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Cause for Action for Student-on-Student Sexual Harassment under the Missouri Human Rights Act, A

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NOTE

A Cause of Action for Student-on-Student Sexual Harassment Under the Missouri Human Rights Act

Doe ex rel. Subia v. Kansas City, Missouri School District, 372 S.W.3d 43 (Mo. App. W.D. 2012)

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I. INTRODUCTION

School districts have an obligation "to protect children in their charge from foreseeable dangers," and a school district's "first imperative must be to do no harm to the children in its care."[1] It seems there would be no argument against guaranteeing students an education free of peer sexual harassment, but there is controversy when determining how much obligation a school district has in ensuring such a guarantee. In *Doe ex rel. Subia v. Kansas City, Missouri School District*, the Missouri Court of Appeals for the Western District found that Missouri's schools districts have a responsibility under the Missouri Human Rights Act (MHRA) to protect students from peer sexual harassment.[2]

Before *Doe*, in order to guarantee that students would not be sexually harassed in a way that would deprive them of their access to public education, legislation like Title IX was used as a vehicle for state and federal courts to provide redress to students who had been victims of peer sexual harassment.[3] However, imposing liability on school districts is controversial because school districts do not have complete control over the behavior of students.[4] When the Supreme Court of the United States allowed a cause of action against public school districts for student-on-student sexual harassment under

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1. L.W. *ex rel.* L.G. v. Toms River Reg'l. Sch. Bd. of Educ., 915 A.2d 535, 550 (N.J. 2007).

2. 372 S.W.3d 43 (Mo. App. W.D. 2012).

3. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).

4. *Id.* at 664-67 (Kennedy, J., dissenting).

Title IX, Justice Kennedy stated in his dissent, "the fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion."[5]

Missouri public schools are familiar with harassment and bullying among students.[6] The state legislature attempted to address this issue in 2007 when it passed a state statute that would require every school district to adopt an anti-bullying policy.[7] The state courts are the latest to join in the battle to end harassment in schools, specifically student-on-student sexual harassment, but the courts operated under a different statute than Title XI: the Missouri Human Rights Act.

Claims for peer sexual harassment in the workplace are commonly filed under the MHRA, but a claim against a public school district had never been decided in Missouri until 2012.[8] The notion of a public school district being liable for peer sexual harassment is controversial. Most claims have been filed under Title IX[9] and few have been filed under state civil rights laws.[10] Under Title IX, the Supreme Court of the United States has held that a public school district is liable if it acted with "deliberate indifference to *known* acts of harassment[.]"[11]

The Missouri Court of Appeals for the Western District is the first to decide whether a public school district can be liable under the MHRA.[12] In doing so, the court has imposed a lower standard of liability than Title IX's

5. *Id.* at 657.

6. In 2006, a 13-year-old suburban St. Louis girl committed suicide after being harassed on MySpace. *Parents: Cyber Bullying Led to Teen's Suicide*, ABC GOOD MORNING AM. (Nov. 19, 2007), http://abcnews.go.com/GMA/story?id=3882520 page=1#.UIrx-3g2_FI. A year later, a Kansas City suburban elementary school was shook by tragedy when a 12-year-old boy hanged himself after enduring years of harassment by classmates. Alan Scher Zagier, *Parents Blame Bullies for 5th-Grade Suicide*, ABC NEWS (Feb. 27, 2009), http://abcnews.go.com/US /wireStory?id =4139504#.UIrxl3g2_FI.

7. 2006 Mo. Laws 667 (codified at MO. REV. STAT. § 160.775 (Supp. 2011)).

8. Doe *ex rel.* Subia v. Kan. City, Mo. Sch. Dist., 372 S.W.3d 43, 47 (Mo. App. W.D. 2012), *transfer denied*.

9. *See, e.g.*, *Davis*, 526 U.S. 629 (1999) (holding that a school board may be liable for monetary damages under Title IX when it shows a deliberate indifference to peer sexual harassment); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (holding that a school could be liable under Title IX for sexual harassment of a student by a teacher if the school had actual knowledge of harassment and showed a deliberant indifference to the harassment); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992) (holding that a damage remedy is available against schools violating Title IX).

10. *See* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1093-95 (D. Minn. 2000); L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 548-49 (N.J. 2007).

