Appellate Case No. D047199

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MEGAN DONOVAN AND JOSEPH RAMELLI,
Plaintiffs, Respondents, Cross-Appellants,

vs.

POWAY UNIFIED SCHOOL DISTRICT, et al.,
Defendants, Appellants, Cross-Respondents.

San Diego County Superior Court Case No. GIC 823157
The Honorable Steven R. Denton, Judge

RESPONDENTS/CROSS-APPELLANTS' SUPPLEMENTAL BRIEF

F. Brian Chase (SBN 242542)
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
3325 Wilshire Boulevard
Suite 1300
Los Angeles, CA 90010
Telephone: (213) 382-7600
Facsimile: (213) 351-6050

Hayley Gorenberg (Pro Hac Vice)
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
120 Wall Street
Suite 1500
New York, NY 10005
Telephone: (212) 809-8585
Facsimile: (212) 809-0055

Paula S. Rosenstein (SBN 126264)
Bridget J. Wilson (SBN167632)
ROSENSTEIN, WILSON & DEAN, P.L.C.
1901 First Avenue
Suite 300
San Diego, CA 92101
Telephone: (619) 232-8377
Facsimile: (619) 238-8376

Attorneys for Plaintiffs, Respondents, Cross-Appellants

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, REGULATIONS AND RULES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTRODUCTION

Respondents/Cross-Appellants Megan Donovan and Joseph Ramelli ("Respondents") hereby respond to the order of this Court dated March 27, 2008 directing the parties to respond to the following issues:

> *Based on the request of February 1, 2008, the parties lodged the legislative histories of various statutes at issue in the above-entitled case. In light of such newly lodged information, the court requests additional briefing regarding the Legislature's intent bearing on the following issues:*
>
> *1) What are the elements a plaintiff must prove in order to state a cause of action for violation of Education Code section 220?*
>
> *2) What are the remedies available for a violation of Education Code section 220, as more particularly described in sections 262.3 and 262.4 in the Education Code?*

The statutes in question reflect the evolution of California's laws granting increased protection to students from discrimination and harassment over the course of the past twenty-five years. The histories demonstrate that the Legislature intended to mandate that schools take affirmative steps to curb in-school harassment of students, and to provide students who have been harmed by school administrators' failure to do so with a broad range of remedies. The fact that these laws have been expanded repeatedly since their initial enactments demonstrates the Legislature's intent to provide California's schoolchildren with robust protections from bias-related harassment, as well as the intent to ensure that those protections are more comprehensive than the anti-harassment provisions of federal Title IX. (20 U.S.C. § 1681, *et seq.*

ELEMENTS OF A CLAIM UNDER EDUCATION CODE SECTION 200 ET SEQ.

Long-established anti-discrimination laws provide guidance as to the elements that must be proven by a student seeking compensation for on-campus harassment. The evolution of the anti-discrimination and anti-harassment provisions of the Education Code, along with unequivocal statements of legislative intent enshrined in the Code itself, indicates that other California laws regarding discrimination and harassment should inform the elements of any such claim.[1]

A. AB 3133 Provides Protection Intended to Parallel the Pre-*Davis* Protections of Federal Title IX

From the initial passage of the anti-discrimination provisions of the Education Code, the progression and development of the law demonstrates that the Legislature has recognized that school officials must take effective measures to curb bias-related harassment in schools.[2] Section 220 of the

---

[1] All statutory references in this brief are to the California Education Code unless indicated otherwise.

[2] Some of the legislative histories lodged by the parties have no direct bearing on the issues the Court has directed the parties to brief. Assembly Bill number 3653 (1987-1988 Reg. Sess.) (AB 3653) required that the governing board of a school district, the Chancellor of the California State University, and the chancellor of each University of California campus were to have the primary responsibility for ensuring that the programs and activities of the school districts and the pertinent university campus were free from discrimination. Senate Bill number 1854 (1989-1990 Reg. Sess.) (SB 1854) amended or repealed 1,200 sections of the Education Code relating to community colleges, and directed that some of the repealed provisions be re-adopted as regulations of the Board of Governors of the Community College System. The legislative history of SB 1854 does not specifically mention the standard of liability or elements of a claim under the anti-discrimination and anti-harassment provisions of the Education Code, nor does it seem to provide any guidance as to what the standard of

Education Code can be traced back to 1982, when the Legislature enacted Assembly Bill number 3133 (1981-1982 Reg. Sess.) (AB 3133), providing protections for students from discrimination on the basis of sex. Section 220 of the Education Code, which was originally created under AB 3133, initially provided that "[n]o person shall be subjected to discrimination on the basis of sex in any program or activity which receives or benefits from state financial assistance or enrolls students who receive state financial aid." AB 3133 did not specifically confront the issue of harassment. The definition of discrimination codified by AB 3133 as Education Code section 230, specifically included, but was not limited to, actions such as excluding persons from academic or extracurricular programs on the basis of sex, or providing differing amounts of student financial aid due to an applicant's sex. Neither the language of AB 3133, nor the legislative history relevant to its enactment, indicates that the Legislature was concerned with the prevention of bias-based harassment in public schools.

