a victim can bring a claim does not toll until the victim realizes he has been injured. For example, if a student has a sexual relationship with a teacher, but does not understand the emotional or psychological damage he has suffered until he enters therapy years later, courts are likely to rule that the statute of limitations did not begin to toll until the student realized he was injured.

Daly v. Derrick.[502] A male teacher at an alternative high school engaged in sexual activity with several students. The students and staff of the school took frequent overnight field trips where many activities were focused on sharing feelings and developing relationships. The teacher used the field trips as an opportunity to fondle

female students, and engage in fellatio and cunnilingus with them. With some students the sexual activity was an isolated incident; with others, the teacher and student remained sexual partners for a period of weeks. The three plaintiffs in this case engaged in sexual activity in 1977-1978. In 1979, several students at the school met with several teachers, including the respondent, to discuss many allegations of his misconduct. At the conclusion of the meeting, the girls agreed not to discuss any further the subject if the teacher left the school. As time passed the girls experienced emotional problems, and finally filed suit against the teacher and school nearly ten years later. The defendants were granted summary judgment and the claims were dismissed by the trial court due to the statute of limitations having expired. In reversing the trial court, the court of appeals reasoned that in cases of childhood abuse, the statute of limitations does not start until the victims are fully aware of the facts essential to the cause of action; that is, until the victims know they were abused and understand the damage caused them.

Green v. Sawdey.[503] The plaintiff female former student had a nearly year-long sexual relationship with her male band director almost twenty years earlier between her sophomore and junior years. After the relationship ended, the student began using drugs and became depressed, rebellious, and sexually promiscuous. The student told no one of the relationship until nearly ten years later, when she confided in her fiancée. The fiancée convinced the former student she had been raped by the teacher, but she did not come to that realization until nearly another ten years later after an epiphany at a prayer meeting. The now adult woman filed suit against the teacher and school district. The

trial court granted summary judgment to all defendants, reasoning the statute of limitations for torts related to sexual abuse had expired. The court of appeals affirmed.

***Harrison v. Gore*.**[504] As a fifteen-year-old sophomore, a female student began playing basketball for the defendant male coach at a private Baptist school. Over the next three years she engaged in oral intercourse and other sexual acts with him. She contended in a lawsuit filed eight years later that the relationship caused her serious debilitating emotional and psychological harm. She further asserted the school was liable for damages by negligently supervising the coach. The trial court ruled that the plaintiff's liberative prescription had expired after one year of the last tortious act against her and dismissed the case. The student appealed, arguing the prescriptive period under Louisiana law should have been ten years because the parties were bound by a contract. She further contended that she was emotionally unable to file suit within the prescription period. In affirming the ruling of the trial court, the court of appeals reasoned that the cause of action clearly arose from a tort, not from a breach of contract, and that the plaintiff offered no proof of psychological dysfunction or organic mental illness that would allow the prescriptive period to be suspended. The plaintiff's suit was dismissed with prejudice.

***Nolde v. Frankie*.**[505] Over the course of sixteen years, a male teacher/coach at a high school had separate sexual relationships with three female students while they were in school and, in two cases, after their graduations. Each of the students came from broken homes and considered the teacher to be a father figure. None of the students ever experienced violence at the hands of the teacher, but all considered him to be intimidating

and prone to violence. The students all blamed themselves for allowing the relationships to occur, and all suffered emotional distress, depression, physical illness, and problems with interpersonal relationships during the years following their relationships with the teacher. Thus, as adult women the former students filed suit against the school district for various claims, including breach of fiduciary duty.

The school moved for summary judgment, claiming the statute of limitations barred the action. The trial court granted the motion, reasoning that no state law provided for tolling the statute. The court of appeals affirmed. The state supreme court conceded that the former students had long known they were abused and knew they were harmed by the abuse. Nonetheless, it reversed the court of appeals and remanded to the trial court. In doing so, the state supreme court reasoned that the teacher's affirmative conduct may have induced the students to delay filing suit, and it directed the trial judge to determine if that had in fact happened.

Finney v. Bransom.[506] Parents of a female eighth grade student learned she had a sexual relationship with her male teacher. They reported the incident to the school, which terminated the teacher. More than a year later they brought suit against the district without giving the school 180 days notice as required under state law. Furthermore, the parents failed to oppose the school's motion for summary judgment until one hour before the hearing and amended their complaint to include a § 1983 claim late in the process. The trial court, therefore, granted summary judgment to the defendants. The court of appeals and state supreme court affirmed.

Soderlund v. Kuch.[507] A fifteen-year-old boy attended a fine and performing arts magnet school in which sexual relationships between students and teachers were common knowledge. The boy, a ballet major, began a sexual relationship with a male instructor in the modern dance department. During the relationship, an assistant dean encouraged the boy to sexually submit to the teacher, publicized the relationship, and mocked the boy in front of other students. The teacher ended the relationship near the end of the school year, after which the defendant teachers ridiculed the plaintiff student about his appearance and dancing skills. At the end of the school year the plaintiff was not invited to return to the school. The plaintiff returned to the school two years later, hoping to earn the praise of the defendants. However, one defendant refused to speak to the plaintiff, and the other verbally abused him.

The teachers' treatment caused the student severe guilt and shame. Over the next several years he had mental breakdowns, gained weight, contemplated suicide, and was unable to form healthy relationships. Finally, eight years after the sexual relationship, the plaintiff told his mother of the relationship. He was diagnosed with post-traumatic stress disorder and filed suit two years later. The defendants moved to dismiss the claims against them, arguing the statute of limitation had expired. The trial court agreed. The plaintiff appealed, arguing the statute of limitations period should not have begun until he made his mother aware of the relationship or was diagnosed with PTSD. The court of appeals disagreed and affirmed the trial court's dismissal of all claims against the defendants.

Doe v. Bakersfield CSD.[508] A male former-student brought state claims against a school district that employed a guidance counselor who molested the student from the time he was a thirteen-year-old seventh grader until he was nineteen-years-old. The abuse first started when the counselor held a slumber party with students at his home, provided students with alcohol and pornography, and performed oral sex on the student in the morning. Soon the counselor was performing oral sex on the student frequently, both on and off school property. The counselor attended many of the student's sporting events and would take the student to dinner afterwards, with the student's parents' permission, stopping to perform oral sex on the student on the way home. During the abuse, the counselor threatened to humiliate the student if he ever disclosed the relationship. The relationship ended when the student was a nineteen-years-old college student, but he did not bring suit until a few years later. The trial court denied the student's petition as untimely. The court of appeals, however, reasoned the counselor's threats of humiliating the student prevented him from bringing a timely claim against the school district. The court of appeals reversed the trial court's order and directed the court to grant the student's petition for relief.

R.L. v. School District of Newark.[509] A fourteen-year-old male freshman was groped by his male band director on several occasions. The student reported the incident to his guardian, who transferred him to another school. He reenrolled a year later and was assigned to a class with the same teacher. He asked his guidance counselor to transfer him to a different class, but she refused. Later, when the student told the counselor about the events of his freshman year, the counselor arranged for the student to

meet with a social worker, and there were no further incidents of sexual touching with the band director that year. During the student's junior year the band director began flirting with him. The band director gave the student rides and took him to private residences where he provided the student alcohol and marijuana. They eventually began having sexual intercourse which was repeated regularly until just before the student's graduation and just after the student turned eighteen. A year later the student tested positive for HIV. He reported the relationship to the school district, and the teacher was terminated, but the student went through a period of deep depression and anxiety.

Six months later the student filed a motion for leave to file a late notice of claim pursuant to state law. The school district argued that the court should not accept the filing because the student's claims accrued on his eighteenth birthday, which would put the claim well after the ninety day accrual period. The trial court judge disagreed, ruling that the student's claim accrued on the day he found out he was HIV positive. Furthermore, even though the plaintiff's claim was not filed until sixty-six days after the ninety day period allowed under state law, the plaintiff's age and the impact of the HIV diagnosis on him amounted to extraordinary circumstances under state law and caused his claim to be filed with a reasonable time of accrual. The court of appeals affirmed.

Doe v. Goodwin.[510] A male elementary teacher asked one of his male former students, now a fourteen-year-old high school student, to work for him. Over the course of the next two years, the teacher and student engaged in sexual intercourse numerous times, often on school property or after school-sponsored events. After the relationship came to light, the teacher was convicted of rape and the student and his mother filed suit

against the district and teacher in federal court for failing to stop the abuse and for negligent supervision of the teacher. The federal case was eventually dismissed. This state suit was filed soon after the federal case was dismissed, but two years after the abuse came to light. The defendants filed a motion to dismiss the state case, arguing that it was not filed within one year of the cause of action arising as required under state law. The plaintiffs argued that the state suit was filed within one year of the federal case's dismissal. The trial court found for the defendants, and the court of appeals affirmed.

Doe v. Hinsdale Township High School District 86.[511] The court of appeals reversed the trial court's ruling that the plaintiff high school student's suit for damages suffered from a sexual relationship with a basketball coach was not filed timely. In this case, the female student was a manager for her school's boys' basketball team. Over the course of two years, she engaged in a sexual relationship with the male head coach, who had engaged in a sexual relationship with another student a few years earlier. The student argued that the school district's poor investigation of the first relationship, in which they did not even interview the alleged victim, gave proximate cause to the injuries she suffered in her relationship with the coach. The defendant school, principal, and superintendent asked for the case to be dismissed, arguing the defendant did not file the suit within the state statute of limitations. The trial court ruled in favor of the defendants.

On appeal, the appellate court heard arguments about apparently conflicting state codes: one code required victims of child abuse to seek damages within five years of discovering the abuse; the other code required people suing for damages caused by a local entity or any of its employees to file suit within a year of the date of injury. In this

case, the student filed suit two years after the abuse came to light. The appellate court ruled that the former code was controlling in this circumstance and ruled for the plaintiff, remanding the case to the lower court for further proceedings.

K.J. v. Arcadia USD.[512] A sixteen-year-old female high school sophomore was seduced by and began a sexual relationship with one of her male teachers. All of the encounters took place in the teacher's classroom during school hours. The teacher had previously been warned about late night email communications with students, but school administrators never monitored the teacher's compliance to their directive. The relationship lasted until the student graduated, at which time she told her mother of the relationship. Her mother, who was also a school employee, feared her daughter may commit suicide and promised not to tell the police of the relationship in exchange for her daughter agreeing to go to counseling. That fall, however, the mother realized she was a mandated reporter of child abuse and told school officials of the relationship between her daughter and her colleague. The teacher was sentenced to prison, but the student continued to believe the teacher had done nothing wrong until a revelation in therapy a year later. At that point the student filed state claims against the school district, but they were dismissed by the trial court as being untimely. The court of appeals, however, reasoned that the accrual of the student's claim did not begin until she realized she was a victim. Thus, the court of appeals reversed the trial court's dismissal of the claims and remanded with orders to reinstate the original complaint against the school district.

State cases involving injury or damages issues. The following four state court summaries involve questions regarding injuries of student victims, injuries of victim's parents, and the potential damage to a student victim called to testify against the teacher with whom she engaged in a sexual relationship.

In re Subpoena Issued to L.Q.[513] A female student who engaged in sexual relations with a teacher more than twenty-five times during her sophomore year in high school was subpoenaed to testify against the teacher before the grand jury. The student and her parents did not want the teacher to be prosecuted for the relationship and asked for the subpoena to be quashed. They contended that testifying would cause the student severe emotional distress and could cause her to be suicidal. The trial court ordered the student to testify. The court of appeals, while affirming the obligation of all to testify when called, reversed the trial court's opinion. However, the court of appeals also remanded the matter and ordered the student to submit reports showing clear and convincing proof that testifying would cause her severe emotional harm and to submit to further examinations if requested by the state.

Wellborn v. Dekalb County School District.[514] The mother of a male hearing-impaired student who engaged in a homosexual relationship with his high school sign language interpreter filed suit for damages that arose from the relationship. During pendency of the claim, the plaintiff's son turned eighteen years old but failed to join his mother as a complaining party. The school district moved for dismissal of the case, arguing that the injured party was not a complainant. The trial court ruled for the district and dismissed the case. The mother appealed, arguing that even though her son failed to

join the suit, she too suffered emotional injuries as a result of her son's relationship with the interpreter. The court of appeals affirmed the trial court's ruling, reasoning that the mother had not suffered any physical injury and could not prove malicious, willful, or wanton acts directed towards her by the district.

Doe v. Greenville County School District.[515] A fourteen-year-old girl had a sexual relationship with a male substitute teacher at her school. After the girl's parents discovered the relationship, they reported it to the school. The teacher was convicted of criminal sexual conduct with a minor, and the student and her parents sued the school district. The student's suit was settled at trial, but the parents moved forward with four causes of action: infliction of emotional distress, loss of consortium, breach of fiduciary duty, and negligent supervision. The parents argued the school district had prior complaints about the substitute's interest in young girls and therefore should have known about the development of this relationship.

The district moved to dismiss all the causes of action, which the trial court granted and the court of appeals affirmed. The lower courts had ruled that the negligent supervision claim could only survive a motion to dismiss if the plaintiffs were seeking recoverable damages, such as medical bills. Because the plaintiffs had not indicated any intention to present evidence of damages, the court could not allow the negligent supervision claim to survive. Upon review, the state supreme court affirmed the trial court's dismissal of all claims except the claim of negligent supervision. The state supreme court reasoned the lower courts had improperly looked beyond the complaint and made a determination on the facts of the case. Indeed, the lower courts should have

considered the motion to dismiss notwithstanding the parents' failure to produce medical bills.

Hei v. Holzer.[516] A high school physical education coach had a friendly relationship with one of his female students, who also happened to be a family friend. During the student's junior year, she and the coach began flirting with each other. Eventually, after the girl turned eighteen, the relationship became sexual. The student told a teacher of her feelings for the coach, the teacher told the activities director, and the activities director told the school administration. The administration investigated but the coach and student denied having a relationship. A few months later, the student told a teaching assistant the truth about the relationship. The administration was notified again, and the coach resigned the next day.

A year later the student filed suit against the district on seventeen counts. The court granted summary judgment to the district on all counts, but the court of appeals vacated and remanded two of the claims, a negligent supervision claim and a Title IX claim against the district. At the jury trial, the student testified about the anxiety and depression the relationship with the teacher caused. She offered no medical records or estimation of costs. The jury returned a verdict in favor of the student, but awarded no damages. The student filed for a new trial, which was denied by the trial court, and then brought this action to the court of appeals. The court of appeals affirmed, finding the student showed no proof of damages.

