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MEMORANDUM

TO: Members of the National Council of State Education Attorneys

FROM: Kevin C. McDowell, Deputy Attorney General

RE: *Case of the Week: Anthony Zeno v. Pine Plains Central School District*, __ F.3d __, 2012 WL 5992147 (U.S. Second Circuit Court of Appeals, December 3, 2012): **Peer Racial Harassment; School Liability**

DATE: December 7, 2012

LaShonda Davis was in the fifth grade when a classmate, G.F., began to harass her (and others) through attempts to touch her inappropriately, vulgar statements, and vulgar displays. She continually reported these incidents to her teachers and principal (as did her mother), but no disciplinary action was taken against G.F. The harassment continued. Davis, who had earned good grades, saw her academic achievement drop as she experienced difficulties in concentrating. At one point, her father found a suicide note she had authored.

The harassment ended in mid-May when G.F. was charged with and eventually pleaded guilty to sexual battery. Davis sued the school district, in part, under Title IX.¹ In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999), the Supreme Court established the bases for determining the liability of a school district where peer sexual harassment is implicated: A school district is liable for damages under Title IX where it exercises substantial control over the harasser and the context in which the harassment occurred and:

- The school had **actual notice** of the harassment, but
- Acted with **deliberate indifference**.
- The harassment was so **severe, pervasive, and objectively offensive** that
- The victim was **effectively deprived of access to educational opportunities or benefits**.

¹ Title IX of the Education Amendments of 1972 provides in relevant part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681(a).

The same analysis is applied to peer racial harassment under Title VI, which prohibits a school district (actually, any recipient of federal funds) from discriminating on the basis of race, color, or national origin.²

Anthony Zeno transferred during his freshman year to the high school in the Pine Hills Central School District. Zeno is biracial (half-white, half-Latino) and dark skinned. The high school he transferred to was referred to obliquely as “racially homogenous” with minority students representing “less than five percent of the student population.” *Slip Opinion* at 2-4.

Zeno’s difficulties occurred almost immediately. In a school that had not previously experienced “bias-related disciplinary matters,” Zeno became the target for racial epithets, threats, slurs, and taunts, including “[w]e don’t want your kind here” and “go back to where [you] came from.” His mother complained to the principal, who initially cautioned her that “this is a small town and ...you don’t want to start burning your bridges.” The taunts continued throughout his freshman year. Zeno reported these incidents to school officials, and his mother continued to seek the intervention of school administrators, particularly when Zeno’s sister, also a student in the school district, began to receive similar hostile treatment. Students involved in the incidents were either warned or suspended, but no other remedial actions were taken. *Id.* at 4-5.

During his sophomore year, the racial incidents continued and escalated. Physical confrontations occurred, and there were graffiti threats on the bathroom wall. There were a number of verbal taunts in his art class. His locker was tampered with, including stacking garbage inside it so it would tumble out when opened. There were at least two incidents where lynching was mentioned or a noose were displayed. The school district did suspend the students involved in such incidents (usually for five days), and moved one student to another school. Zeno obtained Orders of Protection twice during this school year. *Id.* at 5-7.

Zeno’s mother continued to request intervention from school administrators, including the superintendent.³ The school district did discipline students for their untoward behavior, and even called the police when a particularly violent physical attack occurred. The family, however, believed that more needed to be done. They were supported in the request that the school do more by the County Human Rights Commission (HRC) and the local chapter of the NAACP. The family lawyer recommended the school provide a “shadow” to accompany Zeno at school and implement racial sensitivity programs. The HRC and NAACP offered to provide these options at no cost to the school district. *Id.* at 7-8. The school district declined the offers, but did eventually implement a program that involved one day of training and focused largely on bullying and sexual harassment. *Id.* at 9, 11.

² “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(a).

³ Throughout the 49-page decision, the Court notes that the superintendent never sought to meet with Zeno’s mother. This somewhat distant approach may have affected the jury. The Court, through these repeated references, apparently disapproves of this approach as well. In contrast, Zeno’s mother met with the principal between 30-50 times during his high school years.

At the end of Zeno's sophomore year, the school district prepared an Individualized Education Program (IEP) for him.⁴ The IEP specifically noted that Zeno "struggl[es] with acceptance in the school environment" and that there have been "numerous incidents...with prejudicial or racial overtones." The special education director, who was responsible for the preparation of the IEP, is also the compliance officer for the school district, charged with investigating complaints regarding alleged violations of both Title IX and Title VI. Although such complaints had been made (notably, a number of them by Zeno's mother as well as by Zeno himself), the special education director never followed-up or otherwise responded to the complaints. *Id.* at 9-10.