In a letter dated September 3, 1982 urging the governor to sign the bill into law, the author of AB 3133 stated that the bill "parallels and complements Federal Title IX requirements and would extend those protections for equal opportunity on the basis of sex to all California schools." This statement of legislative intent is crucial for understanding

---

liability would be. The Bill Analysis of SB 1854 prepared by the Department of Finance mentions that the Legislature will retain the prohibition against sexual discrimination within the Education Code, rather than suggesting that the protections be re-adopted as regulations, but it provides no guidance as to the legislative intent behind the enactment of those provisions. Finally, Assembly Bill number 2359 (1991-1992 Reg. Sess.) (AB 2359) made the anti-discrimination provisions of the Education Code applicable to the University of California. Again, the legislative history of that bill does not appear to contain information bearing on the Legislature's intent regarding the elements of a claim under Education Code section 220 *et seq.* or the types of remedies available to a plaintiff filing a claim under those statutes.

the elements of a claim under Section 220 of the Education Code today. As demonstrated below, the anti-harassment and anti-discrimination provisions of the Education Code have been extensively revised and strengthened since 1982. These changes include:

- Making it clear that educators have an "affirmative obligation" to curb bias-motivated harassment. (Assem. Bill No. 2543 (1993-1994 Reg. Sess.).) (AB 2543)
- Directing the State Board of Education to enact regulations aimed at reducing hate violence and bias-motivated harassment. (AB 2543)
- Requiring the California Department of Education to enact regulations regarding anti-bias in-service training programs for educators. (AB 2543)
- Stating "it is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to an equal educational opportunity." (AB 2543)
- Adding specific protections for gay and lesbian students to the anti-discrimination and anti-harassment provisions of the Education Code. (Assem. Bill No. 537 (1999-200 Reg. Sess.).) (AB 537)
- Creating a cause of action for students who are subject to on-campus harassment and requiring schools to inform students who complain of harassment that such a cause of action exists. (Sen. Bill No. 1854 (1989-1990 Reg. Sess.).) (SB 1854)

- Adding an express legislative finding that "[h]arassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution. (AB 2543)
- Adding a finding that there is an "urgent need" to prevent "bias related incidents that are occurring at an increasing rate in California's public schools." (AB 2543)
- Recognizing that students should be protected from bias-motivated harassment on the basis of specified perceived, as well as actual, personal characteristics, including sexual orientation. (Sen. Bill No. 1234 (2003-2004 Reg. Sess.).) (SB 1234)

Despite all of the forgoing changes to sections 200 et. seq, Petitioners essentially argue that a trial that took place in 2005 should be governed by their interpretation of the statute as it existed in 1982, rather than in the revised form that was in force when Respondents were students in Petitioners' care. Significantly, this argument misconstrues the pre-*Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629 [119 S.Ct. 1661] (*Davis*) understanding of Title IX. Because the anti-harassment provisions of the Education Code have been significantly strengthened since 1982 when they "paralleled Title IX," the elements of a claim under Title IX as defined in *Davis* do not provide for the appropriate standard of liability.

Furthermore, it is not at all clear that, even in 1982, the appropriate test for school administrators' liability for peer-on-peer harassment under Title IX was the "deliberate indifference" standard Petitioners' suggest. It is true that as of 1999, school administrators could be found liable under this federal statute for student-on-student harassment only if the

administrators acted with deliberate indifference to known acts of harassment. (See *Davis*, Supra, 526 U.S. 629.). The relevant post-1982 amendments to Education Code sections 200 *et seq*., however, each demonstrate that the California Legislature intends for students to be protected by a more aggressive standard.