State cases involving procedural issues. The following three cases involve various state procedural issues, including: whether a superintendent is a mandated reporter of child abuse; whether school districts have sovereign immunity for the actions of employees; and whether a school district's hiring function is separate from its function of providing public education when considering a political subdivision immunity exception.

Locke v. Santa Fe ISD.[517] A male eighth grade student and his female teacher had a sexual relationship on school property. Other teachers and school personnel became aware of the relationship but did not report it to authorities or the student's parents. The student began having psychological and behavioral problems, and the teacher resigned at the end of the school year. Still, the student's parents did not become aware of the relationship until years later. The student's parents filed claims under state law against the school, but the claims were dismissed as independent school districts in that state are immune from state tort claims by virtue of the doctrine of sovereign immunity.

Doe v. Firn.[518] A female high school student had a sexual relationship with her male basketball coach for three years. Midway through the relationship, rumors surfaced around school. A guidance counselor spoke with the student and made a report to children's services, which did not conduct an investigation because the student was sixteen, legal age of consent in the state. At the same time, the superintendent spoke with the coach, but did not discuss the report to children's services with police until two years later when the police learned of the relationship. The superintendent also wrote a letter of

recommendation on behalf of the coach at that time. The student's family then filed state negligence claims against the school district. The court struck all claims against the school, reasoning the superintendent was not a mandated reporter of child abuse under state law and that he was immune from liability as a person who performed discretionary governmental functions.

Bucey v. Carlisle.[519] A male high school principal allegedly pursued an inappropriate relationship with a female student over the course of a year, ending with him raping her in a hotel across state lines. The student alleged that school officials were aware the principal was pursuing a sexual relationship with her throughout the year and that the school district hired him despite his history of inappropriate sexual relationships with students. She filed suit against the district under several state claims, and the district's motion to dismiss was partially granted by the trial court. The court of appeals reversed the trial court in dismissing all claims against the district. In doing so, the court of appeals rejected the student's argument that the hiring of personnel was a function separate from the governmental function of providing a system of public education. Thus, the student was unable to prove the exception to political subdivision immunity should have been triggered. The court of appeals remanded with directions for the trial court to dismiss all claims against the school.

State cases involving consent issues. The following three state court case summaries involve questions regarding a student's ability to consent to sexual activity with a school employee.

Stotts v. Eveleth.[520] A complaint of sexual harassment was filed against a male high school teacher. Believing the complaint was true, the investigators reached a settlement with the teacher whereby he would resign his position. In exchange, the district did not report the teacher to the state department of education and would provide him a positive letter of recommendation. The man was hired to teach in another district, where he engaged in a sexual relationship with a female senior. The student was eighteen-years-old when the relationship began, was not in any of the teacher's classes, and was not a member of any clubs the teacher advised. Their sexual encounters always took place off school grounds and were always consensual. When the student's mother learned of the relationship, she informed the school. The teacher resigned, and the student filed suit against the district under the state teacher licensure code, alleging the district was negligent and breached fiduciary duty by failing to investigate the teacher's background. She also added the teacher's former school district in the claim, alleging they were negligent for failing to inform the teacher's new district about his past.

In ruling for the district, the trial court reasoned that even though the state's administrative code prohibited a sexual relationship between a teacher and student, it did not specifically provide for a private cause of action for a student victim. The court also reasoned that the student was an adult at the time of the relationship, and no law at the time prohibited a sexual relationship between two consenting adults, particularly because the teacher had no authority or influence over the student. The court of appeals affirmed the trial court's dismissal of all claims against the district.

In re Christensen v. Royal School District No. 160.[521] A thirteen-year old female middle school student voluntarily engaged in sexual activity with her male teacher on four separate occasions in the classroom. The student and her parents brought suit against the principal and district alleging negligent hiring and retention. The district and principal argued that the student's willing participation in the relationship constituted contributory fault under state law. The federal district court deferred ruling on the motion pending an answer from the state supreme court on the issue. The state supreme court ruled that a child under sixteen years old in Washington could not have contributory fault assessed against the student for participating in a sexual relationship with an adult, reasoning the child cannot legally consent to intercourse and has no duty to protect him or herself from abuse. The court conceded that this was a civil case, not criminal, but concluded that criminal code provides an adult is guilty of several sexual offenses with a child even if the child consents and it would not be consistent to have a child at contributory fault for the same action in a civil context.

Mora v. Long Beach USD.[522] A man who was convicted of a crime for beating his girlfriend two years earlier was hired by a school district to be a teacher's aide. Four years later the man was hired as a teacher by the district. Five years later he had developed a relationship with a student who worked as an aide in his classroom, and the teacher and student's relationship soon turned sexual. They had sexual intercourse in the teacher's classroom and attended social functions hosted by other teachers. The teacher also shared an apartment with a colleague, and the colleague witnessed the student spending the night in the teacher's bedroom. After the student's senior year, she

continued to take summer classes offered by the school. She and the teacher began sharing an apartment, and the school principal told the teacher he was seeing too much of the student and that it was inappropriate for them to live together. The principal recommended to the superintendent that the teacher be terminated, but the recommendation was not put into writing and no further action was taken. A few months later, the student enrolled in college. Shortly thereafter, the teacher beat, strangled, and stabbed her to death.

The student's mother filed several claims against the school district, including claims of negligent hiring, supervision, training, and retention. In dismissing the claims, the court stated that while it never would be bad for a school to dissuade relationships between teachers and students, the school did not owe the duty to the student in this case because she was eighteen-years-old when the relationship began and legally able to consent to the relationship. Nor could the school be held liable for injury that arose out of the abusive nature of this relationship.

State cases involving miscellaneous issues. The final four state court case summaries include a variety of issues: whether a teacher was acting outside the scope of his employment when he engaged in a sexual relationship with a student; whether a district engaged in negligent hiring and supervision of a teacher who ejaculated while rubbing a student's chest and leg; whether a school district is vicariously liable under state law for a teacher's misconduct; and whether a principal's policymaking was sufficient to rebut a liability claim.

Bratton v. Calkins.[523] From the spring of her high school junior year until she was a college freshman, a student had a sexual relationship with her male junior high school science teacher, who was also her varsity softball coach in high school. The student worked as a classroom assistant for the teacher/coach, and the relationship soon became personal. The student and teacher had sexual intercourse often, on and off school grounds, and conspired to keep the relationship private. The student's parents were unaware of the relationship and encouraged their daughter to spend time with the coach. In the spring of her senior year, the student moved into the home of the teacher and his wife and children. A few weeks before graduation, the superintendent heard rumors the relationship might be sexual, questioned the teacher and student separately, and concluded no sexual relationship existed. The following winter the now-graduated student attempted suicide, and shortly thereafter she and her parents filed suit against the district under several claims, including respondeat superior and § 1983.

The district moved for and was granted summary judgment on some claims, but was denied dismissal of the § 1983 claim. The trial court also did not present the issue of respondeat superior to the jury. The jury found the district, teacher, and student all to be partially at fault for the relationship, and granted damages to the student in excess on $1.7 million, of which the district's liability was slightly more than $230,000. Following the verdict, the student's family filed a motion for the court to take the respondeat superior issue into consideration, arguing the school should be vicariously liable for the negligent acts of the teacher. The court agreed, increasing the district's liability by more than $300,000. The district appealed. The court of appeals agreed with the school district and

reversed the trial court's ruling, ordering the jury's initial verdict be reinstated. In doing so, the court of appeals reasoned that imposing vicarious liability on a school for a teacher's actions would rearrange a district's responsibility for the conduct of its employees, deterring schools from allowing one-on-one contact between teacher and students, which would negatively affect the educational process.

Doe v. Park Center High School.[524] A female high school student and her male teacher had a sexual relationship for approximately five months both on and off school property, including at the student's home. The student ended the relationship and reported it to school officials, who immediately suspended the teacher. He later resigned. At the trial court hearing evidence came forward that the teacher had previously engaged in sexual relationships with students. The teacher admitted to one prior relationship at trial, but had denied it during an internal school investigation following rumors years earlier. At that time the teacher was advised not to be alone with female students, but the principal did not inform other authorities based on her review and understanding of school policy. The current student filed suit against the school district, arguing state negligent retention violations following the principal's alleged botching of the investigation of the teacher's relationship with a student from years before. The trial court granted summary judgment to the school district on the grounds that the district was statutorily immune from suit. In affirming the trial court's ruling, the court of appeals reasoned that the principal met the state law's requirement of balancing and evaluating policymaking facts and effects on a given plan.

T. S. v. Rapides Parish School Board.[525] A fifteen-year-old female high school sophomore who had never been kissed was an assistant for one of her teachers. Twice she entered the classroom of a male teacher next door, once to borrow a meter stick and once for computer help. On each occasion the teacher grabbed her and French kissed her, telling her she was "stacked for a white girl."[526] The student told friends of the incidents months later when she learned other students had similar experiences. Throughout an investigation, the student told her story to school officials four times, the police once, child guidance once, and the grand jury once.

The student sued the teacher and school district for emotional distress of the kisses and the humiliation of recounting the story so frequently in public sessions, reporting that she had nightmares about the incidents and issues forming trusting romantic relationships. The student and teacher reached a settlement before trial, and the trial court found the school district liable for $45,000 in general damages. The court did not accept the school district's argument that the teacher was acting outside the scope of his employment because the student was not one of his own. The court of appeals affirmed.

Ryan W. v. La Habra CSD.[527] A male middle school teacher and a male student sent each other email messages, and the teacher frequently gave the student rides home. The email messages turned sexual, and one day the teacher rubbed the student's legs and chest at school. When the student got home, he had an email message from the teacher saying that he had enjoyed himself and that when he stood up he was "wet all over my leg."[528] The student felt uncomfortable, stopped emailing the teacher, and did not notify

anyone of the incident until five years later when he emailed the school's principal. The next year he filed suit against the district for negligent hiring, retention, training, and supervision. The school filed for summary judgment, which the trial court granted, finding no evidence supporting the claim. The court of appeals affirmed.

CHAPTER SIX

SUMMARY AND PRACTICAL APPLICATIONS

Responses to Questions Posed by the Study

What State Legislation Prohibits Sexual Relationships between Teachers And Students?

State criminal law. Chapter three analyzed the criminal codes from all fifty states as they relate to sexual relationships between school employees and students. Each state has a code of criminal laws. Violating criminal law could subject a perpetrator to fines, probation, imprisonment, and capital punishment in some states. People guilty of sexual crimes are most often sentenced to prison. While no state permits a person to force or coerce another to have sexual relations, each state has laws that prohibit some consensual sexual relationships as well. These laws vary among states based on the age of the victim, the victim's mental or physical capacity to consent, the age difference between the victim and the perpetrator, or the position of trust or authority the perpetrator holds over the victim.

Accordingly, each state varies among its laws prohibiting sexual relationships between teachers and students. Some states specifically forbid sexual relationships between teachers and students regardless of age. Some states forbid sexual relationships between teachers and students depending on the age of the student or the age difference

between the teacher and student. Other states have no laws prohibiting sexual relationships between teachers and students specifically, but have laws that prohibit sexual relationships in general that would prohibit relationships between teachers and students based on their age or age difference.

Eight states have criminal codes that forbid sexual relationships between teachers and students regardless of the age of the student or the age difference between the student and teacher: Connecticut, Iowa, Kansas, North Carolina, Ohio, Oklahoma, Texas, and Wisconsin. In these states, willing participation of the student in the relationship does not mean that the relationship is consensual.

Twenty-eight states have criminal statutes prohibiting sexual relationships between teachers and students in some cases, but allowing the relationships in other cases: Alaska, Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. The legality of the relationships depends either upon the age of the student or the age difference between the student and teacher.

Criminal codes in fourteen states do not specifically forbid sexual relationships between a teacher or other person in a position of authority and a student: Alabama, California, Florida, Georgia, Hawaii, Idaho, Massachusetts, Nebraska, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, and Utah. Nonetheless, these fourteen states have statutes that prohibit certain sexual relationships between adults and

minors that would apply to adults in any profession, even teachers and other school employees.

State administrative law. Chapter three also reviewed administrative rules from all fifty states as they relate to sexual relationships between teachers and students. In addition to a code of criminal statutes, each state has a code of rules or regulations. These regulations specify procedures and policies for state agencies or departments. The state legislature or individual departments may create the procedures and rules.

Each state has a department of education. The policies they create have the power of law. Among these policies, for example, are requirements for student graduation, teacher licensure, school calendars, achievement testing, course offerings, and so forth. Individuals or school districts that do not follow department policies are breaking the law and are subject to penalties. Penalties may include fines, reprimands, suspension or revocation of licenses, consent agreements, and the like. Imprisonment is not a penalty departments of education can impose.

Among the regulations that affect departments of education operations may be requirements for professional and ethical behavior for teachers and conditions upon which teachers may have their license revoked or suspended or cause a person to be ineligible from obtaining a license to practice. In some states, departments of education have created specific codes of ethics or professional conduct for teachers. In other states, the rules regarding teacher behavior will be found in the codes of regulations.

In Alabama, Alaska, Connecticut, Florida, Georgia, Idaho, Iowa, Kentucky, Maine, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon,

Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming, administrative codes specifically prohibit teachers from engaging in sexual relationships with students or sexually harassing them. Each state has the power to revoke a teacher's license if the teacher does not follow the code.

In Arizona, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, Rhode Island, Tennessee, Virginia, and Wisconsin, administrative codes do not specifically forbid teachers from engaging in sexual relationships with students. However, each state's administrative code allows the state to revoke the teacher's license if the teacher is convicted of various sexual crimes, many of which are crimes involving improper sexual relationships between teachers and students.

Arkansas, Illinois, Minnesota, Oklahoma, and West Virginia administrative codes are more nebulous. These states prohibit activities such as violating nonspecific state or federal law (Oklahoma), maintaining unprofessional relationships with students (Arkansas), not respecting the boundaries of professional responsibilities (Illinois), using a professional relationship with students to private advantage (Minnesota), and not maintaining a high standard of moral behavior (West Virginia), or other just cause. Each state may revoke the license of a teacher who violates the code.