11. *Davis*, 526 U.S. at 633 (emphasis added).

12. *Doe*, 372 S.W.3d at 47.

actual knowledge standard with the purpose of broadening the reach and protection of the MHRA.[13]

This Note argues that a cause of action under the MHRA is problematic because it misapplies the law with respect to public schools, creating limitless liability against school districts. The cost of damages and legal fees could overwhelm many of Missouri's school districts, taking taxpayer money from funding education and putting it in the pockets of attorneys and plaintiffs.

II. FACTS AND HOLDING

Doe was a male elementary school student in the Kansas City, Missouri School District (School District).[14] Doe alleged that another male student sexually harassed him on multiple occasions beginning in May 2009.[15] Doe claimed the perpetrator would climb under the stalls in the boys' restroom to commit the sexual harassment.[16] Doe further alleged that even though school administrators and teachers responsible for the perpetrator had knowledge of the behavior, "school personnel permitted the perpetrator to use the restroom at the same time as other male students."[17] In October 2009, Doe filed a charge of discrimination against the School District with the Missouri Commission on Human Rights (Commission).[18]

Doe claimed he experienced "emotional distress in the form of anxiety, fear, and depression" due to the sexual harassment and sexual assaults.[19] He asserted that (1) the sexual harassment constituted sex discrimination; (2) his elementary school was a public place of accommodation; and (3) he was "deprived of the full, free, and equal use and enjoyment of the school and its services" because of the School District's acts and omissions.[20] Doe claimed the School District's conduct violated the MHRA.[21] Doe further asserted the School District was liable for the actions of the elementary school's personnel under the doctrine of *respondeat superior* because the personnel were agents, servants, and employees of the School District.[22] Doe sought compensatory

13. *Id.* at 48-51.

14. *Id.* at 46. Because Doe was a minor, his guardian ad litem filed the claim on his behalf. *Id.* at 43.

15. *Id.* at 46.

16. *Id.* Doe did not plead further facts about the sexual harassment to protect the identities of the students involved. Appellant's Brief at 12 n.1, *Doe*, 372 S.W.3d 43 (No. WD73800). When the petition was filed, the case had not been sealed. *Id.*

17. *Doe*, 372 S.W.3d at 46.

18. *Id.* Doe received a Notice of Right to Sue from the Commission and filed a petition against the School District in October 2010. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; *see* MO. REV. STAT. §§ 213.010-.137 (2000).

22. *Doe*, 372 S.W.3d at 46.

and punitive damages.[23] The School District filed a motion to dismiss Doe's petition, and the circuit court granted the motion on the basis that Doe failed to state a cause of action under the MHRA against the School District.[24] Doe appealed the Circuit Court of Jackson County's dismissal.[25]

On appeal, Doe argued the circuit court should not have dismissed his petition because "the MHRA prohibits student-on-student sexual harassment that rises to the level of sex discrimination in a public accommodation," and because he alleged sufficient facts to state such a claim under Missouri Revised Statutes section 213.065 of MHRA.[26] On his MHRA claim, Doe raised five issues on appeal: (1) the elementary school he attended was a public accommodation under the MHRA;[27] (2) the MHRA prohibited sex discrimination in public accommodations;[28] (3) section 213.065 encompassed discrimination based on peer sexual harassment, and the school district was liable for "indirectly" denying the benefits of a public accommodation;[29] (4) the standard for determining a school district's liability for peer sexual harassment should be the "know or should have known" standard for determining employer liability under the MHRA;[30] and (5) the allegations of his petition were sufficient to state a cause of action under the standard of liability.[31]

In response, the School District argued that (1) the elementary school was not a public accommodation because "the building [was] not in fact open to the public";[32] (2) the MHRA's definition of discrimination limited "the

23. *Id.*

24. *Id.* at 46-47.

25. *Id.* at 47.

26. *Id.* Section 213.065 of the MHRA provides that "[a]ll persons within the jurisdiction of the state of Missouri . . . shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation . . . without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or disability." MO. REV. STAT. § 213.065.

27. *Id.* at 48.

28. *Id.* at 50.

29. *Id.* at 51.