Notably, prior to the 1999 *Davis* decision, Title IX was widely understood to incorporate a standard far more protective than the "deliberate indifference to known acts of harassment" test found in *Davis*. Before *Davis*, the Office of Civil Rights of the United States Department of Education (OCR) had determined that "a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action. (See, e.g., Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12, 037, 12,039 (1997).) (OCR Sexual Harassment Guidance) This interpretation is particularly relevant, in that federal courts are required to give OCR's interpretations of Title IX significant deference. (*Cohen v. Brown Univ.* (1st Cir. 1993) 991 F.2d 888, 895.) Accordingly, even before the numerous amendments to the anti-discrimination and anti-harassment provisions of the California Education Code, it appears that the state Legislature, referring to the federal standard pre-*Davis*, intended the law to afford more protection than is offered by the "deliberate indifference" standard crafted by the Supreme Court in *Davis*—and then further enhanced the state law protections over time.

B. AB 2543 Makes It Clear That School Administrators Must Take Affirmative Steps to Counter Bias-Motivated Discrimination and Harassment

The enactment of AB 2543 (California Schools Hate Violence Reduction Act of 1995), further shows that by repeatedly strengthening the anti-harassment and anti-discrimination provisions of the Education Code the Legislature intended to provide students in California with broader protections than those offered under federal law. AB 2543 required the State Board of Education to adopt policies and guidelines to respond affirmatively to acts of hate violence. The fact that the Board is directed to mandate proactive steps strongly suggests that the Legislature intended to require that school officials must do more than merely avoid being "deliberately indifferent" to hate violence and bias-motivated harassment. AB 2543 further establishes guidelines for teacher and administrator in-service training programs to promote appreciation of different ethnicities and to discourage discriminatory practices among pupils, teachers, administrators and counselors. Again, even in the mid-1990's the Legislature evidenced an intent to hold school administrators to a more meaningful standard than simply not turning a blind eye to harassment and discrimination. AB 2543 demonstrates that affirmative steps must be taken.

AB 2543 sets forth the principle that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment" and that "California's public schools have an affirmative obligation to combat racism, sexism and other forms of bias, and a responsibility to provide equal educational opportunity." There is no language in federal Title IX directly imposing any similar sort of "affirmative obligation," nor does Title IX specifically state that students have a right to expect that they can attend school without being harassed. The plain language of AB 2543 demonstrates that California law was

intended to be more expansive than the post-*Davis* interpretation of Title IX.

Finally, in a particularly telling passage, AB 2543 bluntly states "it is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to an equal educational opportunity." Again, the plain language of the bill demonstrates that California law diverges from Title IX in critically important ways. Accordingly, the evolution of the anti-harassment provisions of the Education Code demonstrates that those provisions are more protective than the post-*Davis* understanding of Title IX.

According to the report of the April 6, 1994 hearing of the Assembly Committee on Education, the author of AB 2543 intended the law to "combat the increasing incidence of on-campus hate crimes" by fostering "cultural awareness and tolerance for all races at an early age and on a regular basis." The report goes on to note that the development of appropriate educational policies may "reduce prejudice by striking at cultural ignorance" while indicating that opponents of the bill expressed fear of the so-called "homosexual agenda." The report indicates that hate incidents were extensive on California campuses, noting that the Los Angeles Human Relations Commission documented 2,265 such incidents during the 1988-89 school year. The recognition that bias-motivated harassment was widespread and that affirmative steps must be taken by schools in order to prevent such incidents belies Petitioners' claim that the Legislature did not intend for California's anti-harassment laws to provide any greater protection than pre-existing federal law.

C. AB 537 Adds Protections Based on Sexual Orientation

AB 537 added protections for students from discrimination based on sexual orientation to section 200 *et seq.* of the Education Code. (Stats 1999 ch. 587) Sexual orientation was not specifically named, but instead was added by reference to the classifications named in section 422.55 of the Penal Code, which defines and provides enhanced penalties for the commission of bias-motivated crimes.[3]