How Does Federal Legislation, Specifically Title IX of the Rehabilitation Act of 1972, the Fourteenth Amendment, and 42 U.S.C. § 1983, Apply to Sexual Relationships between Teachers and Students?

Title IX. Chapter three discussed Title IX as it relates to sexual relationships between teachers and students. Title IX prohibits gender-based discrimination and abuse of students in federally funded education programs.[529] All programs of all educational institutions that receive federal financial assistance are subject to the requirements of Title IX. Title IX protects students from some forms of sexual harassment and abuse.

Prohibitions under Title IX include sexual harassment of a student by a teacher or other school employee, which may take the form of quid pro quo or hostile environment harassment. Quid pro quo harassment occurs when a school employee bases an educational decision on the student's submission to the school employee's sexual advances. Hostile environment harassment occurs when a student's ability to benefit from or participate in an educational program or activity is severely limited by a school employee's sexual advances.

In situations where the sexual conduct between the employee and student is consensual, a school will be liable under the same standards that would apply to peer or third party harassment. A school will be liable if it has actual knowledge of the harassment and fails to take immediate and appropriate corrective action. However, under this standard of liability, a school may be in compliance with Title IX if it takes immediate corrective actions upon learning of the harassment. When harassment occurs

between a school employee and a student, the conduct does not have to be unwelcome, while harassment must be unwelcome in peer-to-peer harassment.

If a school has actual notice of a sexually hostile environment and does not take immediate corrective action, it will be violating Title IX. A school is considered to have actual notice if a responsible employee of the school actually knows about the harassment. According to the Office of Civil Rights (OCR), defining an employee as "responsible" may vary on such factors as the actual authority given to the employee and the age of the student.[530] Guidelines developed by the OCR state that, considering the age of the student, a school will be liable if an employee whom the student reasonably believed to be responsible had actual notice of harassment and was deliberately indifferent. The OCR further explained that in these cases of "apparent authority," the younger the student victim, the more likely any adult employee (e.g., custodian, cafeteria worker) is to be considered responsible.[531]

However, the guidelines offered by the OCR do not appear to be good law. Contrary to OCR policy, for example, the court ruled in *Canutillo Indep. School Dist. v. Leija*[532] that a school district was not liable when one of its teachers sexually molested a second grade student, because the student and her mother only reported the harassment to the homeroom teacher as instructed by the student handbook, and the homeroom teacher did not have authority to take remedial action. The court stated that "before the school district can be held liable under Title IX for a teacher's hostile environment sexual abuse, someone in a management-level position must be advised about (put on notice of) that conduct, and that person must fail to take remedial action."[533] Indeed, the court reasoned

it would not be appropriate to require a school district to take prompt remedial action when it learns of sexual harassment and then define who a responsible person is so broadly that it includes people who do not have authority to take action. Similarly, *Rosa H. v. San Elizario Indep. School Dist.*[534] saw the court hold that a school district is only liable if an employee who has been recognized 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.

United States Supreme Court rulings also show that OCR guidance regarding Title IX and apparent authority is inappropriate. In *Gebser v. Lago Vista Independent School District*, the Court stated that

> in a private action against a school district by a student under Title IX for the sexual harassment of the student by one of the district's teachers, damages may not be recovered unless an official of the 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.[535]

The Court repeated its stance on Title IX liability requiring actual notice of a responsible person in two peer-to-peer student sexual harassment cases. In *Fitzgerald v. Barnstable School Committee*, the court stated that "a Title IX plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference."[536] In *Davis v. Monroe County Board of Education*, the Court reiterated a "recipient cannot be directly liable for its indifference where it lacks authority to take remedial action."[537] So while the OCR

contends that a school district may be liable for Title IX violations of sexual harassment of a student by an employee if an "apparent authority" knew of the harassment, court rulings have shown that contention to be erroneous.

42 U.S.C. § 1983. Chapter three discussed § 1983 as it relates to sexual relationships between teachers and students. Section 1983 itself is not a source of substantive rights. Rather, it provides a vehicle for those whose rights have been violated under other federal laws to be made whole through monetary compensation. The Supreme Court has reasoned that the basic purpose of § 1983 is to compensate people for injuries caused by the deprivation of their constitutional rights. For example, a student who feels she has been sexually harassed by her teacher may sue under Title IX or the Fourteenth Amendment, attaching a § 1983 claim for damages.

Courts have ruled that state officers' actions completed in their official capacities might cause them to be personally liable for damages under § 1983. The Supreme Court ruled that state officials are "persons" under § 1983, and that the Eleventh Amendment, which immunizes states from suits in federal courts, does not bar suits brought against state officials in their individual capacities under § 1983. Other case law has emerged that confirms a petitioner's ability to file successful claims against a state actor individually, particularly if the individual demonstrated callous indifference for the rights of the petitioner and violated a clearly established law. In addition to compensatory damages, other relief is also available through § 1983, including injunctive relief, punitive damages, and attorney's fees.

Individual persons and municipalities are subject to liability under § 1983. However, some individuals are immune from liability under § 1983. For example, judges and legislators acting in their official roles are always immune from liability under § 1983. Also, most state and local government officials can be granted qualified immunity if they act in good faith. The Supreme Court ruled that school board members could be immune from liability under § 1983 unless the school board members knew or should have known that their actions would violate an individual's constitutional rights or they acted with malicious intent to deprive individuals of their constitutional rights or injure them.

What Are Specific Outcomes and Trends of Judicial Law Involving Teachers Alleging Wrongful Termination after Having Sexual Relationships with Students?

Chapter four summarized fifty cases in which a school employee who suffered an adverse employment action filed suit against his former employer or state department of education. Several trends in law became apparent through the summaries.

Due process. A common challenge made by employees terminated for engaging in sexual relationships with students is that they were denied their Fourteenth Amendment Due Process rights. Case law makes it clear that public employees have a property interest in their employment and that governmental deprivations of a property interest must be accompanied by procedural safeguards. Among these procedural safeguards are a notice of the intended deprivation and a hearing. Greater due process should be given when the possible deprivation is greater. For example, notice and a

hearing may be sufficient if an employee were going to be reprimanded or suspended from work with pay. However, if an employee may be subject to wage deprivation or loss of employment, he should be given clear and actual notice of the reasons for termination in sufficient detail to enable him to present evidence relating to them, notice of both the names of those who have made allegations against him and the specific nature and factual basis for the charges, and the opportunity to confront, call, and cross-examine witnesses.

In some cases involving a student who had sexual relationships with a school employee, the employee may not be permitted to confront the victim witness to protect the witness from further harm. However, in such cases the victim may be required to submit an affidavit, and the employee may be given the opportunity to challenge the affidavit. Often school employees who have engaged in sexual relationships with students are involved in criminal cases before or during the time they bring wrongful termination claims. Courts are likely to rule that criminal charges are not material to wrongful termination claims. Indeed, often school employees may be acquitted of criminal charges, but their behavior still may have violated state administrative code that mandates their discharge. That is likely a function of the different standards of proof required for criminal and civil cases. The standard of proof in criminal cases is proof beyond a reasonable doubt, which is significantly higher than the standards most often seen in civil cases. In termination cases, for example, some states require merely a preponderance of the evidence while others require the higher substantial evidence standard. However, both standards are short of that required for a criminal conviction.

Sometimes when allegations of a school employee's sexual misconduct surface, the superintendent may conduct the initial investigations and inform the school board of details. Later, when the board has to rule on an employee's termination, the employee might claim the board was not objective in accepting the superintendent's recommendation because the superintendent is the board's chief executive. Courts have consistently dismissed this argument, reasoning that the board's exposure to evidence before the hearing in itself does not make a board unfair.

However, if board members overstep their bounds and conduct investigations themselves, discuss evidence with the public, or try to convince an accused employee to resign, they put themselves at risk of violating the employee's due process rights. Furthermore, if board members have pre-hearing knowledge of an accused teacher's actions, it is important for the board member not to deny having such knowledge at the hearing. Denying the knowledge is more likely to support a dismissed employee's claim of board bias than actually having the knowledge, particularly if the board member truly remains objective when weighing evidence at a hearing.

Courts have ruled that a discharged employee may not automatically demonstrate bias through every discrepancy between a board member's prehearing conduct and his statements at the hearing, nor have courts set a threshold for when such a discrepancy will rise to the level of a disqualifying bias. Courts will rule on that matter on a case-by-case basis. Courts have used a four factor balancing test in determining disqualifying personal bias: (1) Whether the board member's role in seeking termination was procedural, or implies that the board member's mind is already made up on the issue of

the employee's guilt; (2) Whether the board member's possible lack of impartiality gives risk of a wrong decision based on faulty findings of fact; (3) Whether the board member has a personal interest in the termination being upheld; and (4) Whether personal conflict exists between the employee and the board member.

Boards sometimes use impartial officers to hear cases and recommend what type of discipline a board should impose on an employee. Courts have ruled that an employee's due process is not denied if the board does not follow the recommendations of the hearing officer, as long as the board did not act in a fraudulent, arbitrary, or unreasonable manner that was not supported by substantial evidence. Moreover, even if the evidence of the teacher's misconduct is obtained through illegal police activity, courts may not find due process violations, supporting a school district's interest in protecting its students and insuring an appropriate school environment.

Procedural errors. Employees discharged for engaging in sexual relationships with students often cite procedural mistakes in their claims against school districts. One such claim is that the relationship that caused the termination of the employee happened years earlier and was outside the statute of limitations for either criminal prosecution or dismissal hearings. Employees may claim that since they cannot be charged criminally, neither should they be subject to termination. Or, state teacher tenure law may specify that acts of misconduct have a statute of limitations which prevents an employee from being disciplined for certain misconduct.

This challenge may be more successful in some states than others as statutes of limitations vary widely among states and among the claims being challenged. Where no

statute of limitations is expressly declared by the state legislature, boards of education are free to pursue termination or license revocation against employees who had sexual relationships with students years earlier, even if a statute of limitations exists for criminal prosecution for the same actions. Of course, the employee would have the right to attack the credibility of adverse witnesses related to their memory of the events. In instances where collective bargaining agreements (CBAs) specify a statute of limitations for employee discipline, courts find that the statute of limitations does not toll until the school district is aware of the disciplinary infraction.

In addition to arguing the conduct in question was outside the statute of limitations specified, school employees discharged for misconduct sometimes argue that discipline imposed upon them was outside the scope of other terms of a CBA. Collective bargaining agreements may specify progressive discipline for various infractions or require the use of mediators or arbitrators in determining employee discipline. Having a sexual relationship with a student is a serious disciplinary infraction and almost always would not be subject to progressive discipline before termination. Inappropriate relationships between employees and students that do not involve sex, however, may require forms of progressive discipline including warnings, reprimands, and suspensions before termination. Furthermore, if the CBA requires binding arbitration for disciplinary hearings, or if the employee and administration entered into such an agreement, a school board would be required to abide by the arbitrator's ruling.

Another common defense for school employees terminated for having sexual relationships with students is that the student consented to the sexual activity. This

defense is consistently denied by courts. Even in cases where the student was a willing participant in the sexual activity and actively worked to hide the relationship, each state's criminal code, administrative code, or both, prohibit sexual relationships between school employees and students, with few exceptions. In almost every situation, courts will rule that a student was unable to consent to sexual activity with a school employee as a matter of law.

Sometimes employees who engage in sexual relationships with students find themselves involved in a criminal trial at the same time the administrative hearing for termination is ongoing. Such employees might request a stay of the administrative hearing, claiming that being required to answer questions in an administrative hearing would jeopardize the Fifth Amendment protection against self-incrimination. Courts have consistently ruled that no right of continuance of administrative proceedings pending the outcome of parallel criminal proceedings exists. If such a right existed, it would greatly slow down administrative proceedings. Thus, as long as no requirement that an employee answer questions or lose employment exists, schools can hold administrative hearings concurrently with criminal proceedings, with the employee who claims Fifth Amendment protections forfeiting the ability to testify in defense. Schools should not hold the employee's refusal to speak at the hearing against the employee, however.

As mandated reporters of abuse, school administrators often report sexual relationships between employees and students to children's service agencies while also commencing disciplinary proceedings in-house. It is not uncommon for children's

services agencies not to find enough evidence that the employee abused the student. Nonetheless, courts have ruled that this does not preclude a school district from pursuing termination as schools and children's service agencies have different standards of proof.

In one case[538] reviewed in Chapter four, a mother of a child victim surreptitiously recorded phone conversations between her son and the teacher with whom the son was having a romantic relationship. Peculiarly, the teacher's counsel withdrew his objection to the tapes being entered into testimony. These tapes likely would not have been allowed had the teacher not withdrawn her challenge to them. The Omnibus Crime Control and Safe Streets Act of 1968[539] makes wiretapping a crime, except under very narrow exceptions. The law prohibits surreptitiously recorded tapes of nonconsenting parties, such as the ones in this case, from being entered into evidence.

In the same case, a man who had a sexual relationship with the teacher fifteen years earlier was called to testify to the credibility of the teacher. She had claimed she never had a relationship with a person younger than eighteen-years-old, and he was called to testify that he had a relationship with her when he was younger than eighteen, thus calling her credibility into question. Other cases reviewed in Chapter four contained similar circumstances in which after a teacher-student sexual relationship came to light, some of the teachers' former students came forward to report similar incidents happening in the past, sometimes several years in the past. The admission of this sort of testimony is generally allowed by courts in teacher termination hearings, and the same type of evidence likely would be permitted in criminal trials. Federal rules permit admitting

evidence of a defendant's commission of another offense of sexual assault[540] and evidence of the defendant's commission of another offense of child molestation.[541]

Immorality. Often school employees who are dismissed from employment for inappropriate relationships with students argue that their behavior did not meet the standard of "immorality" that qualifies as a reason for termination in many states. Courts have clearly determined that engaging in a sexual relationship with a student rises to the level of immorality required for an employee to be discharged. Inappropriate conduct that falls short of sexual activity, though, may or may not be viewed as reaching the standard of immorality for employee termination. Employees who have a long-term, nonsexual dating relationship with a student likely would be found to be immoral, while a teacher who makes infrequent comments about a student's body likely would not be found to be immoral. However, if it is found that the employee engaged in immoral activity, courts do not require school districts prove the immoral conduct was job related. That is, even though a teacher may still be able to present dynamic, engaging lessons, his involvement in a sexual relationship with a student would justify his termination because the immoral conduct would have an adverse impact on the school community.