30. *Id.* at 52; *see*, *e.g.*, Barekman v. City of Republic, 232 S.W.3d 675, 679 (Mo. App. S.D. 2007) (holding that "[a]n employer is liable [under Section 213.055.1(1)(a) of the MHRA] for the sexual harassment of one co-worker by another if the employer *knew or should have known* of the harassment and failed to take prompt and effective remedial action" (emphasis added) (quoting Mason v. Wal-Mart Stores, Inc., 91 S.W.3d 738, 742 (Mo. App. W.D. 2002))). Initially, Doe pled the actual knowledge standard in his petition. Petition at 4, *Doe*, 372 S.W.3d 43 (No. WD 73800). It is likely that Doe chose to file a claim under the MHRA rather than Title IX because the actual knowledge standard of liability is more difficult to prove. *See* discussion *infra* Part IV.D.

31. *Doe*, 372 S.W.3d at 54.

32. *Id.* at 48-49 (internal quotation marks omitted). The School District claimed that its buildings are not open to the public because members of the general public do not have unrestricted access to it and Missouri law controls students' enrollment in

context in which such claims can occur[,]" and public schools are excluded from that context;[33] (3) Doe failed to plead sufficient facts establishing vicarious liability, but was instead attempting to hold the School District liable for the perpetrator's conduct;[34] (4) the applicable standard of liability for peer sexual harassment is the "actual knowledge standard"[35] applied in actions brought under Title IX;[36] and (5) the allegations of Doe's petition were insufficient to state a cause of action because Doe did not allege he was actually denied or refused access to school and young elementary school children cannot engage in conduct constituting unlawful sexual harassment.[37]

The appellate court reversed the circuit court's dismissal and remanded the case to the circuit court.[38] The appellate court held that (1) a public school is a public accommodation under the MHRA;[39] (2) the MHRA prohibits sex discrimination in public schools;[40] (3) the MHRA's prohibition against indirectly denying benefits to public accommodations encompassed Doe's claim against the School District;[41] (4) a public school district can be liable for peer sexual harassment "if it knew or should have known of the harassment and failed to take prompt and effective remedial action;"[42] and (5) Doe's allegation that he was sexually harassed was sufficient to plead that he was discriminated against in his use of the school.[43]

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public schools based upon "age, residency, and immunization requirements." *Id.* at 49.

33. *Id.* at 50.

34. *Id.* at 51. Specifically, the School District argued that the pled facts were insufficient to establish it was vicariously liable under the doctrine of *respondeat superior*. *Id.* In his petition, Doe pled that the School District was liable for the actions of teachers and school officials under the doctrine of *respondeat superior*. Petition for Damages at 4, *Doe*, 372 S.W.3d 43 (No. 1016-CV30364).

35. The United States Supreme Court held that Title IX allows a private action for damages against a school board based on sexual harassment where the board is a funding recipient acting with "deliberate indifference to known acts of harassment in its programs or activities." Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

36. *Doe*, 372 S.W.3d at 54. The Missouri School Boards' Association joined the School District in this argument through an *amicus curiae* brief. *Id.*; *see also* Missouri School Boards' Association's Amicus Curiae Brief in Support of Respondent, Kansas City, Missouri School District, *Doe*, 372 S.W.3d 43 (No. WD 73800) [hereinafter Amicus Brief for Respondent], 2011 WL 7452084, at *21-24.

37. *Doe*, 372 S.W.3d at 55.

38. *Id.* at 46.

39. *Id.* at 48.

40. *Id.* at 51.

41. *Id.* at 51-52.

42. *Id.* at 54.

43. *Id.* at 54-55.

III. LEGAL BACKGROUND

Students bringing sexual harassment claims against public school districts have primarily filed these claims in federal court under federal law. Few claims have been brought under state law and most are coupled with federal claims. First, this Part will discuss federal liability for harassment beginning with liability under Title IX. Second, this Part will discuss state liability, focusing on the MHRA, Missouri's anti-bullying policy requirement, and how other state legislatures and courts have addressed the issue.