The school district also attempted to coordinate a mediation between Zeno's mother and his antagonists (and their parents). However, this was botched from the beginning. The mediator was ill trained for such a mediation, and the school district neglected to advise Zeno's mother of the date or time of the mediation. *Id.* at 11.

Zeno's junior year was little different from his previous two years in the high school. However, he did attempt to punch at a student who threatened to rape Zeno's sister. Zeno was punished but not the instigator. Zeno also began attending more vocationally oriented classes during his junior year, which required travel by bus. There were repeated incidents of racial taunting during these bus rides. Even though the school district did discipline students for this conduct, it continued unabated. *Id.* at 12-13.

The school district hired a consultant who intended to collect data and then train faculty, staff, and students on various diversity issues. However, no training occurred during the remainder of Zeno's junior year. The sensitivity training did not occur until the following school year. The school district also reorganized a student extracurricular group that had been defunded (Students and Teachers Opposed to Prejudice or STOP). The school district also brought in a group to address character education, including racism and racial harassment. *Id.* at 13-14, 15.

During his senior year, the number of reported incidents decreased but the incidents that did occur were more serious, including a fight where a friend of Zeno was choked into unconsciousness. (The student who did the choking received a 45-day suspension.) The racial taunts and slurs continued.

Zeno realized that he would be short of math credits required to graduate from high school with a regular high school diploma. Rather than spend more time in school in order to qualify for a regular high school diploma, Zeno opted to receive an "IEP diploma," which would allow him to attend certain community colleges but was not accepted by employers, the military, four-year colleges, apprenticeship programs, or business/trade schools. *Id.* at 16.

Zeno sued the school district, alleging it discriminated against him in violation of Title VI. A jury returned a verdict in his favor and awarded him \$1.25 million in damages. The federal district court reduced the damage amount to \$1 million. The school district appealed, asserting it was not liable under Title VI and, in the alternative, the damage award was excessive. *Id.* at 17-19.

⁴ The Court does not provide any additional information, such as what the suspected disability might have been, who referred Zeno for an educational evaluation, or what role the parent had in the development of the IEP.

The *Davis* Analysis Applied to *Zeno*

On appeal,, the school district argued that the evidence failed to support a key component for liability—deliberate indifference. It asserted its responses to each incident were reasonable, it was under no obligation to implement the suggestions from the family’s attorney (and supported by HRC and NAACP), and that it never knew its responses were inadequate or ineffective. The 2nd Circuit panel disagreed. *Id.* at 19-20.

Under Title VI, applying *Davis*, liability will be imposed on a school district for the intentional discriminatory activities of a third party (or third parties) that constitute discrimination on the basis of race, color, or national origin. However, the standard applied is a narrow one, and not all harassment is actionable. First, the school district must exercise substantial control over the harasser and the context within which the known harassment occurred. The school district must have actual knowledge of the harassment. Constructive knowledge is insufficient for this purpose. The harassment itself must be severe, pervasive, and objectively offensive so as to be discriminatory in effect. The discriminatory effect is not restricted to exclusion from school activities but includes any restriction on an individual that interfered with the enjoyment of such services and benefits offered by the school. Lastly, the school district must be “deliberately indifferent” to the harassment it has actual notice of, which is the key issue challenged by the school district in this case. *Id.* at 20-25.

A finding of deliberate indifference depends on the adequacy of a school district’s response to the harassment. [Citation omitted.] A failure to respond, ... a response that only follows after a lengthy and unjustified delay,...and a response that amounts to deliberate indifference to discrimination...have all been found inadequate.

Nevertheless, a school district’s actions are only deliberately indifferent if they were clearly unreasonable in light of the known circumstances. [Citations omitted.] Thus, when weighing the adequacy of a response, a court must accord sufficient deference to the decisions of school disciplinarians. [Citations omitted.] To that end, victims do not have a right to specific remedial measures.

Id. at 26 (citations and internal punctuation omitted).

Actionable Harassment

The Court determined that it was reasonable for the jury to find that the repeated verbal and physical threats, taunts, and slurs were severe, pervasive, and objectively offensive and not merely simple acts of teasing or name-calling typical of students. These activities occurred repeatedly over the three and one-half years *Zeno* was in the school district’s high school. *Id.* at 27-29.