Remediability. Some employees who engage in inappropriate relationships with students admit their behavior was wrong, but argue that the relationships are not so wrong as to warrant termination. Instead, they argue their behavior is rehabilitative and that they should be given a second chance. Generally courts will determine inappropriate touching of students is not remediable because the victims suffer psychological damage, the school suffers damage by losing the trust of its community, and a mere warning to a

teacher not to engage in similar behavior in the future does not remedy the damage already caused.

Standards of review. Many of the cases reviewed in Chapter four saw employees terminated for having sexual relationships with students arguing the proper standard of review was not applied to their case. Indeed, courts have held different standards for boards of education to meet in affirming or reversing terminations of school employees who engaged in sexual relationships with students.

Proof beyond a reasonable doubt is used exclusively in criminal cases. A defendant cannot be found guilty of a crime unless the court is convinced of the person's guilt beyond a reasonable doubt. This standard is higher than the standards used in civil cases, which is why it is not unusual for a teacher accused of sexual misconduct with a student to be acquitted of a crime but to have his termination from employment affirmed.

In most civil cases, the standard of review is preponderance of the evidence. This standard is defined colloquially as fifty percent plus one. In other words, a party must show its version of the facts was more likely than not the correct version. Whichever party that has the burden of proof must be supported by a preponderance of the evidence; otherwise, the court cannot rule in its favor. A higher standard of proof than preponderance of the evidence is substantial evidence. Substantial evidence is the amount needed for a reasonable mind to adequately support a conclusion. Substantial evidence may require inferences, and the inferences must be based on logic and reason and be supported by the evidence. In the cases reviewed in Chapter four, the standard of review was most often either preponderance of the evidence or substantial evidence,

depending on the state in which the litigation took place. While preponderance of the evidence is the most common standard for civil cases, substantial evidence is used in some states when a person's property or liberty interests are being challenged, such as in termination cases.

Clear and convincing evidence is a stronger burden of proof than preponderance of the evidence, but a less burden of proof than conclusive evidence. It is a standard similar to the beyond a reasonable doubt standard seen in criminal cases. Generally, when a defending party stands to lose significant property or liberty rights, the burden of proof is clear and convincing. However, in the cases reviewed in Chapter four, clear and convincing was never a standard required by the courts. In one case[542] a hearing officer found clear and convincing evidence that a teacher had engaged in a sexual relationship with a student, but the court of appeals reasoned that the hearing officer applied a higher standard than necessary. The standard of proof in employee termination cases is lower when the employee is being terminated for misconduct with students. This is clearly an effort of the judicial system to err on the side of caution when the safety and welfare of students is a concern.

He said/she said. Because the standard of review in the wrongful termination cases summarized in Chapter four was most often preponderance of the evidence or substantial evidence, the key evidence in determining the school employee's fate sometimes came down to he said/she said disputes. In these cases, hearing officers had the discretion to determine which witness was most credible, siding with the students' versions of the facts in each case. As the court said in *Parker v. Byron Center,*[543] many

sexual abuse cases are simply credibility contests between the abuser and the victim. It is the hearing officer's role to determine who is most believable, and understandably hearing officers tend to err on the side of student safety and welfare.

Additional and prior misconduct. In some of the cases reviewed in Chapter four, investigations into alleged employee-student sexual relationships uncovered additional misconduct by the employee. For example, some employees were found to be harassing colleagues, violating the school's technology policy, falsifying attendance records, and so forth. School officials are wise to include all violations in seeking termination of the employee. An employee who successfully defends one allegation may still be removed for the other violations.

Cases reviewed in Chapter four also showed that courts will affirm terminations for school employees who had prior misconduct with students, even if the prior misconduct happened years earlier or, in one case, in another school district. Courts have reasoned that "by virtue of the nature of the offense--sexual intercourse with a minor student of the district--it may be considered doubtful whether such conduct could ever be too remote in time."[544] If schools were not able to consider prior misconduct of school employees, even misconduct in an employee's former district, that would serve to "immunize an individual who managed to hide his past conduct prior to hiring."[545] Indeed, schools have a duty to protect students from sexual misconduct, a duty that "outweighs any claim that the perpetrator may have that claims cannot go forward simply because of the passage of time."[546]

Post-graduation teacher-student relationships. In an interesting case reviewed in Chapter four, *Flaskamp v. Dearborn Public Schools*,[547] the Sixth Circuit court of appeals ruled that a school board could prohibit an employee from dating a former student for a year or two after graduation. The court reasoned such a ban was not so restrictive as to violate an employee's right to association. After all, the employee could still date a wide range of adults of a wide range of ages. In *Flaskamp*, a material dispute existed whether the student and teacher had begun their relationship prior to the student's graduation. Shepardizing *Flaskamp* shows that five courts have followed some portion of the court's ruling, but none of the five cases involve teacher-student relationships. Thus, it would be logical for a school administrator who learned of an employee dating a former student soon after graduation to conduct an investigation to see if the relationship existed during the student's tenure at school. If so, the district would likely be supported by the courts in terminating the employee.

However, courts may not support a school district that disciplines an employee for dating a former student if no evidence exists that the relationship began before graduation. In *Flaskamp*, the Sixth Circuit in 2004 affirmed the 2002 ruling of the district court, which stated that intimate personal relationships are not constitutionally protected under the right to association, a right that flows from the Fourteenth Amendment concept of substantive due process. The district court reasoned that friendships, or even sexual relationships, are small in number—namely, two people—and thus do not play a critical role in shaping the Nation's culture, which is what the right to association is supposed to protect. The district court cited *Bowers v. Hardwick*[548] in its

reasoning. In *Bowers*, the Supreme Court ruled in 1986 that the right to association did not extend to homosexual couples engaging in sodomy in the privacy of their own home.

Interestingly, before the Sixth Circuit could hear the *Flaskamp* appeal in 2004, the Supreme Court in 2003 overturned *Bowers* in the landmark case *Lawrence v. Texas*.[549] In doing so, the Supreme Court reasoned that there existed an emerging recognition that liberty gives substantial protection to adults in deciding how to conduct their private lives in matters pertaining to sex and that criticism of *Bowers* by scholars and state courts had been substantial and continuing.[550] The Court went on to say that "the criminal convictions of two adults for consensual sexual intimacy in the home…violated the adults' vital interests in liberty and privacy protected by the due process clause of the Federal Constitution's Fourteenth Amendment,"[551] particularly considering the case did not involve minors, people who might be injured or coerced, or people who were in relationships where consent might not easily be refused.

Curiously, the Sixth Circuit court's affirmation in 2004 of the *Flaskamp* ruling disregarded the Supreme Court's reasoning in *Lawrence*, instead relying on the reasoning of another 2004 Sixth Circuit case, *Anderson v. Lavergnem*.[552] In *Anderson*, the court held that a police policy prohibiting dating between officers of different ranks was not a direct and substantial burden on the right to intimate association because officers were still free to date anyone other than this relatively small subset of the population.

Arguably, not permitting police officers to date other officers of different ranks is not similar to prohibiting educators from dating former students. In the police officer situation, the issue of supervisor/supervisee is clear, and one could logically understand

that such relationships might jeopardize the fidelity of evaluations, promotions, and other employment decisions. A former student/teacher relationship, however, does not carry with it the same issues. Therefore, relying on the reasoning of the Supreme Court in *Lawrence*, and notwithstanding the Sixth Circuit court's ruling in *Flaskamp*, schools would be well advised not to pursue disciplinary action towards an employee dating a former student unless there was evidence suggesting the relationship began before the student graduated. In such cases, the evidence sought in the investigation should be limited only to incidents that happened before the student's graduation.

What Are Specific Outcomes and Trends of Judicial Law Involving Students Alleging Rights Violations by School Employees after Having Sexual Relationships with Teachers?

Chapter five summarized ninety-nine cases in which a student or the student's family brought action against school districts or their employees alleging the student was harmed by engaging in a sexual relationship with a school employee. Several trends in law became evident through the summaries.

Title IX. Title IX of the Education Amendments of 1972 applies to educational institutions that receive federal financial assistance from the Department of Education. It is designed to protect persons from sex discrimination and is sometimes used as a source of challenge by families of students who engaged in sexual relationships with teachers. The U.S. Supreme Court has held that boards of education can be liable for damages if administrators are actually aware of a school employee's sexual relationship with a

student but fail to take steps to stop the conduct. Courts have consistently ruled that only recipient institutions that receive federal funds can be held liable under Title IX, not individuals.

Cases reviewed in Chapter five revealed that most federal courts agree for a school district to be liable under the hostile environment sexual harassment provision of Title IX, a school employee who had the power to take corrective action had actual notice that sexual harassment was occurring and was deliberately indifferent to it. Often federal district court opinions of what constitutes actual knowledge are more liberal than circuit court opinions. Also, federal district court opinions of what constitutes deliberate indifference are often less strict than the opinions of federal circuit courts. In most cases, federal circuit courts have ruled to have actual knowledge a school official must actually know the harassment is happening, not simply be aware that a possibility exists that harassment is happening. Most courts have also ruled that deliberate indifference is turning a blind eye to the actual knowledge of harassment. School officials who conduct an investigation into the reports of sexual harassment are usually held harmless by the courts no matter how inept or negligent their investigations, even if the harassment does not stop.

The cases reviewed in Chapter five showed that schools most often successfully defend Title IX challenges. If school officials take seriously allegations of employee sexual misconduct and diligently investigate the allegations, almost always the school districts are supported by the courts.

Section 1983. A person who believes somebody acting under color of state law has violated his rights can file a claim under § 1983 to receive a damage award for the violation of his rights. Generally, students who have had sexual relationships with teachers file § 1983 claims alleging that a school employee violated their rights under the Fourteenth Amendment Equal Protection Clause or Title IX, although they less frequently attach § 1983 to other applicable federal laws.

Cases reviewed in Chapter five revealed the courts take two separate approaches to determining liability under § 1983. One avenue is for the court to determine whether a school official received notice of a pattern of unconstitutional acts committed by an employee, demonstrated deliberate indifference to the acts, and failed to take sufficient remedial action which caused proximate injury to a student. A second avenue in determining a school's liability under § 1983 is for a court to determine three elements: (1) The school showed a continuing, persistent and widespread practice of unconstitutional misconduct by employees; (2) The school showed deliberate indifference to the misconduct by the school's policymakers after being notified of the misconduct; and (3) A student was injured by virtue of the unconstitutional acts pursuant to the board's custom or policy and that the custom or policy was the moving force behind the unconstitutional acts.

The cases reviewed in Chapter five showed that school officials most often successfully defend § 1983 challenges. If school officials take seriously allegations of employee sexual misconduct and diligently investigate the allegations, they most always are supported by the courts.

Qualified immunity. The Supreme Court has ruled that school officials successfully can claim a qualified immunity defense against § 1983 challenges.[553] However, this defense is not available if school officials with malicious intent deprive students of their constitutional rights or cause them injury. Nor is qualified immunity available if school officials knew or should have known that their actions would violate a student's constitutional rights. This is not to say that school officials cannot claim qualified immunity if they did not know of a teacher's sexual misconduct towards a student but should have known. Rather, this speaks to the deliberate indifference of school officials when they have actual notice of a student's rights being violated. In other words, to be liable under § 1983, a school official must have actual notice that a student's rights are being violated and react in a way that the official knows or should have known would continue to cause the student's rights to be violated. If the school official has actual knowledge of a student's rights being violated and acts in such a way to stop the violation, the school official may claim qualified immunity.

This is the crux of many cases reviewed in Chapter five; students who file § 1983 claims against school officials argue the officials knew of the students' sexual relationships with school employees but did nothing about it. Unless the school officials practically went out of their way not to investigate sexual misconduct allegations, the courts consistently supported them. Indeed, a recurring theme of many of the cases reviewed in Chapter five was summarized by the court in *Hagan v. Houston ISD*, in which a principal conducted an unsuccessful investigation of a sexual relationship

between a teacher and students, allowing the relationship to continue: "simple ineffectiveness is not enough to overcome qualified immunity."[554]

Title VII. Title VII of the Civil Rights Act of 1964 protects people from sexual discrimination and harassment in the workplace,[555] but its standards are sometime adopted for Title IX cases involving harassment of a student by a teacher or other school employee. In *Meritor Savings Bank v. Vinson*,[556] the Supreme Court ruled that employers can be liable for quid pro quo and hostile environment sexual harassment that occurs at work either between coworkers or between a supervisor and subordinate. However, the Supreme Court applied Title VII agency principles to determine Title IX hostile environment claims are subject to litigation in schools in *Franklin v. Gwinnett County*.[557]

In *Doe v. Claiborne County*, reviewed in Chapter five, the Sixth Circuit Court of Appeals remanded the case to the district court with directions to apply Title VII standards to the sexual harassment claim. Other courts also have applied Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student.[558] Nonetheless, courts disagree to what extent Title VII should be used in teacher-student harassment claims. The Seventh Circuit Court of Appeals agreed that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX."[559]

Respondeat superior. Some of the cases reviewed in Chapter five saw students who engaged in sexual relationships with school employees file claims under the theory of respondeat superior. Respondeat superior is a legal doctrine that declares employers

are liable for the actions of their employees performed within the scope of their employment. Courts have held that respondeat superior is not available as a theory of recovery under § 1983. However, courts have held that intentional discrimination by teachers is imputed to the school district under respondeat superior in Title IX cases. In Title IX cases where students look for recovery under respondeat superior, school districts argue that an employee engaging in misconduct was not acting within the scope of the person's employment. This defense is generally successful as having sexual activity with students is never a job responsibility of a school employee.

Statute of limitations. When students who have been involved in sexual relationships with school employees file claims against the school years later, schools sometimes contend that the statute of limitations has expired and seek summary judgment. Courts have consistently sided with students on this matter. In some instances, courts reason that the statute of limitations does not toll until the student is aware of an injury. Particularly when a student was a willing participant in the relationship, the student may not have a grasp of the magnitude of the damage done until years later. Many cases reviewed in Chapter five saw students seek professional counseling in their adult lives only to realize the source of their current emotional problems was the relationship they engaged in years earlier. Courts have consistently ruled that the statute of limitations does not begin until the student is aware of the injury. In some states, the statute of limitations for a childhood abuse victim does not toll until the child reaches the age of majority. In other states, there is no statute of limitations for claims filed by victims of childhood sexual abuse. A review of the cases in Chapter five

shows that courts tend to lean towards victims' rights under statute of limitations arguments.