A. Federal Liability for Harassment Under Title IX

Generally, students who experienced harassment at the hands of students or teachers initially attempted to bring actions under 42 U.S.C. section 1983,[44] but over time, theories of liability based on violations of Title IX of the Education Amendments Acts of 1972[45] became more successful in federal courts.[46] After federal courts determined that a school district could be liable for peer sexual harassment, the issue became what the standard of liability should be.[47] In determining the standard, federal courts have compared Title IX to Title VII of the Civil Rights Act of 1964.[48] The reasoning of the Supreme Court of the United States in determining the standard has impacted

44. *See generally* Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that schools and school officials may be liable for § 1983 claims for equal protection violations based on peer harassment, but not for due process claims); B.M.H. v. Sch. Bd., 833 F. Supp. 560 (E.D. Va. 1993) (holding that a student did not sufficiently state a § 1983 claim for peer harassment and assault because the school does not have an affirmative obligation to protect students under federal law); Pagano v. Massapequa Pub. Sch., 714 F. Supp. 641 (E.D.N.Y 1989) (holding that a student had a valid § 1983 action against school officials for failure to prevent continuing instances of peer harassment).

45. "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 education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681 (2006).

46. *See generally* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (holding that a school board may be liable for monetary damages under Title IX when it shows a deliberate indifference to peer sexual harassment); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (holding that a school could be liable under Title IX for sexual harassment of a student by a teacher if the school had actual knowledge of harassment and showed a deliberant indifference to the harassment); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992) (holding that a damage remedy is available against schools violating Title IX).

47. *See Davis*, 526 U.S. at 646-47.

48. *See id.* at 643 (citing *Gebser*, 524 U.S. at 283).

courts in determining the same issue under state law.[49] Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance[.]"[50]

In *Franklin v. Gwinnett County Public Schools*, the Supreme Court of the United States found that there is an implied right of action for money damages against schools violating Title IX.[51] *Franklin* involved a suit for sexual harassment of a student by a teacher over a period of two years.[52] The Court relied on the general rule "that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[53]

Following *Franklin*, the Supreme Court of the United States applied some of the section 1983 standards in *Gebser v. Lago Vista Independent School District*, noting that school officials can be liable in damages for teacher-on-student sexual harassment if the school has actual knowledge of the harassment but showed a deliberate indifference to such harassment.[54] In *Franklin*, the court found that a private right of action under Title IX is judicially implied, but did not define a scope of the available remedies.[55] *Gebser* took up the issue of what remedies could be afforded to a plaintiff.[56]

Gebser considered the contractual nature of Title IX to define the scope of available remedies.[57] Title IX is contractual in nature because Congress has attached conditions to the award of federal funds under its spending power.[58] The Court defined a standard that required a school district to have actual notice of harassment in order to be liable because Title IX's express means of enforcement requires actual notice to the funding recipient and an opportunity to voluntarily comply.[59] This also supported the Court's finding that damages cannot be recovered from a school district under Title IX based on principles of *respondeat superior* when the school district did not have

49. *See, e.g.*, Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1094-95 (D. Minn. 2000) (analyzing peer sexual harassment claim under state law); Doe *ex rel.* Subia v. Kan. City, Mo. Sch. Dist., 372 S.W.3d 43, 53-54 (Mo. App. W.D. 2012), *transfer denied*; L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 548-49 (N.J. 2007).

50. 20 U.S.C. § 1681(a).

51. *Franklin*, 503 U.S. at 76.

52. *Id.* at 63.

53. *Id.* at 70-71.

54. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

55. *Id.* at 284-85 (citing *Franklin*, 503 U.S. at 77-78).

56. *Id.* at 287.

57. *Id.*

58. *Id.* at 286.

59. *Id.* at 288.

actual notice of the teacher's conduct and an opportunity to remedy the harassment.[60]

The students in *Gebser* relied on the standard of liability defined in the context of sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964,[61] but the Court noted that the contractual framework of Title IX distinguishes it from Title VII.[62] The purpose of Title VII is "centrally to compensate victims of discrimination [in the workplace], Title IX focuses more on 'protecting' individuals from discriminatory practices . . . ."[63] This difference supported the Court's decision to adopt a different standard of liability.[64] Under Title VII, the standard of liability for an employer is constructive notice, where the employer knew or should have known about harassment but failed to address and remedy it.[65] Agency principles are applied to find liability under Title VII because discrimination prohibition runs against an "employer" which is defined to include "any agent."[66] Because Title IX does not have a "comparable reference" to "agents," the court rejected the application of agency principles to a school district for the misconduct of its teachers.[67] The court noted that a constructive notice standard posed a problem for school districts because it could be liable for third party actions and not for its own official decision.[68] To avoid removing education funding from beneficial uses where the school district was unaware of harassment and is willing to remedy the problem, the Court adopted an actual knowledge standard.[69] Such a standard imposes liability where a school district intentionally violated Title IX because they were deliberately indifferent to teacher-student harassment of which it had actual knowledge.[70]