---

[3] The Senate Committee on Education report regarding AB 537 states that the law differed from Assembly Bill number 222 (1999-2000 Reg. Sess.) (AB 222), which narrowly failed to pass the legislature in a floor vote on June 4, 1999, in that AB 537 contained " a more narrowly drawn set of prohibitions against discrimination on the basis of sexual orientation." The report notes that "AB 222 had a more ambitious set of objectives, which included the prohibition of discrimination on the basis of sexual orientation in the areas of employment in education, and the operation of alternative schools, charter schools, or interscholastic athletics." Although AB 222 was broader than the law passed by AB 537 in that it applied in more contexts, its lengthier provisions did not address the elements of a cause of action or the standard of liability for a private suit seeking to enforce the law. The Enrolled Bill Report issued by the Office of the Secretary of Education on September 23, 1999 noted that the primary difference between AB 222 and AB 537 was that AB 537 prohibited discrimination on the basis of sexual orientation by reference to the Penal Code instead of doing so in the text of the Education Code, because some legislators "wanted to vote for the bill as long as it did not contain the phrase sexual orientation." These legislators also had insisted that a "specific prohibition on the applicability of the bill to curriculum be included in the bill and Assemblymember Kuehl accepted such an amendment." These changes from AB 222 do not in any way affect or specifically illuminate the elements of a claim under section 200 et seq. of the Education Code.

D. SB 1234 Ties School Anti-Harassment Protections to Criminal Hate Crime Laws and Clarifies Protections for Students Who Are Perceived as Having Protected Personal Characteristics

Five years after the passage of AB 537, SB 1234 revised California's laws regarding bias-motivated criminal offenses. The bill also amended sections 200 and 220 of the Education Code to protect students from harassment and bias motivated violence on the basis of perceived, as well as actual, traits. This further demonstrates the Legislature's determined intent to provide meaningful anti-bias protection for all students. Consequently, Education Code sections 200 *et seq.* offer protection to all California students and is intended to confront all forms of bias in schools, whether that bias targets students based on religion, sexual orientation, race, ethnicity, or even if that bias stems from another student's misperception of a student's characteristics. For example, the law protects a heterosexual student who is perceived to be gay, or a "tomboy" who is harassed for failing to conform to feminine stereotypes. As a further illustration, the law would also direct schools to take steps to prevent atheist students from ridiculing religious students, and vice-versa. It is the very breadth of the anti-harassment protections under the Education Code that most clearly demonstrate that the Legislature intended those laws to impose a more protective standard than the one articulated in *Davis*.

SB 1234 further amended the Education Code to track the revised section numbers in the amended hate crime provisions of the Penal Code. Although neither the text of the bill nor the legislative history speaks directly to the elements of a claim under Education Code section 200 *et seq.*, SB 1234 does reinforce the distinction between the anti-harassment provisions of the Education Code and the anti-discrimination protections offered by the post-*Davis* understanding of federal Title IX by employing

the criminal law hate crime framework and its emphatic condemnation of bias-motivated abuse.

E. SB 777 Clarifies the Education Code Without Changing its Anti-Harassment Provisions.

Senate Bill number 777 (2007-2008 Reg. Sess.) (SB 777) was enacted by the Legislature after the events relevant to this appeal and the trial of this matter in the Superior Court for San Diego County. The bill amended the Education Code section 220 to prohibit harassment and discrimination on the basis of sexual orientation in the educational context. As noted above, the Education Code has included sexual orientation nondiscrimination provisions by reference to section 422.55 of the Penal Code since 1999. Nothing in the legislative history of SB 777 indicates that this revision was intended to modify the elements of a claim for damages or that the passage of SB 777 was necessary in order to provide that the protections for students in California are more rigorous than the protection provided by federal Title IX after *Davis*. Indeed, the Senate Judiciary Committee report on SB 777 confirmed that prior California law provides "broad protections" for students from harassment and discrimination, in obvious contrast to the protection from harassment offered under the post-*Davis* interpretation of federal Title IX.

Petitioners argue that the elements of a student's cause of action for peer harassment under section 200 *et seq.* of the Education Code should be identical to the elements of a claim under Title IX of the United States Code. Even if this had been true in 1982, when anti-discrimination protections were first added to the Education Code, and despite the fact that prior to *Davis* the federal law was understood to impose a duty of reasonable care (see, OCR Sexual Harassment Guidance at p. 12,039), it is

no longer the case. The Education Code has been amended multiple times since then to provide progressively stronger and more explicit anti-harassment protections for students in California. Accordingly, the anti-harassment protections offered by the post-*Davis* interpretation of Title IX are not an appropriate measure of the elements of a claim under the anti-harassment provisions of the Education Code.