Parents as victims. Parents of students who engage in sexual relationships with school employees sometimes file suit against schools claiming they too are victims. The parents might argue that they have suffered emotional distress and seek punitive damages, compensatory damages, and attorney's fees. Courts have consistently ruled that parental distress is only a byproduct of teacher-student relationships and is not concomitant to them. Because parents are not direct victims, they have not been found to be entitled to damages.

A Practical Guide for Current and Future School Administrators

It is impossible to prevent every instance of teachers and students engaging in sexual relationships. Pedophiles and hebephiles have psychosexual disorders in which they have a sexual preference for children. Such individuals are likely to seek employment where they have access to children. They often have highly complex grooming, manipulation, and concealment skills in which they induce, coerce, coax, persuade, or force children to engage in sexual relationships with them and influence the children not to report the activities.

More common than pedophilia and hebephilia in the cases this study reviewed, however, are educators who do not have a sexual attraction to children per se but instead find themselves entangled in romantic relationships with students or who are sexual predators motivated by power and control. These educators, too, work hard to conceal

any sexual relationships they have with students. With estimates that up to 5% of educators engage in verbal or physical sexual misconduct with students,[560] the sheer volume of the phenomena leads one to understand that the problem cannot be completely eradicated.

Nonetheless, a review of the cases summarized in Chapters four and five give current school administrators the benefit of hindsight. The schools who found themselves subject to claims from either discharged employees or abused and harassed students provide valuable lessons to administrators who hope to prevent such relationships from occurring in their school districts or who must defend themselves when the relationships do occur. By analyzing what the schools in the reviewed cases did right and wrong as determined by the courts, a current school administrator can utilize the following guidelines to help prevent student-teacher sexual relationships from occurring in their schools, and to properly respond if such relationships unfortunately do happen.

In the guidelines that follow, it should first be noted that superintendents must maintain a highly competent administrative staff. Front-line administrators, such as principals and personnel directors, must be willing to work extra hours to do work necessary to make good hiring selections and conduct competent investigations. Administrators must be willing to confront the ugly and disturbing details that come with student-teacher sexual relationships, and they must be able to take the pressure from angry staff and community members as they investigate allegations. Investigations are often contentious and controversial, and weak administrators who hide from the difficult work they need to do cause harm to students and liability to their districts. Because of

this, superintendents must maintain excellent staffs and remove those principals and directors who are not able to perform at the necessary level.

Prevention of Student-Teacher Sexual Relationships

Hiring staff. Students who claimed injuries arising from a sexual relationship with a school employee frequently alleged the school engaged in negligent hiring practices. Certainly it is impossible to guarantee that no employee hired would ever engage in a sexual relationship with a student. However, districts that give due diligence to the hiring process, particularly when hiring employees with prior experience in other districts, can prevent being on the receiving end of another district "passing the trash."

Use a structured interview. It is imperative to use a research-based structured interview as part of the initial screening process for new hires. In general, structured interviews ensure that candidates are assessed accurately and consistently. Because they ask each candidate identical questions and use a standard rating scale, they are more reliable and valid than unstructured interviews and provide a consistent framework for the interviewer to compare candidates. Unstructured interviews, in which candidates may be asked different questions, do not provide for reliability and validity and are therefore more susceptible to legal challenges.[561]

Investigate red flags. The interviewer should pay careful attention to potential red flags in an applicant's resume, application, or responses to interview questions. If there are gaps in the candidate's employment that are not logically explained; if the

candidate has moved often, especially far distances; if the candidate is leaving a seemingly better job than the job for which the teacher is applying; or if candidate is not from the area and seemingly has no connections to the area, the interviewer should be alert. One study found that 85% of teachers first enter teaching within forty miles of their hometowns.[562] If a candidate comes from a far distance, the interviewer should probe for a reasonable explanation. All interview committees should keep detailed documentation of their interviews, preferably through audio or video recording.

Conduct reference checks. After several rounds of interviews have been completed and the field of applicants has been narrowed, reference checks should be completed on the finalists. Interview committees should not rely solely on the responses of the interviewees, particularly in red flag areas. References of candidates must be checked. First, the interviewer should do a public records request for the applicants' personnel files if the applicants were employed by other school districts. These records should include evaluation reports and discipline files. The interviewer should maintain these records for each applicant, whether or not the applicant is hired.

Next, the interviewer should call individuals whose names of references are provided by the applicants and others who may have knowledge of the candidates' work but are not listed as references in the candidates' application materials. For example, it would be a red flag for a teacher applying for a job not to list the last supervising principal as a reference. The school that is interviewing the candidate should call the principal nonetheless to determine if the candidate is hiding information. The

interviewing school should also call people who may have knowledge of the applicant, including former board members and former colleagues.

Potential for defamation suits arise if reference checks are not completed properly. Defamation is an injury to the reputation of someone as the result of false or malicious statements. Defamation suits may arise if an applicant is not hired for employment as a result of statements made by the previous employer during a reference check. Because of the fear of defamation suits, sometimes references will not be as forthcoming with information as the prospective employer would like. However, if the information is given in good faith, is truthful, is limited to the inquiry, is related to the requirements of the job, and is only given to a party with a need to have the information, a former employer is likely to win a defamation claim. Nonhired applicants may also file privacy claims against the hiring school, claiming the reference check improperly delved into the applicant's past. To prevent such claims, a district should ask the applicant to sign a release allowing the reference check, and insure that questions asked during the reference check relate to the ability of the candidate to complete the duties of the job. The refusal of an applicant to sign a release for a reference check is a red flag that should be noted.

The interviewing school must clearly assign the duty of calling references to a competent administrator. The administrator making the calls should ask the references questions related to the applicants' ability to do the job, reasons for the applicants leaving past employment, and character issues of the applicants. Questions to ask include: were there issues you are aware of that affected the applicant's job performance? Did you

evaluate the applicant's job performance? Can you speak to the applicant's weaknesses? Did you note areas where the applicant needed improvement? Is there anything I haven't asked about the applicant that you would like to share with me? Was the applicant asked or forced to resign? Are you aware of the applicant violating any state codes of ethics or board policy?

The administrator making the reference calls must keep copious documentation of the reference calls, and listen for what the references do not say. If a reference hesitates to answer a question, seems evasive about an answer, or otherwise seems to be hiding information, that should be noted. The superintendent or designee should follow up with the administrator who made the reference calls to discuss the information gathered and make a decision whether the information garnered during the reference checks disqualified the applicant from being hired.

Conduct Internet searches. As seen in Chapter one, sometimes an applicant's criminal background check will come back clean, but that does not necessarily mean the applicant does not have a past that would make the applicant unemployable. The Internet is a valuable source of job applicant information that does not surface in interviews, reference calls, or criminal background checks. When the candidate field is narrowed to a few finalists, the superintendent or designee should do a detailed Internet search looking for information about the applicants.

The applicant may have criminal arrests that do not appear on a criminal background check. Doing public domain searches of court records may expose such information. The person doing the search should not limit the search to only the counties

in which the applicants live; the searcher should review court databases of surrounding counties, counties near where the applicants went to college, and counties near where the applicants may have lived in the past. The searcher should also review social media sites such as Facebook and Twitter. These sites may show applicants engaging in behaviors that would cause a school not to want to employ them. State board of education websites provide discipline information about educators who may have engaged in conduct unbecoming an educator but conduct that was not illegal; these sites should be checked to see if any of the candidates fall into this category. Finally, "Googling" the applicants may reveal information about them that may be elsewhere on the web. If internet searches reveal information that, if made public, would put the school district in an embarrassing light, the candidate should not be hired. The district should mmaintain excellent documentation about information found during internet searches.

Conduct background checks. When all of the above steps have been followed and a selection for hire has been made, the candidate must be given the legally required criminal background checks. If the applicant's background check shows violations of law that would prevent the candidate from being permitted to work in the schools, the applicant should not be hired. The hiring school should keep the background check records whether the applicant is hired or not, but should review state law as to where the records may be stored. For example, in Ohio, criminal background check records may be maintained in a personnel file, but they are not public records.[563]

Supervising staff. Students who claimed injuries arising from a sexual relationship with a school employee frequently alleged the school engaged in negligent retention and supervision practices. Though no practice will completely guarantee employees will not engage in sexual relationships with students, adhering to the following guidelines will make it more difficult for employees to do so and help a school successfully defend claims of negligent supervision and retention of staff.

Develop harassment policy. Under federal law, all education programs receiving federal financial assistance must designate at least one "responsible employee" to investigate complaints of sexual harassment and must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of harassment.[564] School superintendents must ensure this happens in their districts and must make sure that all employees are aware of the policy. Superintendents must document their efforts in this area.

In addition to naming a responsible employee and listing grievance procedures, school district policies and procedures should protect against real or potential situations that might bring about the opportunity for employee sexual misconduct. These policies should include: prohibitions against physical contact with students; guidelines for conducting tutoring at times and places that would not cause confusion about the teacher-student relationship; requirements that unused rooms are locked at all times; requirements for adequate adult supervision on field trips; prohibitions against phone calls, text

message, emails, and social networking between staff and students; and prohibitions against staff exchanging gifts of an expensive or personal nature with students.[565]

The school's harassment policy also must include obligations for reporting suspected sexual misconduct and consequences of not reporting. The policy should remind staff of the obligation to report suspected child abuse to children's services or law enforcement, protect staff from reprisals for reporting suspected misconduct by a colleague, and remind staff to take all allegations seriously. The policy should remind staff that even if a single staff member may hold only one piece of information, when joined with information from another staff member, it may develop a larger picture that shows potential misconduct.[566] Finally, staff must be trained on the harassment policies annually and sign a document memorializing their having received training.

Train staff on warning signs of misconduct. A superintendent should make sure the school district provides training to all employees on recognizing warning signs of sexual misconduct. Such training should be provided by experts in the field of child abuse recognition, and training should be provided regularly throughout each employee's tenure. Signs of a student being sexually abused in general include the student having trouble sleeping, having advanced knowledge of sexual behavior for the student's age, being overly compliant or defiant in class, having grades fall, not being able to concentrate in class, discussing suicide, and running away from home.[567] Staff should be trained to recognize these signs and be trained to know the procedures they must follow as mandated reporters of suspect child abuse.

Other signs may alert a school employee to sexual misconduct between a colleague and a student. Such signs include the employee and student working closely together outside regular class hours; the employee displaying unusual enjoyment for admiration received from students; the employee and student confiding in each other regarding personal issues; the employee and student exchanging gifts; the employee and student emailing, calling, text messaging, or engaging in social media with each other; the employee providing private tutoring for the student; the employee and student taking trips together; and the employee and student meeting each other privately when peers are not around.[568]

As seen in many of the cases reviewed in Chapters four and five, sexual relationships between teachers and students were often preceded by or concurrent with teachers buying gifts for students; teachers having students spend their free time in the teacher's classroom; teachers frequently writing late passes for students; teachers giving rides to students; students babysitting for teachers' children; teachers acting flirtatiously with students; teachers engaging in excessive conversation or laughing with particular students; teachers hugging or touching students; and so on. Staff should be trained to recognize these signs of potential trouble and immediately report them to the responsible person designated by board policy. Staff should also be trained not to be fooled by their "human nature" biases.[569] Employees who engage in sexual misconduct with students are frequently well liked teachers and coaches who are respected by the entire school

community. An employee who recognizes signs of potential misconduct should not ignore the signs because of the status of the suspected perpetrator.

Supervise adequately. School administrators can best prevent sexual relationships between school employees and students through strong supervision. While case law has shown that ineffective supervision might not cause a school to be liable for sexual relationships between employees and students, the ultimate goal is not to protect a district against liability; it is to protect students from harm. Therefore, while the following tips may consume time and effort, they will be worth the extra work if they keep students safe.

First, school administrators must learn to recognize the behaviors that suggest employee misconduct. These "red flags of employee behavior"[570] should alert the school administrator of potential problems: a teacher closing the door when alone with a student; a teacher covering glass openings into the classroom; a pattern of a teacher having lunch with one student; a pattern of a teacher staying after school with one student; a student who works for a teacher more than one period per day; a teacher being alone with a student in isolated areas of the school during or after school hours; a teacher giving a student rides in personal automobiles; a teacher giving gifts or cards to a student; a teacher hiring a student to clean house, do yard work, or babysit; a teacher taking a student to events instead of the student's parents, such as college nights, concerts, games, and so forth; a teacher engaging in phone calls, text messages, emails, or social networking with a student; a teacher attending parties at a student's home; and a teacher

giving special attention to a student facing personal issues, such as parental divorce or emotional problems.

Recognizing these red flags will assist an administrator in conducting focused inspections around the building. School administrators should visit unoccupied areas of the building frequently during and after school. They should enter classrooms during teacher planning periods, visit custodial closets, enter empty auditoriums and gymnasiums, and walk through parking lots while looking into car windows. Furthermore, administrators should vary their patterns as they conduct this supervision so potential perpetrators cannot effectively adjust their habits. In other words, a principal should not always visit the auditorium during first period and first period only. Some days, he should visit the auditorium during first period. On other days, he should visit third period. On still other days, he should stop in the auditorium in the evening.

While administrators travel throughout the building, they should look for window and door coverings that prevent a hallway observer from seeing into classrooms. If coverings are found, the administrator should remove them and direct the employee not to replace the covering. Administrators frequently should visit classrooms that have internal office areas and athletic practices and arts rehearsals, particularly near the time they are to end. Often coaches and music directors give rides home to student participants. Giving rides to students should be prohibited, and principals should visit practices and rehearsals to ensure the policy is being followed.

Employees should be made aware through written policy that school technology is the property of the school and subject to district review at any time. School administrators, then, should periodically review staff email accounts and internet history. These reviews should be generally random, with more frequent review of staff members who have greater access to students outside typical classroom environment: coaches, club advisors, band and choir directors, and alternative program instructors who have frequent field trips or other off site learning activities.

During class exchanges and lunch periods, administrators need to place themselves where they can hear students talking and listen for conversations that might signal an employee-student sexual relationship. Administrators should also be aware of their employee's personal situations and observe more frequently those who have issues. Many cases reviewed in Chapters four and five saw employees who had sexual relationships with students having trouble at home, often having marital problems with their spouses.