The Supreme Court of the United States later extended its reasoning in *Gebser* to peer sexual harassment in schools.[71] In *Davis v. Monroe County Board of Education*, a school board argued that a student's claim for peer sexual harassment should be dismissed because the school board would be liable for a student's actions instead of its own.[72] The court disagreed with the school board and found that the student was seeking to hold the school board "liable for its *own* decision to remain idle in the face of known student-

60. *Id.* at 287-88.
61. *Id.* at 281; *see* 42 U.S.C. § 2000e-2 (2006).
62. *Gebser*, 524 U.S. at 286.
63. *Id.* at 287 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).
64. *Id.* at 289.
65. *Id.* at 282, 289.
66. *Id.* at 283 (citing 42 U.S.C. § 2000e-2(a)).
67. *Id.*
68. *Id.* at 290-91.
69. *Id.* at 289.
70. *Id.* at 290.
71. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646-47 (1999).
72. *Id.* at 641.

on-student harassment in its schools."[73] The opinion stressed that under the actual knowledge standard school administrators still have disciplinary flexibility to account for appropriate discipline and potential liability arising from certain forms of discipline,[74] noting that courts should give deference to the disciplinary decisions of school administrators.[75]

Because of the actual notice requirement proscribed in *Gebser*, the Court in *Davis* was faced with the issue of what kind of discrimination is in the context of a private damages action.[76] The Court considered the difference between schools and the workplace and that it may be normal for children to interact in a way that would be unacceptable for adults.[77] To receive damages, the Court determined that the behavior must rise above simple acts of teasing and be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education . . . ."[78] The Court noted that whether conduct is considered actionable harassment is dependent on the surrounding circumstances, expectations, and relationships.[79]

In his dissent, Justice Kennedy criticized the majority's finding in *Davis* because it failed to consider that the law treats children differently,[80] invited courts and juries to second-guess the decisions of school administrators,[81] did not provide a workable definition of actionable harassment,[82] ignored the constraints federal law imposes on school disciplinary actions,[83] and confronted schools with limitless liability.[84]

B. State Statutory Liability

A majority of the claims for peer sexual harassment have been filed under federal claims of liability, but a few states, including Missouri, provide rights of action under statute or mandate harassment policies for school districts by statute.

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73. *Id.*

74. *Id.* at 649. The school district in this case argued that under this standard they would be unable to avoid liability without expelling every "student accused of misconduct involving sexual overtones . . . ." *Id.* at 648.

75. *Id.* at 648-49 (citing New Jersey v. T.L.O., 469 U.S. 325, 341-43 n.9 (1985)).

76. *Id.* at 649-50.

77. *Id.* at 651-52.

78. *Id.* at 652.

79. *Id.* at 651 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998)).

80. *Id.* at 672-75 (Kennedy, J., dissenting).

81. *Id.* at 678-79.

82. *Id.* at 675-77.

83. *Id.* at 665-66.

84. *Id.* at 679-83.

1. Missouri Human Rights Act

Under Missouri Revised Statutes section 213.065 of the MHRA, discrimination in public accommodations is prohibited.[85] The statute provides that:

> It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.[86]

Section 213.065 was enacted "[to] mandate that all persons be treated equally in public accommodations . . . [and] 'in the interest of public welfare.'"[87] A private right of action is available under the MHRA.[88] Injunctions along with actual and punitive damages and emotional distress damages are available under the MHRA.[89] Missouri Revised Statutes section 213.111 limits the amount of punitive damages to $500,000, but emotional distress damages are not capped.[90] Additionally, punitive damages are available against a school district.[91]

The MHRA defines but does not limit a public accommodation as "all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public or such public places providing food, shelter, recreation and amusement . . . ."[92] The statute provides an example of a place of public accommodation to be a public facility supported by public funds.[93]

Missouri courts had not applied Missouri Revised Statutes section 213.065 to a public school district for sex discrimination based on peer sexual

85. MO. REV. STAT. § 213.065 (2000).

86. *Id.* § 213.065.2.

87. Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 167 (Mo. App. W.D. 1999) (quoting Hagan v. Dir. of Revenue, 968 S.W.2d 704, 706 (Mo. 1998) (en banc)).

88. MO. REV. STAT. § 213.111.1.

89. *Id.* § 213.111.2; *see also* H.S. v. Bd. of Regents, Se. Mo. State Univ., 967 S.W.2d 665, 673 (Mo. App. E.D. 1998).

90. *Id.*

91. McCrainey v. Kan. City Mo. Sch. Dist., 337 S.W.3d 746, 752 (Mo. App. W.D. 2011).

92. MO. REV. STAT. § 213.010.15.

93. *Id.* § 213.010.15(e).

harassment until the instant decision.[94] However, Missouri courts have frequently applied the MHRA to other public places like restaurants[95] and the workplace.[96] The court in *Doe* compared section 213.065 to section 213.055, the statute addressing unlawful employment practices under the MHRA.[97] Under section 213.055, an employer is liable for peer sexual harassment between co-workers "'if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.'"[98]

2. Missouri's Anti-Bullying Policy Requirement

In addition to the MHRA, the Missouri legislature has enacted a statutory requirement that every school district adopt an anti-bullying policy.[99] The court in *Doe el rel. Subia v. Kansas City, Missouri School District* noted that "[t]his statute indicates that the legislature recognizes that harassment, a form of bullying, is a problem facing the state's educational system."[100] The statute defines "bullying" as "intimidation or harassment that causes a reasonable student to fear for his or her physical safety."[101] The statute requires that:

> Each district's antibullying policy shall be founded on the assumption that all students need a safe learning environment. Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment. Policies may include age-appropriate differences for schools based

94. Doe *ex rel.* Subia v. Kan. City, Mo. Sch. Dist., 372 S.W.3d 43, 47 (Mo. App. W.D. 2012), *trasnfer denied*.

95. *See* Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 170 (Mo. App. W.D. 1999).

96. *See* Gilliland v. Mo. Athletic Club, 273 S.W.3d 516, 520 (Mo. 2009) (en banc); Barekman v. City of Republic, 232 S.W.3d 675, 679-80 (Mo. App. S.D. 2007).

97. *Doe*, 372 S.W.3d at 52.

98. *Barekman*, 232 S.W.3d at 679 (quoting Mason v. Wal-Mart Stores, Inc., 91 S.W.3d 738, 742 (Mo. App. W.D. 2002)). In order to win a claim for sexual harassment in the workplace, it must be alleged that: "(1) [plaintiff] is a member of a protected group; (2) [plaintiff] was subjected to unwanted sexual harassment; (3) [plaintiff's] gender was a contributing factor in the harassment; (4) a term, condition, or privilege of plaintiff's employment was affected by the harassment; and (5) the employer knew or should have known of the harassment and failed to take appropriate action." *Id.*

99. MO. REV. STAT. § 160.775.1 (Supp. 2011).

100. 372 S.W.3d at 52 n.2 ("Interpreting [the MHRA] to prohibit student-on-student sexual harassment will further promote what the legislature describes as its 'assumption that all students need a safe learning environment.'").

101. MO. REV. STAT. § 160.775.2.

> on the grade levels at the school. Each such policy shall contain a statement of the consequences of bullying.[102]

School district employees are required to report instances of bullying for which the employee has "firsthand knowledge."[103]

3. How Other State Statutes Address Peer Sexual Harassment

California's Unruh Civil Rights Act has a similar construction to the public accommodations protection in the MHRA, but the California statute uses the term "business establishment" rather than "public accommodation."[104] It states:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all *business establishments* of every kind whatsoever.[105]

The language of the act states that "[a] person is liable in a cause of action for sexual harassment . . . when the plaintiff proves . . . [t]here is a . . . professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a . . . [t]eacher."[106] The act further provides a right of action against anyone in violation of the act for actual damages and in any amount.[107]

The Unruh Act is similar to the MHRA because it does not expressly state that public schools are liable under the statute, but it is different because the reference to a teacher shows the legislature intends the statute be applied to public schools.[108] Other states have included separate sections addressing public education in their civil rights statutes, leaving no question whether the statute applies to schools.