F. The Fair Employment and Housing Act Provides a Model For the Elements of a Claim of Harassment Under the Education Code

Other provisions of California law provide guidance as to the elements of a harassment claim under the Education Code. As discussed extensively in Combined Respondents' Brief and Cross-Appellants' Opening Brief, the Fair Employment and Housing Act (FEHA) provides the appropriate reference. FEHA is specifically referenced in Education Code section 201, subdivision (g), and, unlike Title IX, FEHA specifically addresses peer-on-peer harassment and provides explicit remedies. (Gov. Code § 12940 subd. (j).) As the California Supreme Court has held:

> One "elementary rule" of statutory construction is that statutes in *pari materia*-that is, statutes relating to the same subject matter-should be construed together. We have long recognized the principle that even though a statute may appear to be unambiguous on its face, when it is considered in light of closely related statutes a legislative purpose may emerge that is inconsistent with, and controlling over, the language read without reference to the entire scheme of the law. The rule of in *pari materia* is a corollary of the principle that the goal of statutory interpretation is to determine legislative intent.

(*Droeger v. Friedman, Sloan & Ross* (Cal. 1991) 54 Cal.3d 26, 50.) Because both FEHA and the Education Code specifically address harassment and share the same legislative purpose, they should be read

consistently with one another. Accordingly, the elements of a FEHA claim inform the elements of a claim under California Education Code sections 200 *et seq.*

Reference to the standard of liability found in FEHA is also supported by the fact that all of the bills directly relevant to the standard of liability for violations of Education Code sections 200 *et seq.* predate *Davis v. Monroe County, supra,* 526 U.S. at p. 629. In 1990 SB 1854, codified as section 262.3, created a private right of action for students who have been subjected to bias-motivated harassment. AB 2543, which was enacted in 1994, imposed an "affirmative obligation" on educators to take reasonable steps to address bias-related harassment and expressed the Legislature's intent to "minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to an equal educational opportunity." (Ed. Code, sec. 201.) The Legislature certainly did not intend the *Davis* standard to apply with respect to these key enforcement provisions; the U.S. Supreme Court had yet to establish the *Davis* standard. What was well established in California law at the time, however, was the reasonableness standard that had evolved over many years to control abusive harassment in the employment and public accommodations contexts. (See, e.g., *Rojo v. Kliger* (1990) 801 P.2d 373, 376 n.4 [upholding sexual harassment claim, and relying on Commission's construction of FEHA and controlling interpretations of Title VII); see also *Etter v. Veriflo Corp.* (1998) 79 Cal. Rptr. 2d 33, 37 [upholding racial harassment claim under FEHA]; *Doe v. Capital Cities* (1996) 58 Cal. Rptr. 2d 122, 126 [holding that similar standards apply to claims of same-sex sexual harassment as to mixed-sex sexual harassment].) Accordingly, rather than the inconsistent *Davis* standard that had yet to be adopted to govern Title IX claims, the Department of Education Office of Civil Rights' pre-*Davis* guidelines, which provided that educators shall be liable if they fail to take reasonable

steps to curb harassment when they know or should know that the harassment is occurring, was consistent with California's existing liability standard under other then-existing anti-harassment statutes. The OCR guidelines thus are the logical contemporaneous referent to confirm the Legislature's intent in providing what was offered to be a useful tool for students harmed by harassment fueled by bias.

In stark contrast to the pre-*Davis* amendments, the enactments that followed the *Davis* decision — AB 537, SB 1234, and SB 777 — all added additional personal characteristics, or provide clarifying definitions of characteristics, as to which the anti-discrimination provisions of the Education Code forbid abusive harassment. For example, AB 537 added sexual orientation to the enumerated characteristics, and SB 1234 clarified that these protections apply to perceived, as well as actual, personal characteristics. In short, the post-*Davis* amendments to section 200 *et seq.* clarify who is protected, but they do not materially alter the scope of that protection. Again, since the bills relevant to the actual standard of liability under section 200 et seq. all predate *Davis*, it is not plausible that the Legislature could have intended for the *Davis* standard to apply.

FEHA, codified at Government Code section 12940, Subdivision (j)(1), provides a cause of action for an employee subjected to a hostile workplace environment. The provision states that it is unlawful for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass and employee, an applicant, or a person providing services pursuant to a contract." (*Ibid*) The law further directs that [a]n entity shall take all reasonable steps to prevent harassment from occurring." (*Ibid*) Government Code section 12940, subdivision (k) provides that it is an unlawful employment practice for "an employer, labor organization,

employment agency, apprenticeship training program, or any training program leading to employment, to fail to take reasonable steps necessary to prevent discrimination and harassment from occurring."