Throughout all of the supervision described above, school administrators must confront any issues that are out of place and document those situations. For example, if a principal finds a teacher and student in an otherwise unoccupied classroom after school one day, the principal must investigate the issue with the teacher and student and, at the very least, advise both parties not to be alone in a classroom again, following up any verbal instructions with a written summary. The principal then should document the issue at hand and the actions taken.

Involving students and parents. Prevention of employee sexual misconduct with students requires that students and parents are trained in recognizing signs of misconduct, are knowledgeable about how to properly report suspected misconduct, and have a school culture in which they feel safe to report suspected misconduct.

Develop student handbook. School administrators should ensure that student handbooks contain much of the same information contained in employee handbooks. That is, student handbooks should contain the board policy that lists prohibited actions between employees and students and tells students how to report suspected misconduct. These policies should be reviewed with students annually when the handbooks are distributed, and electronic copies of the handbook should be available on the school district website for parent review.

Train students and parents to recognize misconduct. All parents and particularly secondary students must be trained to recognize signs of sexual grooming and signs of sexual misconduct between their classmates and employees. School administrators should provide opportunities for students and parents to hear experts in the field discuss the common signs as detailed above. Furthermore, students and parents must be educated that suspected boundary invasions should be reported to the school administration immediately so the administration may investigate the matter.[571] As seen in many of the cases reviewed in Chapters four and five, students engaging in sexual relationships with school employees often disclosed signs to their classmates that classmates either did not recognize or did not report.

Create safe student culture. School administrators need to develop a culture within their buildings where students feel free to report concerns like sexual misconduct. Students should be given multiple avenues to report concerns, both anonymously and in person. For example, students may be told that if they are aware of ongoing sexual misconduct, they can report it to the principal or a guidance counselor, and perhaps be given a place to submit written, anonymous concerns. It is important to have adults of both sexes available for students to report, as some students may be uncomfortable reporting sexual misconduct to members of the opposite sex.

A safe student culture also is created when students who report suspected misconduct are believed and taken seriously. School employees who receive reports from students of potential misconduct must avoid the initial reaction not to believe the student.[572] Data suggest that "false accusations constitute only a small percentage of all allegations."[573] Therefore, the employee who receives the report must be supportive of the student, reassure the student did the right thing by reporting the information, and offer to provide therapy or counseling if necessary.[574] Students who report sexual misconduct must be protected from adverse consequences and must have their confidentiality honored.

Properly Responding to Student-Teacher Sexual Relationships

When a school administrator becomes aware that an employee is engaging in a sexual relationship with a student, litigation may potentially come from two different

directions. Students may file claims that the administrator's actions--or lack thereof--caused injury to the student. The employee may file suit claiming discipline was not properly meted out. A review of investigations into alleged sexual abuse of students found several common administrator errors: investigations were carried out poorly; allegations were not reported to police or children's services; investigations were often kept confidential, with the administrator rarely seeking corroborating evidence; the denial of misconduct by the accused employee often ended the investigation; administrators often found themselves unable to believe the accusations because the student was troubled and the accused employee was highly regarded; and the administrator was often friends with the accused, thus not willing to complete an investigation with fidelity.[575]

An effective school administrator can be protected from employee and student challenges and protect the safety and welfare of students by adhering to the following guidelines. The guidelines will refer to a nonspecific school administrator. It is imperative that throughout these processes, the building principal, superintendent, and personnel director maintain constant communication with each other.

Take all reports seriously. First, school administrators must always err on the side of student safety and welfare. As reviewed, hardly any reports of sexual abuse are fabricated.[576] Therefore, all reports of employee-student sexual relationships must be taken seriously and thoroughly investigated. Though case law seems to hold school officials liable only if they are deliberately indifferent to actual knowledge of harassment, school administrators should investigate any remotely credible report. This should include even hunches or "bad vibes" felt by other employees. Many cases reviewed in

Chapters four and five saw principals and superintendents ignore or quickly brush aside such concerns only to find sometime later that a sexual relationship could have been stopped or prevented. Also, school administrators who see grooming behavior towards a student by one of their employees must confront it right away. The employee and student should be questioned, the student's parents should be notified, and the issue should be thoroughly documented.

Consult legal counsel. Attorneys can be expensive, particularly in these times of inconsistent school funding. Nonetheless, an administrator who believes an employee may be engaging in sexual relationships with a student must consult legal counsel immediately. The role of the attorney may be extensive. The attorney may conduct the investigation, may prepare the district for a termination hearing, may be the fact finder, and may interview witnesses.[577] An attorney is better prepared than an administrator to determine the strengths and weaknesses of witnesses that may be called, including determining the credibility of witnesses.[578] In addition, any documents created by the attorney are protected by attorney-client privilege and would not be subject to public records requests.[579]

Remove the employee. When the superintendent receives a complaint that an employee is involved in misconduct with a student, the superintendent may remove the employee from duties.[580] The employee will still be entitled to receive pay and benefits, and the timing of the removal depends upon the severity of the allegations.[581] The employee should be removed immediately if the allegations are credible and involve significant misconduct, or if the employee's presence might jeopardize the ability to

conduct a full and fair investigation.[582] If the allegations are not credible or involve less serious matters, the employee may be removed if a thorough investigation, which includes interviewing witnesses, determines removal to be an appropriate action.[583] When the employee is being removed from duties, the superintendent must send a letter to the employee stating as much.[584] The superintendent and legal counsel should also check the CBA and board policies for any additional local requirements regarding procedures, notices, and the employee's rights while removed.[585]

If the administrator and legal counsel determine the employee needs to be removed immediately, the removal should happen systematically. The administrator should go to the employee, ask the employee to come with the administrator, and provide for class coverage for the educator for the rest of the day if needed. It is imperative that the employee has as little advance notice of removal as possible to minimize the opportunity to destroy evidence. The district's technology department should work to secure the employee's computer and email files immediately.

A school employee who is removed from the work place should meet with a school administrator who gives the employee written notice that the employee is being relieved of duties with pay pending the results of an investigation. The terminology is important here. The employee should be "relieved of duty with pay," not "assigned to home." "Assigned to home" puts the school district at potential liability for workers' compensation claims if the employee has an accident at home. An administrator should not be concerned with paying the employee while on leave. In the large scheme of events, the cost is minimal compared to potential costs of the employee bringing claims

of due process violations. The employee should be directed not to use school email accounts while at home, not to speak with any students or parents, and not to speak with other colleagues except for union representatives.

Consult other agencies. The administrator should report the allegations against the employee to law enforcement, children's services, and the state department of education immediately. The school should not wait for these agencies to conclude their investigations before beginning its own investigation. Nor should the school drop its investigation solely because law enforcement or children's services finds no evidence of wrongdoing in its investigations. The legal standards for schools and law enforcement are different; what might constitute an offense worthy of termination in school may not rise to the level of criminal activity with the police. If possible, the school may want to coordinate its investigation with the law enforcement investigation. While the possibility to do this may depend on the jurisdiction, doing so limits the numbers of times the victim and other witnesses need to be interviewed.[586]

Control the board. While it is important for the board to be informed that a potential teacher-student sexual relationship has been ongoing, the board needs to understand its role. The superintendent must inform the board that it should not discuss the issue with anyone, particularly because the board might at one point vote on the termination of the employee. The superintendent must tell the board not to contact the employee in question or the student in question. Board members should tell anyone who asks that they are aware that there is an ongoing investigation, that they cannot comment on it, and that they have student safety and welfare as their highest priority. The board

needs to be prepared for the onslaught of questions that are likely to come its way from friends and neighbors and understand the potential liability for defamation claims if it speaks information that is later shown to be false. Defamation is making untrue statements about somebody which damages the person's reputation. Accusations that a person has committed a crime or is unable to perform the assigned job are called libel per se or slander per se and can easily lead to large financial liability for a school.[587] Therefore, the board should take a strict "no comment" stance throughout the investigation.

Conduct the investigation. When allegations of employee sexual misconduct with students arise, the administrator or legal counsel must conduct an investigation. A proper investigation will protect students from harm, and protect the district from liability from lawsuits from both students and employees.[588] Furthermore, a proper investigation will document the response to allegations of misconduct, identify the source of the problem to aid in future prevention, and deter future misconduct by showing employees that action will be taken against them if they misbehave.[589] Throughout the entire investigation process it is imperative for the administrator to document actions taken, conversations had, items discovered, and decisions made. The administrator should anticipate the need to remember everything in court one day and document accordingly.

The investigation should begin with an interview of the victim. The victim should provide details recounting who the perpetrator is, what happened, where it happened, when it happened, and how it happened.[590] The events should be detailed chronologically, and the investigator should strive to get the name of every person the

victim believes may have information regarding the incident, and the name of every person the victim has spoken to about the incident.[591] Because the victim and many of the witnesses may be children, the investigator should check board policy for guidelines on questioning students and should obtain parent permission where needed.[592] The investigator should anticipate some parents may not be cooperative, perhaps due to an unwillingness to believe their child may be a victim or an unwillingness to subject their children to such sensitive matters.[593]

Throughout the interviewing process the investigator should consider whether each witness would be credible at a hearing, and whether the witness would be willing to testify.[594] Some witnesses may be willing to testify confidentially, which may or may not be allowed by the hearing officer. In determining the credibility of witnesses, the investigator should understand that "credibility deals not with truth, but with perceptions. Credibility is the study of how people judge books by their covers."[595]

As seen in many cases in Chapters four and five, court rulings in teacher-student sexual relationship trials often come down to he said/she said evidence. Knowing this, the school's investigator must work diligently to corroborate evidence. Corroboration may come from testimony of witnesses, such as the victim's friends, parents, or counselors; it may come from documents, such as notes or letters sent between the student and teacher; and it may come from email or social media messages between the student and teacher.[596] In the case of corroborating evidence found on a computer, it is vital the board has a school-friendly technology policy. The board's policy must clearly state that the employee does not have a privacy interest in the content of the employee's

assigned computer. In such cases where there is no legitimate expectation of privacy, a workplace search is allowed regardless of the scope and nature of the search.[597] If the board policy gives the employee a reasonable exception of privacy, however, the investigator may only conduct reasonable searches.[598] A search may be determined to be reasonable if the employer's need for supervision, control, and efficient operation of the school outweighs the employee's expectation of privacy.[599] Furthermore, the search must be "justified at its inception," meaning a reasonable person would suspect the search will reveal relevant evidence to the employee's misconduct.[600] Additional corroboration may be found by obtaining the employee's cell phone records. These records may be obtained from the cell phone company through a subpoena, but will require court involvement.

Unless an administrator has a strong legal background, the district should hire a private investigator to conduct the inquiry into the allegations. Generally, district legal counsel can do this work. The investigator should question witnesses and gather relevant evidence. If no preponderance of the evidence shows misconduct occurred, the administrator should bring the employee back to work. If the student alleged to be involved in the relationship is a student in the educator's class, the student should be rescheduled to another class. If a preponderance of the evidence shows that a relationship likely occurred, the administrator should consult legal counsel and continue with termination proceedings.

While investigating the alleged misconduct between an employee and student, the investigator should look closely for other victims of the employee or other acts of misconduct.[601] As seen in cases reviewed in Chapters four and five, it is not uncommon

for a teacher who is having a sexual relationship with a student to be engaged in relationships with other students simultaneously. Furthermore, a teacher engaging in a sexual relationship with a student is likely breaking other board policies worthy of discipline; the teacher is likely misusing district technology, violating policies prohibiting providing rides or gifts to students, and perhaps falsifying records to excuse the student victim from class. The investigator should enter such information into evidence at the hearing. Even if the sexual relationship is not proven through a preponderance of the evidence, there may be enough evidence to terminate the teacher for other acts of misconduct.

After all witnesses have been interviewed, the investigator should interview the accused employee.[602] The employee should be given the opportunity to respond to charges, and the investigator should document the employee's responses. If the employee refuses to answer questions, the employee may be considered insubordinate unless invoking a Fifth Amendment right, which would only be permissible if there were an ongoing criminal trial.[603] The investigator should consider past discipline of the employee in making a recommendation for discipline.[604]

Consider requiring a polygraph. With certain exceptions, the Employee Polygraph Protection Act of 1988 (EPPA) generally prohibits private employers from using lie detector or polygraph tests for pre-employment screening or issues arising during the course of employment.[605] The term "lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar mechanical or electrical device that is used for the purpose of diagnosing the honesty or

dishonesty of a person.[606] The term "polygraph" means an instrument that continuously, visually, permanently, and simultaneously records changes in cardiovascular, respiratory, and electrodermal patterns and is used for the purpose of diagnosing the honesty or dishonesty of a person.[607] The EPPA prohibits employers from requiring, requesting, suggesting, or causing an employee or prospective employee to take or submit to any lie detector test; using, accepting, referring to, or inquiring about the results of any lie detector test of an employee or prospective employee; and discharging, disciplining, discriminating against, denying employment or promotion, or threatening to take any such action against an employee or prospective employee for refusal to take a test.[608]

Important for this discussion, however, is that the EPPA provides an exclusion from coverage for the United States government, any state or local government, or any political subdivision of a state or local government.[609] Specifically listed in the EPPA exceptions are facilities, materials, or operations having a significant impact on the health or safety of any state or political subdivision thereof, or the national security of the United States.[610] These facilities include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could significantly impact on the general public's safety or health,[611] including public schools.[612]

In other words, public schools may require employees suspected of engaging in sexual relations with students to submit to polygraph testing. If a school district decides to do so, the school must give the employee a written notice explaining the employee's rights. These rights include: the examinee may terminate the test at any time; the examinee may not be asked any questions in a degrading or intrusive manner; the

examinee may not be asked any questions dealing with religious, political, or labor union beliefs or affiliations, racial opinions, sexual preferences or sexual behavior; and the examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase.[613] Also, an employee who terminates the test, or who for medical reasons is not administered the test, may be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test.[614] That is, an employee refusing to take a polygraph test or terminating the test in process may not be terminated or otherwise disciplined without evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.[615]

The examiner conducting the polygraph is required to have a valid and current license and must maintain a minimum of $50,000 bond or professional liability coverage.[616] Civil actions may be brought by an employee against employers who violate EPPA for legal or equitable relief, such as employment reinstatement and payment of lost wages and benefits. The action must be brought within three years of the date of the alleged violation.[617]

Consider a resignation. If appropriate, the investigator may try to get a resignation from the accused employee. The resignation can be withdrawn until accepted by the board,[618] so a superintendent may encourage a board to call a special meeting to accept a resignation that is tendered. However, as part of a resignation agreement, an administrator should never cover-up the relationship and should never agree to write a

positive recommendation for the employee. Also, the administrator will likely be required to report the employee's misconduct to the state department of education. The administrator should not agree not to submit the report as a component of a resignation agreement.