The Wisconsin legislature enacted a statute intended to protect students in its schools from discrimination.[109] The statute provides that:

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102. *Id.* § 160.775.3.

103. *Id.* § 160.775.4.

104. *See* CAL. CIV. CODE § 51 (West, Westlaw through 2012 legislation).

105. *Id.* (emphasis added).

106. *Id.* § 51.9(a)(1)(E). The statute also requires the plaintiff establish that the defendant has acted in a sexual manner toward the plaintiff, "there is an inability to easily terminate the relationship[,]" and the plaintiff has suffered or will suffer some type of loss or injury. *Id.* § 51.9(a)(2)-(4).

107. *Id.* § 51.9(c).

108. *Compare id.* § 51.9(a)(1)(E), *with* MO. REV. STAT. § 213.065 (2000).

109. *See* WIS. STAT. ANN. § 118.13 (West, Westlaw through 2011 Act 286).

> [N]o person may be denied . . . participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the persons [sic] sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.[110]

The statute further provides guidelines on how residents of a school district may file a complaint when a school district is not complying with the discrimination statute.[111] A procedure for determining compliance is given as well as a scope of remedial action that may be taken.[112]

Florida requires that each school adopt a policy to address and remedy peer sexual harassment.[113] The statute acknowledges the behavioral differences between elementary and secondary students by requiring age-appropriate policies.[114]

In defining a public accommodation in its Law Against Discrimination (LAD), New Jersey expressly included public schools.[115] The Supreme Court of New Jersey held that a cause of action for peer harassment existed under LAD[116] and that the standard of liability is whether the school "knew or should have known of the harassment, but failed to take action *reasonably calculated* to end the harassment."[117] The New Jersey court also defined actionable harassment as "conduct that would not have occurred 'but for' the student's protected characteristic," and a reasonable student similarly situated to the aggrieved student would consider the conduct "severe or pervasive enough to create an intimidating, hostile, or offensive school environment . . ."[118] The court was also careful to provide guidance for future litigation when determining the reasonableness of a school district's response to harassment.[119] To determine if a school district's action was reasonable to end har-

110. *Id.* § 118.13(1).

111. *Id.* § 118.13(2)(a).

112. *Id.* § 118.13(3)-(4).

113. FLA. STAT. ANN. § 1006.07 (West, Westlaw through 2012 2nd. Reg. Sess.).

114. *Id.* § 1006.07(2).

115. N.J. STAT. ANN. § 10:5-5(*l*) (West, Westlaw through L.2013) ("'A place of public accommodation' shall include . . . any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.").

116. L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 547 (N.J. 2007). Specifically, this case dealt with "student-on-student affectional or sexual orientation harassment." *Id.* at 540.

117. *Id.* at 550 (emphasis added).

118. *Id.* at 547. The court noted that a similarly situated student would be a student of the "same age, maturity level, and protected characteristic." *Id.*

119. *Id.* at 550.

assment, the court said that "[o]nly a fact-sensitive, case-by-case analysis will suffice,"[120] and that expert opinions should assist in determining reasonableness in the educational context.[121]

The Minnesota Human Rights Act contains a section that addresses education institutions and expressly prohibits discrimination based on sex.[122] A male student brought an action against his school district for peer sexual harassment under the act in federal district court.[123] The court was presented with the issue of what the standard of liability should be for the school district: constructive notice or actual knowledge.[124] The student argued that the standard should be constructive notice, but the court refrained from resolving the issue because the student's allegations were sufficient to meet the tougher actual knowledge standard.[125]

IV. THE INSTANT DECISION

In *Doe ex rel. Subia v. Kansas City, Missouri School District*, the Missouri Court of Appeals, Western District reversed the dismissal of Doe's petition alleging that he was subjected to student-on-student sexual harassment that rose to the level of sex discrimination in a public accommodation, pursuant to the MHRA.[126] Chief Judge Hardwick wrote the opinion, and all judges concurred.[127] The case was remanded to the circuit court for proceedings consistent with the opinion.[128]