The Judicial Council of California has outlined the elements of a cause of action under Government Code section 12940, subdivision (j)(1) in Civil Jury Instruction, CACI 2527. These elements are[4]:

1. Plaintiff was an employee of defendant;

2. Plaintiff was harassed due to a protected personal characteristic;

---

[4] The verbatim text of the instruction is as follows:

That [*name of plaintiff*] claims that [*name of defendant*] failed to prevent [harassment/discrimination/retaliation] [based on [*describe protected status -- e.g. race, gender, or age*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] [was an employee of [*name of defendant*]/applied to [*name of defendant*] for a job/was a person providing services under a contract with [*name of defendant*]];

2. That [*name of plaintiff*] was subjected to [*either:*]

[[harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status*];

[or]

retaliation because [he/she] [opposed [*name of defendant*]'s unlawful and discriminatory employment practices/ [or] [[filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]];

3. That [*name of defendant*] failed to take reasonable steps to prevent the [harassment/discrimination/retaliation];

4. That [*name of plaintiff*] was harmed; and

5. That [*name of defendant*]'s failure to take reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [*name of plaintiff*]'s harm.

3. Defendant failed to take reasonable steps to prevent the harassment;

4. That plaintiff was harmed; and

5. That defendant's failure to take reasonable steps to prevent the harassment was a substantial factor in causing plaintiff's harm.

The Judicial Council further notes that, in order to be actionable, harassment must be sufficiently "severe or pervasive" in order to create a hostile or abusive environment. (Judicial Council of Cal. Civil Jury Instruction, CACI 2524 (2008), citing *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [internal citations omitted].) Most recently, the Judicial Council has promulgated Civil Jury Instruction, CACI 2521A to outline the essential elements of a claim for hostile work environment harassment. The elements of a claim as found in that model instruction are[5]:

---

[5]The verbatim text of the instruction is as follows:

> [*Name of plaintiff*] claims that [he/she] was subjected to harassment based on [his/her] [*describe protected status, e.g. race, gender or age*] at [*name of defendant*], causing a hostile or abusive work environment. To establish this claim, [*name of plaintiff*] must prove all of the following:
> 1. That [*name of plaintiff*] was [an employee of/ a person providing services under a contract with] [*name of defendant*];
> 2. That [*name of plaintiff*] was subjected to unwanted harassing conduct because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status*];
> 3. That the harassing conduct was severe or pervasive;
> 4. That a reasonable [*describe member of a protected group, e.g. woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment hostile or abusive;
> 5. That [*name of plaintiff*] considered the work environment to be hostile or abusive;

1. Plaintiff was an employee of defendant;

2. The harassment of the plaintiff was motivated by a particular personal characteristic (sex, race, etc...);

3. The harassing conduct was severe or pervasive;

4. A reasonable person in plaintiff's circumstances would have considered the work environment hostile or abusive;

5. Plaintiff considered the work environment to be hostile or abusive;

6. Defendant knew or should of known of the harassment; and,

7. Plaintiff was harmed by the harassment.

Accordingly, because the legislative history of section 200 *et seq.* of the Education Code indicate that the successively amended anti-harassment protections of that law are intended to be more robust than the protections offered under Title IX as construed by *Davis v. Monroe County*, supra, 526 U.S. at p. 629, and because the closest analogous law is the California Fair Employment and Housing Act, the elements of a claim for damages for failure to take appropriate steps to curb student-on-student harassment under the Education Code are:

1. Plaintiff was a student;

---

6. [Select applicable basis of defendant's liability:]
[That a supervisor engaged in the conduct]
[That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
7. That [*name of plaintiff*] was harmed; and
8. That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

2. Plaintiff was subjected to unwanted harassing conduct based on a personal characteristic listed in section 220 of the California Education Code;

3. The harassing conduct was severe or pervasive;

4. A reasonable person in plaintiff's circumstances would have considered the educational environment hostile or abusive;

5. Plaintiff considered the educational environment to be hostile or abusive;

6. Defendant knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action;

7. Plaintiff was harmed; and

8. The harassing conduct was a substantial factor in causing plaintiff's harm.

The foregoing elements of a claim fulfill the Legislature's intent to provide effective anti-harassment protections for students in California.

DAMAGES AVAILABLE UNDER SECTION 200, *ET. SEQ.* OF THE EDUCATION CODE

The Court has further instructed the parties to brief the issue of what remedies are available under section 200 *et seq.* of the Education Code. Current law provides that students who have been subjected to bias-motivated harassment in California's schools are entitled to "civil law remedies, including but not limited to injunctions, restraining orders, or other remedies or orders." (Cal. Ed. Code § 262.3.) The United States District Court for the Eastern District of California has held that damages available under the anti-harassment and anti-discrimination provisions of

the California Education Code include the full range of monetary civil damages, including punitive damages, because section 262.3 does not limit the remedies allowed. (*Gay Straight Alliance Network v. Visalia Unified Sch. Dist.* (2001 E.D. Cal.) 262 F.Supp.2d 1088.)