Hold the hearing. After the investigation has been concluded, the superintendent must decide if the accused employee should be disciplined, and in which way. Assuming the decision is to terminate the employee, the superintendent should consult legal counsel to guide the process. The process will vary from state to state, but it is likely the employee will need to be given written notice of the intent to terminate, the right to a hearing which may be held by the school board or a referee and give the accused a chance to call and cross examine witnesses, and an affirmative vote to terminate by the board. The board will be permitted to deliberate in executive session but will be required to vote in public. As seen in some cases in Chapters four and five, the board does not necessarily have to accept the recommendation of the hearing officer, so long as the board's decision is reasonable considering the evidence presented.

Conclusion

It is hard to go a week without reading a news story of a school employee who engaged in misconduct with a student. Sexual misconduct between educators and students is particularly troubling because of the position of trust in which educators are placed. Much evidence exists that educator sexual misconduct with students is widespread, some of which is the direct result of school leaders' unwillingness to confront the issue. It is easier sometimes for school leaders to look the other way when

employees engage in misconduct, and easier still to pass the trash, allowing bad employees to quietly resign and seek employment elsewhere.

When a teacher engages in sexual misconduct with a student, there is more than one victim. Certainly the student who was abused, harassed, or manipulated into a sexual relationship must deal with a tragic lifetime of emotional scarring, guilt, depression, boundary issues, and the like. But when teachers engage in inappropriate conduct with students, an otherwise positive school culture turns to a culture of anger and distrust; that is, the school community itself is a victim.

A 2001 study addressed issues that arise from teachers abusing students in the school community.[619] A common theme that arose through interviews of abuse survivors, teacher colleagues of abusers, and leaders of schools in which abuse took place was that often the abuse was permitted to go on for years. In these situations, the school culture was characterized by "normal" trusting relationships between school employees and students. But, when the abuse finally came to light, the mirage was exposed. The positive, trusting school culture was frequently replaced by accusations and denials.

Abuse victims are frequently castigated as liars because they either show no outward signs of abuse or they are seen as "damaged children…[who] cannot be telling the truth about a respected member of the school community."[620] Relationships between teachers become strained as those who are in denial of the abuse feud with those who believe the students. Parents and community members also take sides, often in highly emotional and vocal ways. Soon the culture that had been promoting student

achievement becomes chaotic, and the crumbled walls of trust must be rebuilt one brick at a time.

While far and away most educators are professionals who care for, educate, and protect students, some cross moral, ethical, and legal lines in their behavior. American media have produced many stories about teachers who have engaged in misconduct with students. As a result of the increased outrage in the court of public opinion, many laws have been passed relating to background checks for teacher employment. Despite such laws, abusive teachers still find their ways into American schools and prey on our students.

The role of the modern school leader is complex. It is the responsibility of schools to protect students. School administrators who take this mission seriously should be aware of the laws that exist to help them protect children. A review of case law reveals that diligent administrators who respond quickly and appropriately to allegations of educator sexual misconduct protect themselves and their districts from liability.

However, simply protecting school districts from liability should not be the mission of the modern school leader. As long as school employees are mistreating students, causing them emotional scarring that lasts for years and preventing them from fully engaging in the learning process, the school leader must continue to proactively recruit, hire, and supervise quality educators whose primary interest is serving children.

Endnotes

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[118] Fred Deel et al, *Student Sexual Abuse—An Administrative Nightmare* (paper presented at Amer. Ass'n of Sch. Admin. annual meeting, Mar. 1991).
[119] Pat Sikes, *Scandalous Stories and Dangerous Liaisons: When Female Pupils and Male Teachers Fall in Love*, SEX EDUC., Aug. 2006, at 265.
[120] *Id.*
[121] *Id.*
[122] Sandra Connaway, *ABCs for Teachers Who Suspect Child Abuse*, NRCCSA NEWS, July/Aug./Sept./Oct. 1996, at 4.
[123] Graves, *supra.*
[124] Winks, *supra.*
[125] Wishnietsky, *supra.*
[126] McGrath, *supra.*
[127] *Id.*
[128] Shakeshaft & Cohan, *Sexual Abuse of Students, supra.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] Yaffe, *supra.*
[140] Shakeshaft & Cohan, *Sexual Abuse of Students, supra.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*

[146] *Id.*
[147] U.S. CONST. amend. X.
[148] http://dictionary.law.com/Default.aspx?selected=2010
[149] CONN. GEN. STAT. § 53a-71 (a)(8)
[150] CONN. GEN. STAT. § 53a-73a (a)(6)
[151] CONN. AGENCIES REGS. § 10-145d-400a (b)(2)(A), (B), and (D)
[152] IOWA CODE § 702.17 defines the terms *"sex act"* or *"sexual activity"* to mean any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 151, or 152; or by use of artificial sexual organs or substitutes therefore in contact with the genitalia or anus.
[153] IOWA CODE § 709.15 (3)(a)-(b)
[154] IOWA ADMIN. CODE r.282-25-3(1)(c)
[155] KAN. CRIM. CODE ANN. § 21-3520 (a)(8)
[156] KAN. STAT. ANN. § 72-1383
[157] KAN. STAT. ANN. § 72-1397
[158] N.C. GEN. STAT. § 14-27.7 (b)
[159] 16 N.C. ADMIN. CODE 06C .0602 (b)(5)(A)-(F)
[160] 16 N.C. ADMIN. CODE 06C .0602 (a)
[161] OHIO REV. CODE § 2907.03 (A)(7)
[162] OHIO DEPARTMENT OF EDUCATION, LICENSURE CODE OF PROFESSIONAL CONDUCT FOR OHIO EDUCATIORS, (2008).
[163] OKLA. STAT. §21-1123v2(A)(4)
[164] OKLA. STAT. §21-1123v2(B)
[165] OKLA. ADMIN. CODE § 210:20-9-98 (j)
[166] TEX. STAT § 21.12(a)(1)
[167] 19 TEX. ADMIN. CODE § 247.2
[168] WISC. STAT. § 948.095 (2)(a)-(b)
[169] WISC. STAT. § 948.02 (2)
[170] WIS ADMIN. CODE PUB. INSTR.§ 34.35(2)(a)(1)
[171] WISC. STAT. § 115.31(2g)
[172] ALASKA STAT. § 11.41.434 (a)(3)(B)
[173] ALASKA ADMIN. CODE tit.4 § 12.200 (a)
[174] ALASKA ADMIN. CODE tit.4 § 12.200 (b)(4)
[175] ARIZ. REV. STAT. §13-1405
[176] ARIZ. ADMIN. CODE § R7-2-1307 (A)(1)-(11)
[177] ARK. CODE ANN. § 5-14-125(a)(4)(A)(iii)
[178] Arkansas State Board of Education Rules Governing the Code of Ethics for Arkansas Educators Agency Rule #005.16 ADE 291-1, (5.01)

[179] Arkansas State Board of Education Rules Governing the Code of Ethics for Arkansas Educators Agency Rule #005.16 ADE 291-1, (6.01)
[180] COL. REV. STAT. § 18-3-405.3 (1)
[181] COL. REV. STAT. § 22-60.5-107 (2)(b)(I)-(II)
[182] DEL. CODE ANN. tit.11, § 769 (a)(2)
[183] DEL. CODE ANN. tit.11, § 770 (a)(4)
[184] DEL. CODE ANN. tit.11, § 772 (a)(2)(h)
[185] DEL. CODE ANN. tit.11, § 773 (a)(6)
[186] 3.1.4 DEL. CODE REGS.
[187] 3.2.1.4 DEL. CODE REGS.
[188] 3.2.2 DEL. CODE REGS.
[189] 3.2.3 DEL. CODE REGS.
[190] 720 ILL. COMP. STAT. 5/12-13 (a)(4) (1961)
[191] 720 ILL. COMP. STAT. 5/12-16 (f) (1961)
[192] ILL. ADMIN. CODE tit. 23, § 24.100 (k)(2)(B)-(C)
[193] IND. CODE § 35-42-4-9(a)(1) and (b)(1)
[194] 20 IND. ADMIN. CODE 28-5-7(1)
[195] 20 IND. ADMIN. CODE 28-5-8(3)(c)(10)
[196] KY. REV. STAT. ANN. § 510.060 (1)(D)
[197] KY. REV. STAT. ANN. § 510.090 (1)(D)
[198] 16 KY. ADMIN. REGS. 1:020 § 1(3)(a)(8)
[199] LA. REV. STAT. ANN. § 14:81.2(A)
[200] LA. ADMIN. CODE (need title) §905 (A)
[201] LA. ADMIN. CODE (need title) §907 (A)
[202] ME. CODE § 253(1)(F)
[203] 05-071 ME. CODE R. §14.1(A)
[204] 05-071 ME. CODE R. § 14.1(D)(7)(a)-(b)
[205] MD. CODE ANN. § 3-308 (c)(1)-(2)
[206] MD. CODE REGS. § 13A.12.05.02(C)(1)(a)-(b)
[207] MICH. COMP. LAWS § 750.520b(1)(b)(iv)
[208] MICH. COMP. LAWS § 750.520c (1)(b)(iv)
[209] MICH. COMP. LAWS § 750.520d (1)(e)
[210] MICH. COMP. LAWS § 750.520e (1)(f)
[211] MICH. ADMIN. CODE r.380.1535a (1)(a)-(b)(i)
[212] MICH. ADMIN. CODE r.380.1535a (2)(a)
[213] MINN. STAT. § 609.342 (b)
[214] MINN. STAT. § 609.343 (b)
[215] MINN. STAT. § 609.344 (e)
[216] MINN. STAT. § 609.345 (e)
[217] MINN. R. 8700.7500 (2003)
[218] *Id.*
[219] MISS. CODE ANN. § 97-3-95 (2)

[220] 37-3-2 MISS. CODE R. § (11)(h) (1972)
[221] MO. REV. STAT. § 566.034 (1)
[222] MO. REV. STAT. § 566.086 (1)(1)-(5)
[223] MO. CODE REGS. ANN. tit.5, § 80-800.300(1)(A)
[224] MONT. CODE ANN. § 45-5-501 (1)(a)(ii)(D)
[225] MONT. CODE ANN. § 45-5-622 (1)(b)(ii)
[226] MONT. CODE ANN. § 45-5-503 (1)
[227] MONT. CODE ANN. § 45-5-502 (1)
[228] MONT. CODE ANN. § 20-4-110 (1)(f)
[229] MONT ADMIN. R. 10.57.601A (1)(a)
[230] NEV. REV. STAT. § 201.540 (1)(a)-(c)
[231] NEV. REV. STAT. § 201.540 (2)(a)-(c)
[232] NEV. REV. STAT. § 391.033 (5)(b)(1)-(2)
[233] N.H. REV. STAT. ANN. § 632-A:2 (k)
[234] N.H.CODE ADMIN. R. ANN. Ed 511.01 (a)(2)(a)-(b)(2)
[235] N.H.CODE ADMIN. R. ANN. Ed 511.01 (a)(3)(a)-(c)
[236] N.H.CODE ADMIN. R. ANN. Ed 511.02 (a)(2)(a)-(b)
[237] N.J. STAT. ANN. § 2C:14-2 (a)(2)(b)
[238] N.J. STAT. ANN. § 2C:14-2 (c)(2)(b)
[239] N.J. STAT. ANN. § 18A:6-7.1(1)
[240] N.M. STAT. § 30-9-13 (D)(2)
[241] N.M. CODE R. § 6.60.9.9 (B)(8)(a)
[242] N.D. CENT. CODE § 12.1-20-07 (1)(e)-(f)
[243] N.D. ADMIN. CODE 67.1-03-01-01 (2002).
[244] S.C. CODE ANN. § 16-3-655 (B)(2)
[245] S.C. CODE ANN. § 16-15-342 (A)
[246] S.C. CODE ANN. REGS. 43-58.
[247] TENN. CODE ANN. § 39-13-527(a)(1)(3)(A)
[248] TENN. COMP. R. & REGS. 0520-02-04-.01 (9)(a)
[249] TENN. COMP. R. & REGS. 0520-02-04-.01 (9)(b)(1)
[250] TENN. COMP. R. & REGS. 0520-02-04-.01 (9)(b)(6)
[251] VT. STAT. ANN. (need title) § 3252 (d)
[252] VERMONT STANDARDS BOARD FOR PROFESSIONAL EDUCATORS, VERMONT DEPARTMENT OF EDUCATION, CODE OF PROFESSIONAL ETHICS AND RULES OF PROFESSIONAL CONDUCT FO VERMONT EDUCATORS, § 5522 (a)-(g), (2009)
[253] VA. CODE ANN. §18.2-370.1 (A)
[254] 8 VA. ADMIN. CODE § 20-22-690 (A)(3)-(4)
[255] WASH. REV. CODE § 9A.44.093(1)(b)
[256] WASH. REV. CODE § 9A.44.096(1)(b)
[257] WASH. ADMIN. CODE § 181-87
[258] *Id.*