Deprivation of Educational Opportunities and Benefits

It was also reasonable for the jury to find, based on the actionable harassment, that *Zeno* was “discriminatorily deprived of three educational benefits”: (1) a “supportive, scholastic environment free of racism and harassment”; (2) receipt of an IEP diploma rather than a standard high school diploma; and (3) forced to withdraw from school before completing his education due to a racially hostile educational environment. *Id.* at 29-31.

Actual Knowledge and Control

The jury easily found the school district had actual knowledge of the harassment. Zeno repeatedly reported such incidents, as did his mother. Faculty and staff also reported incidents, as did representatives of outside groups (HRC and NAACP) and the family's attorney. There is also no question the school district possessed substantial control over the circumstances: the incidents occurred in school, on school property, or on a school bus, often during school hours. The harassers were students subject to the school district's control. *Id.* at 31-32.

Deliberate Indifference

As noted previously, this is the core issue. The school district did attempt to address the continuing harassment of Zeno through disciplinary measures and other attempts to raise awareness of diversity issues and racial sensitivity. *Id.* at 32-33.

In some circumstances, prompt disciplinary action against a student's identifiable harassers may show that a school district was not deliberately indifferent. The sufficiency of a response, however, must be considered in light of the known circumstances, and as the known circumstances change, the sufficiency of a response may also have to evolve.

Id. at 33-34 (internal citations and punctuation omitted). The jury could have reasonably found that the school district's remedial measures were inadequate:

- The school district knew that suspension of Zeno's harassers was not serving as a deterrent to other students to engage in the same behavior.
- The harassment Zeno suffered "grew increasingly severe" and violent, including threats on his life such that he obtained Orders of Protection against the students involved.
- The disciplinary measures employed by the school district had little, if any, effect on the taunting and other harassment Zeno experienced in the hallways during his three and one-half years at the high school.
- The school district knew the harassment directed towards Zeno was predominantly based on race and color.
- The school district declined the offer from HRC and the NAACP to provide a free shadow and racial sensitivity training series, yet its own remedial responses were inadequate—and, thus, deliberately indifferent—in several respects (it "dragged its feet" by waiting more than a year to implement non-disciplinary remedial action; in the absence of being more proactive in a quicker fashion, the school district "effectively caused" further harassment; the delay in taking additional action was unreasonable; and the remedial actions eventually taken—including the mediation—were "half-hearted measures" not calculated to address or resolve the harassment of Zeno).

Id. at 33-39.

Although *actually* eliminating harassment is not a prerequisite to an adequate response [citations omitted], the District's actions could not have plausibly changed the culture of bias at [the high school] or stopped the harassment directed at [Zeno]. A jury was

entitled to compare the alternatives offered by the ...HRC and NAACP with the District's programs when it evaluated the adequacy of the District's ultimate response. Thus, we conclude that the record supports the jury's finding that the District's deliberately indifferent responses effectively caused [Zeno's] continued harassment.

Id. at 39-40 (emphasis by Court). The Court also agreed that the jury was reasonable in concluding that the school district should have known that its responses were inadequate or ineffective. There were "many signals that greater, more directed action was needed." *Id.* at 40-41. There was sufficient evidence to support the jury's finding that the school district was deliberately indifferent to the discrimination Zeno suffered based on the school district's responses. *Id.* at 41.

Damages

The Court also upheld the \$1 million in compensatory damage awarded to Zeno, as reduced by the district court. Evidence at the trial revealed the "increasing frustration, loneliness, and other emotional anguish" Zeno suffered during the three and one-half years at the high school. Zeno also suffered "adverse educational consequences" resulting from the school district's deliberate indifference. *Id.* at 42-45.

[Zeno's] prolonged harassment resulted in an educational environment that was disparately hostile, depriving him of a scholastic benefit. [Citation omitted.] [He] also accepted the IEP diploma rather than attempt to satisfy the Regents [diploma] requirements. As a consequence, the jury reasonably could have found that this ability to attend college or enter the workforce was significantly and adversely impaired.

Id. at 45. In addition, the harassment will have a profound and long-term impact on Zeno's life and his ability to earn a living. The amount determined (as reduced by the district court) was within the range of permissible and did not "shock the judicial conscience." *Id.* at 46-48.

Given the ongoing and objective offensiveness of the student-on-student harassment here, we hold that the district court did not abuse its discretion in determining that the record could support an award to [Zeno] of \$1 million.

Id. at 48.