The legislative history of the anti-harassment and anti-discrimination provisions of the Education Code further indicates that a broad range of civil remedies, including awards of compensatory and punitive damages, are available to plaintiffs. As discussed further below, although AB 3133, codified at Education Code Section 200 *et seq.*, did not specifically provide for a civil cause of action, either for injunctive relief or damages, subsequent amendments to the Education Code have provided for a broad range of civil damages. The present version of the law accordingly does provide for a full range of "civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders." (Ed. Code, § 263.3, subd. (b).)

The Sex Equity in Education Act, Assembly Bill number 499 (1997-1998 Reg. Sess.) (AB 499), is a helpful starting place on this issue. The Assembly Judiciary Committee report on AB 499 addressed whether "remedies for discrimination in education [should] be made consistent with federal law to include the availability of monetary damages." (Assem. Com. On Judiciary, Education: Remedies For Discrimination, Bill Analysis of Assem. Bill. No. 499 (1997-1998 Reg. Sess.) [emphasis added], available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0451-0500/ab_499_cfa_19970415_165510_asm_comm.html> (last visited April 15, 2008).) The committee report captured the answer to that question, recording that the bill was "intended to make the statutes consistent with other statutes providing a remedy for the same or similar allegations of discrimination." (*Ibid.*) Accordingly, the Legislature intended that the damages available under Education Code section 200 *et seq.* should mirror

the damages available under other anti-discrimination and anti-harassment provisions of California law and achieve consistency in this area of law. Such damages include actual damages, including but not limited to, damages for emotional injuries. (Gov. Code § 12970.) The Fair Employment and Housing Act also specifically provides for awards of punitive, as well as actual, damages. (Gov. Code, §§ 12965, 12989.2.)

More specifically, section 201, subdivision (g) of the Education Code, codifies the Legislature's intention that remedies available under section 200 *et seq.* of the Education Code should be consistent with certain other anti-discrimination and anti-harassment provisions, including FEHA and the Unruh Civil Rights Act (Civ. Code, § 51), both of which expressly allow a full range of remedies, as well as Title IX. A comparison of Title IX and Section 200 *et seq.* of the Education Code provides great insight as to the intent of the Legislature regarding the range of damages the Legislature intended to provide for students who have been harmed by discrimination and harassment.

Despite the fact that Title IX does not expressly provide for a private cause of action as FEHA and the Unruh Act do, the United States Supreme Court concluded that students must have an implied right of action to sue for discrimination in violation of Title IX. (*Cannon v. University of Chicago* (1979) 441 U.S. 677 [99 S.Ct. 1946].) Title IX also does not expressly provide for remedies, either injunctive or monetary, but the United States Supreme Court similarly has recognized there is an implied right to recover monetary damages under Title IX. (*Franklin v. Gwinnett County Public Schools* (1992) 503 U.S. 60 [112 S.Ct. 1028].)

In stark contrast, Education Code section 262.3 specifically authorizes plaintiffs to sue and provides that "[p]ersons who have filed a complaint, pursuant to this chapter, with an educational institution shall be advised by the educational institution that civil law remedies, including, but

not limited to, injunctions, restraining orders, or other remedies or orders may also be available to complainants." Education Code section 262.4 also explicitly states "[t]his chapter may be enforced through a civil action." AB 499 added the foregoing language to the California Education Code during the 1997-1998 session, long after the U.S. Supreme Court had concluded there must be both a private right of action and a right to monetary damages under Title IX. As "[t]he Legislature is presumed to be aware of existing law at the time it considers enacting a statute" (*An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal.App.4th 1418), we must infer that the Legislature knew there was an implied private right of action and a right to recover monetary damages under Title IX when it amended Section 262 by enacting AB 499. Because the Legislature intended Section 200 *et seq.* of the Education Code to be read consistently with Title IX, and also with FEHA and the Unruh Act, there can be no serious question that California law provides for an award of monetary damages just as these federal and state statutes do.