[259] W. VA. CODE § 61-8D-5 (a)
[260] W.VA. CODE R. §126-162-4.
[261] WYO. STAT. ANN. § 6-2-314(a)(iii)
[262] WYO. STAT. ANN. § 6-2-315(a)(iv)
[263] WYO. STAT. ANN. § 6-2-316(a)(ii)
[264] WYO. STAT. ANN. § 6-2-317(a)(ii)
[265] 21-2-802 WYO. CODE R. § 3238 (4)(a), (b)(2).
[266] ALA. CODE § 13A-6-62
[267] ALA. CODE § 13A-6-67
[268] ALA. CODE § 13A-6-70 (c)(1)
[269] Alabama Educator Code of Ethics, retrieved at ftp://ftp.alsde.edu/documents/70/Alabama_Educator_Code_of_Ethics.pdf on June 16, 2009.
[270] ALA. ADMIN. CODE r.290-3-2.22(a)(1)
[271] CAL. PENAL CODE § 261.5 (a)
[272] CAL. EDUC. CODE 44421
[273] CAL. EDUC. CODE 44425 (a)
[274] FLA. STAT. § 794.05 (1)
[275] FLA. ADMIN. CODE ANN. r. 6B-1.006 (3)(g)-(h).
[276] GA. CODE ANN. § 16-6-3 (2008)
[277] GA. CODE ANN. § 16-6-4 (2008)
[278] GA. COMP. R. & REGS. 505-6-.01 (3)(a)
[279] GA. COMP. R. & REGS. 505-6-.01 (3)(b)(3)
[280] GA. COMP. R. & REGS. 505-6-.01 (3)(b)(5)
[281] GA. COMP. R. & REGS. 505-6-.01 (5)(a)(1)
[282] HAW. REV. STAT. § 707-730
[283] HAW. REV. STAT. § 707-732
[284] Hawaii Teacher Standards Board, http://www.htsb.org/news/2006_hearings/2006_Code_Of_Ethics.html
[285] HAW. CODE R. §8-7-2 (b)(1)
[286] IDAHO CODE ANN. § 18-6101(1)
[287] IDAHO PPROFESSIONAL STANDARDS COMMISSION, CODE OF ETHICS FOR IDAHO PROFESSIONAL EDUCATORS, (2006).
[288] MASS. GEN. LAWS ch.272, § 4
[289] 603 MASS. CODE REGS. 7.14 (8)(a)(1)(c)
[290] NEB. REV. STAT. § 28-319 (1)(c)
[291] NEB. REV. STAT. § 28-319.01 (1)(b)
[292] NEB. REV. STAT. § 28-709 (1) and (3)
[293] State v. VanAckeren, 263 Neb. 222, 639 N.W.2d 112 (2002).
[294] 92 NEB. ADMIN. CODE § 004.02(F) (2005)
[295] 92 NEB. ADMIN. CODE § 001.03(F) (2005)
[296] N.Y. PENAL LAW § 130.05 (3)(a)

[297] N.Y. PENAL LAW § 130.40 (2)
[298] N.Y. PENAL LAW § 130.25 (2)
[299] 8 NY ADC 83.1 (a)
[300] 8 NY ADC 83.6 (b)(1)-(5)
[301] OR. REV. STAT. § 163.355
[302] OR. REV. STAT. § 163.415 (1)(b)
[303] OR. ADMIN. R. 584-020-0035
[304] OR. ADMIN. R. 584-020-0040
[305] 22 PA. CONS. STAT. § 3121 (c)
[306] 22 PA. CONS. STAT. § 3125 (a)(8)
[307] 22 PA. CODE § 235.10 (3)
[308] 22 PA. CODE § 235.5
[309] R.I. GEN. LAWS § 11-37-6
[310] R.I. GEN. LAWS § 23-17-37 (a)
[311] S.D. CODIFIED LAWS § 22-22-7
[312] S.D. CODIFIED LAWS § 22-24-3 (2)
[313] S.D. ADMIN. R. 24:08:03:01 (8)
[314] S.D. ADMIN. R. 24:08:03:01 (10)
[315] UTAH CODE ANN. § 76-5-401.2 (1)-(2)(D)
[316] UTAH CODE ANN. § 76-5-401 (1)-(2)(C)
[317] UTAH ADMIN. CODE r.277-515-3 (C)(14)
[318] UTAH ADMIN. CODE r.277-515-3 (C)
[319] 20 U.S.C. § 1681 (2010).
[320] *See* Doe v. Petaluma, 830 F.Supp. at 1564-65, 1575 (female student alleged sexual harassment by both male and female classmates, sufficient to raise claim under Title IX); John Does 1 v. Covington County Sch. Bd., 884 F.Supp. 462, 464-65 (M.D. Ala. 1995) (male students sought relief under Title IX when a male teacher sexually harassed and abused them); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d at 468 (female student claimed Title IX violation after being harassed by a female teacher).
[321] *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 at 75 (1992).
[322] *See* Alexander v. Yale Univ., 459 F.Supp. 1 at 4 (D.Conn. 1977), aff'd, 631 F.2d 178 (2nd Cir. 1980) (sex discrimination occurs when academic advancement is a condition of submission to sexual demands).
[323] *See* Franklin, 503 U.S. at 63 (kissing and intercourse supported Title IX claim of sexual harassment).
[324] *See* Franklin, 503 U.S. at 75.
[325] *See* Kadiki v. Virginia Commonwealth Univ., 892 F.Supp. at 754-755, (E.D. Va. 1995).
[326] *See* Henson v. City of Dundee, 682 F.2d 897, at 903 (11th Cir. 1982).
[327] *See* Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220 (7th Cir. 1997); Does v. Convington County Sch. Bd. of Educ. (Does I), 930 F.Supp. 554 (M.D. Ala. 1996).

[328] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Office of Civil Rights, 1997.
[329] Harris, 114 S.Ct. at 370-71 (The Supreme Court used a "reasonable person" standard in to determine whether sexual conduct constituted harassment.)
[330] *See e.g.*, Doe v Petaluma, 830 F. Supp at 1566 (student transferred to a private school due to pressures from harassment by other students); Modesto City Sch., OCR Case No. 09-93-1391 (harassment caused a student's grades to drop); Weaverville Elementary Sch., OCR Case No. 09-91-1116 (harassment caused students to drop out of school).
[331] *See*, *e.g.*, McKinney v. Dole, 765 F.2d 1129, 1138-40 (D.C. Cir. 1985); Robinson v. Jacksonville Shipyards, 760 F.Supp. at 1522 (M.D. Fla. 1991).
[332] *See* Rosa H. v. San Elizario Indep. Sch. Dist., 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997) (holding a school cannot be liable for sexual harassment where it has only constructive notice).
[333] Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398-400 (5th Cir. 1996), (A school district was not liable for the molestation of a second grader by one of its teachers, even though the mother followed written district policy to report complaints to homeroom teachers, because the court held that notice must be given to "someone with authority to take remedial action.") *See also* Rosa H. v. San Elizario Indep. Sch. Dist., 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997), (Holding a school district is only liable if an employee who has supervisory power over the harassing employee knew of the abuse, had the power to end the abuse, and failed to do so.)
[334] 34 CFR § 106.8(a)-(b)
[335] *See* Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220 (7th Cir. 1997).
[336] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S.274 (1998).
[337] Cong. Globe, 42nd Cong., 1st Sess., 374-376 (1871) (Remarks of Congressman Lowe).
[338] Cong. Globe, 42nd Cong., 1st Sess., 335, 374-376.
[339] Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961).
[340] Monell v. Dept. of Soc. Serv., 436 U.S. 658, 98 S.Ct. 2018 (1978).
[341] Will v. Michigan Department of State Police, 491 U.S. 58; 109 S.Ct. 2304 (1989)
[342] *Id.*
[343] Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991).
[344] *Id.*
[345] Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985).
[346] Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984).
[347] Carey v. Piphus, 435 U.S. 247 (1978).
[348] Millikin v. Bradley, 418 U.S. 717, 94 S.Ct. 3112 (1974).
[349] Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625 (1983).
[350] *Id.* at 56.
[351] Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502 (1980).
[352] 42 USCS § 1988

[353] Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 283 (1951)
[354] Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 92 (1975).
[355] Gomez v. Toledo, 446 U.S. 635, S.Ct. 1920 (1980).
[356] Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984).
[357] Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982).
[358] *Id.* at 2737
[359] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
[360] Arnett v. Kennedy, 416 U.S. 134, 164 (1974).
[361] Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).
[362] Casada v. Booneville Sch. Dist. No. 65, 686 F. Supp. 730, (W.D. Ark. 1988).
[363] Brouillette v. Board of Directors of Merged Area IX, 519 F.2d 126, (8th Cir. 1975).
[364] Elvin v. City of Waterville, 573 A.2d 381, (Me. 1990).
[365] Hall v. Board of Educ., 169 Ill. Dec. 758, 592 N.E.2d 245 (Ill. App. 1992).
[366] Board of Directors of Fairfield Community Sch. Dist. v. Justmann, 476 N.W.2d 335 (Iowa 1991).
[367] Strain *v.* Rapid City Sch. Bd., 447 N.W.2d 332 (S.D. 1989).
[368] Dohanic v. Commonwealth of Penn. Dept. of Educ., 533 A.2d 812 (Pa. Cmwlth. 1987).
[369] *Id.* at 815.
[370] Sauter v. Mount Vernon Sch. Dist., 791 P.2d 549, 58 Wash. App. 121 (Wash. App. 1990).
[371] Fisher v. Independent Sch. Dist. No. 622, 357 N.W.2d 152 (Minn. App. 1984).
[372] In Re the Proposed Immediate Discharge of Lester Etienne from Indep. Sch. Dist. No. 241, 460 N.W.2d 109 (Minn. App. 1990).
[373] Purvis v. Oest, 614 F.3d 713 (7th Cir. 2010).
[374] Sertik v. School Dist. of Pittsburgh, 136 Pa. Commw. 594, 584 A.2d 390 (Pa. Commw. 1990).
[375] Crosby v Holt, No. E2009-00712-COA-R3-CV LEXIS 881 (Tenn. App. Dec. 28, 2009).
[376] Crump v. Board of Educ. of Hickory Admin. Sch. Unit, 378 S.E.2d 32 (N.C. 1982).
[377] Waisanen v. Clatskanie Sch. Dist. No. 6J, 215 P.3d 882 (Or. Ct. App. 2009).
[378] Board of Educ. v. Adelman, 423 N.E.2d 254, 53 Ill. Dec. 62, 97 Ill. App. 3d 550 (Ill. App. 1981).
[379] Libe v. Twin Cedars City Sch. Dist., 350 N.W.2d 748 (Iowa App. 1984).
[380] Carroll v. Kentucky Educ. Prof. Standards Bd., NO. 2008-CA-000813-MR, LEXIS 165 (Ky. App. May 22, 2009) Unpublished.
[381] Parker v. Byron Ctr. Pub. Sch., 229 Mich. App. 565, 582 N.W.2d 859 (Mich. App. 1998).
[382] Linden Bd. of Educ. v. Linden Educ. Ass'n. ex rel. Mizichko, 202 N.J. 268 (N.J., 2010).

[383] Barcheski v. Board of Educ. of Grand Rapids Pub. Sch., 412 N.W.2d 296 (Ct. App. Mich. 1987).
[384] *Id.* at 297.
[385] Shipley v. Salem Sch. Dist., 64 Or. App. 777, 669 P.2d 1172 (Or. App. 1983).
[386] In the Matter of Wolf, 555 A.2d 722 (N.J. Super. A.D. 1989).
[387] *Id.* at 726.
[388] Queen v. Minneapolis Pub. Sch., Spec. Sch. Dist. No. 1, No. C3-90-835 (Minn. App. 1990)
[389] Deloney v. Thornton Twp. Sch. Dist. No. 205, 281 Ill. App. 3d 775, 666 N.E.2d 792 (Ill. App. 1996).
[390] Cisneros v. State Bd. for Educ. Certification, NO. 03-05-00657, LEXIS 11125 (Tex. App. Dec. 29, 2006).
[391] *Id.* at 4.
[392] *Id.*
[393] In re Chadwick v. Superior Court of Ariz., 184 Ariz. 190, 908 P.2d 4 (Ariz. App. 1995).
[394] Ashurst v. Monterey Peninsula Unified Sch. Dist., 57 Cal. App. 4th 665, 67 Cal. Rptr. 2d 316 (Cal. App. 1997).
[395] City Sch. Dist. of New York v. Hershkowitz, 801 N.Y.S.2d 231 (N.Y. 2005).
[396] In re Tenure Hearing of Young, 202 N.J. 50; 995 A.2d 826, (N.J. 2010).
[397] Joyell v. Commissioner of Educ., 45 Conn. App. 476, 696 A.2d 1039 (Conn. App. 1997).
[398] Sampson v. Sylvania Bd. of Educ., LEXIS 7313 (Ohio App. Feb. 27, 1976).
[399] Duncan v. Greenhills-Forest Park City Sch. Dist., LEXIS 5579 (Ohio App. Jan. 31, 1985).
[400] ORC 2907.01
[401] Sellers v. Logan-Hocking City Sch. Dist., LEXIS 851 (Ohio App. Feb. 24, 1992).
[402] Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935 (6th Cir. 2004).
[403] Madril v. School Dist. No. 11, 710 P.2d 1 (Colo. App. 1985).
[404] Lile v. Hancock Place Sch. Dist., 701 S.W.2d 500 (Mo. Ct. App. 1985).
[405] Downie v. Independent Sch. Dist. No. 141, 367 N.W. 2d 913 (Minn. App. 1985).
[406] Andrews v. Independent Sch. Dist. No. 57, 12 P.3d 491 (Okla. Civ. App. 2000).
[407] Clark v. Ann Arbor Bd. of Educ., 344 N.W.2d 48 (Mich. App. 1983).
[408] Beebee v Haslett Pub. Sch., 66 Mich App 718; 239 NW2d 724 (1976).
[409] Mondragon v. Poudre Sch. Dist. R-1, 696 P.2d 831 (Colo. App. 1984).
[410] Lehto v. Caesar Rodney Sch. Dist., 962 A.2d 222 (Del. 2008).
[411] Weissman v. Jefferson County Sch. Dist. No. 1, 190 Colo. 414; 547 P.2d 1267 (Colo. 1976).
[412] Board of Education of Argo-Summit Sch. Dist. No. 104 v. State Bd. of Educ., 138 Ill. App. 3d 947, 93 Ill. Dec. 580, 487 N.E.2d 24 (Ill. App. 1985).
[413] Mott v. Endicott Sch. Dist. No. 308, 713 P.2d 98 (Wash. 1986).

[414] Fadler v. State Bd. of Educ., 106 Ill. App. 3d 1024, 506 N.E.2d 640 (Ill. App. 1987).
[415] Wright v. Mead Sch. Dist. No. 354, 87 Wn. App. 624, 944 P.2d 1 (Wash. App. 1997).
[416] *Id.* at 633.
[417] Pryse v. Yakima Sch. Dist. No. 7, 30 Wn. App. 16, 632 P.2d 60 (Wash. App. 1981).
[418] *Id.* at 61.
[419] *Id.*
[420] Clark v. Commissioner of Educ., NO. 14-99-00088-CV, LEXIS 5380 (Tex. App. Aug. 9, 2001).
[421] Padilla v. South Harrison R-II Sch. Dist., 181 F.3d 992 (8th Cir. 1999).
[422] 42 U.S.C. § 1983 (2008).
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