Furthermore, Education Code section 200 *et seq.* provide that the Code must be read consistently with Title IX "except where this chapter may grant *more* protections or impose additional obligations, and that the remedies provided herein *shall not be the exclusive remedies*, but may be combined with remedies that may be provided by the above statutes." (Ed. Code § 201, subd. (g), [italics added].) The text of the Education Code expressly incorporates the remedies available under other civil rights statutes, including Title IX. The Code provides that, although California law may be more protective of students than federal Title IX, it cannot be interpreted as less protective. This straightforward statement of legislative intent removes any possible remaining doubt that the California Legislature has provided meaningful remedies for plaintiffs suing based upon harm suffered due to violation of the protections set forth in section 200 *et seq.* of

the Education Code, and that those remedies must include appropriate monetary damages consistent with Title IX.

CONCLUSION

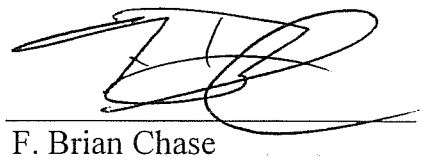
The anti-discrimination provisions of the California Education Code have developed over the past several decades to provide greater and greater protections for students in our state. The law originally offered protection against abuse based on sex, but now also protects students from discrimination based on religion, sexual orientation, nationality or race. As the anti-harassment and anti-discrimination protections have evolved to encompass more personal characteristics, the protections themselves have also become more robust. Legislators have added language confirming that educators' have an "affirmative obligation" to intervene and stop bias-related harassment and discrimination. The law was clarified to specifically provide students with a private cause of action, and to make it clear that plaintiffs may pursue a wide range of remedies under the law, including money damages. This explicit legislative commitment to equal educational opportunity and student safety, and clear progression in the law, demonstrate beyond any serious question that students in California may seek compensation from school administrators where, as is the case here, those administrators fail to respond reasonably to severe or pervasive on-campus harassment and discrimination based on sexual orientation.

Dated: April 15, 2008.

Respectfully submitted,

F. Brian Chase (SBN 242542)
Hayley Gorenberg (Pro Hac Vice)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND

Paula Rosenstein (SBN 126264)
Bridget J. Wilson (SBN167632)
ROSENSTEIN, WILSON & DEAN

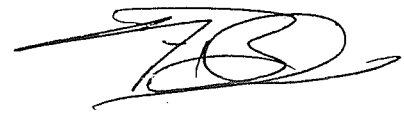
By: 

F. Brian Chase
Counsel for Respondents and
Cross-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that, excluding tables and this certificate, but including footnotes, the foregoing brief contains 5976 words, based on the computer program used to prepare the brief.

Dated: April 15, 2008

By: 

F. Brian Chase
Counsel for Respondents and
Cross-Appellants

DECLARATION OF SERVICE

I, Jamie Farnsworth, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On April 15, 2008, I served a copy of the attached document, described as **RESPONDENTS/CROSS APPELLANTS' SUPPLEMENTAL BRIEF,** on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:

George E. Murphy Suzanne M. Nicholson Farmer, Murphy, Smith & Alliston 8801 Folsom Blvd., Ste. 230 Sacramento, CA 95826 *Attorneys for Appellants*	Daniel R. Shinoff Jeffery A Morris Paul V. Carelli, IV Stutz, Atriano, Shinoff & Holtz 2488 Historic Decatur Rd., #200 San Diego, CA 92106 *Attorneys for Appellants*	Paula S. Rosenstein Bridget J. Wilson Rosenstein, Wilson & Dean 1901 First Avenue, Suite 300 San Diego, CA 92101 *Attorneys for Respondents*
Clerk of the Court (4 copies) California Supreme Court 350 McAllister Street San Francisco, CA 94102	David Blair-Loy Charles Pratt ACLU Foundation of San Diego & Imperial Counties PO Box 87131 San Diego, CA 92138 *Attorneys for Amicus Curiae*	The Honorable Steven R. Denton San Diego County Superior Court 330 West Broadway San Diego, CA 92101
Natalie Nardecchia ACLU Foundation of Southern California 1616 Beverly Blvd. Los Angeles, CA 90026 *Attorney for Amicus Curiae*	Kellie M. Murphy, Esq. Lehoa Nguyen, Esq. Johnson Schachter & Lewis 2180 Harvard Street, Suite 560 Sacramento, CA 95815 *Attorneys for Amicus Curiae*	Alex Cleghorn ACLU Foundation of Northern California 39 Drumm St. San Francisco, CA 94103 *Attorney for Amicus Curiae*

I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice, this correspondence would be deposited with the U.S. Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 15, 2008

Jamie Farnsworth