Doe's claim arose under Missouri Revised Statutes section 213.065 of the MHRA.[129] The court noted that Missouri courts had not yet addressed whether this statute covered a claim against a public school district for sex discrimination based on student-on-student sexual harassment.[130] The court looked to the legislature's intent to interpret section 213.065 and whether it covered such a claim.[131] Section 213.065 is a remedial statute, which means it was "enacted for the protection of life and property, or which introduce[s]

120. *Id.* at 551.
121. *Id.* at 552.
122. MINN. STAT. ANN. § 363A.13 (West, Westlaw through 2013 Reg. Sess.).
123. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1083 (D. Minn. 2000).
124. *Id.* at 1094-95.
125. *Id.*
126. Doe *ex rel.* Subia v. Kan. City, Mo. Sch. Dist., 372 S.W.3d 43, 46 (Mo. App. W.D. 2012), *transfer denied*.
127. *Id.* at 46, 56.
128. *Id.* at 56.
129. *Id.* at 46.
130. *Id.* at 47.
131. *Id.*

some new regulation conducive to the public good."[132] The court found that a remedial statute should be liberally interpreted to include "cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case."[133] In applying section 213.065 to this case, the court considered five issues.[134]

A. Public Schools are Public Accommodations

First, the court determined whether a public school is a "public accommodation" under the MHRA.[135] Missouri Revised Statutes section 213.010 defines "places of public accommodation" as "all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public . . . ."[136] Doe argued that his elementary school fit under the description in section 213.010(15)(e) because it was a "public facility owned, operated or managed by or on behalf of this state or agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds . . . ."[137]

The School District contended that section 213.065.3 excluded public schools as public accommodations because an elementary school building is not in fact "open to the public" in that members of the general public do not have unlimited access to it.[138] Based on these claims, the issue was "whether a place of public accommodation must be accessible by *all* members of the public to be 'open to the public.'"[139]

In resolving this issue, the court considered the meaning of the word "public."[140] The MHRA does not define "public," but the court considered the Supreme Court of Missouri's interpretation of the word when considering whether access restrictions on a service defeat the public character of the service.[141] The supreme court considered various definitions of the word "public" in determining a definition and noted that prior case law specifically

132. *Id.* (alteration in original) (quoting State *ex rel.* Ford v. Wenskay, 824 S.W.2d 99, 100 (Mo. App. E.D. 1992)) (internal quotation marks omitted).

133. *Id.* at 47-48 (quoting Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999)) (internal quotation marks omitted).

134. *Id.* at 48-56.

135. *Id.* at 48.

136. MO. REV. STAT. § 213.010(15) (2000).

137. *Doe*, 372 S.W.3d at 48; *see also* MO. REV. STAT. § 213.010(15)(e). Please confirm my change in this quotation.

138. *Doe*, 372 S.W.3d at 48; *see also* MO. REV. STAT. § 213.065.3.

139. *Doe*, 372 S.W.3d at 49.

140. *Id.*

141. *Id.* (citing J.B. Vending Co. v. Dir. of Revenue, 54 S.W.3d 183, 184-85 (Mo. 2011) (en banc)).

recognized "that an entity can be said to serve the public even if it serves only a subset or segment of the public and is subject to regulation on that basis."[142]

The appellate court applied that definition to the instant decision and found that limiting the statute's phrase "open to the public" to mean accessible by all members would be inconsistent with the legislature's intent.[143] The court further noted that many places listed in the statute as public accommodations limit access to their facilities to a segment of the public, but the legislature has nonetheless deemed such facilities to be public accommodations.[144]

The court also considered that the Missouri Constitution mandates the establishment and maintenance of free public schools.[145] As a free public school, Doe's elementary school was subject to state law and the restrictions claimed by the School District did not defeat the public character of the school.[146] Because the school still served a subset of the public, it was a "public accommodation" under the MHRA.[147]

B. The MHRA Prohibits Sex Discrimination in Public Schools

Next, the court considered whether the Commission had jurisdiction to issue the Notice of Right to Sue.[148] The School District argued that the MHRA's definition of discrimination limited the context of claims of discrimination only to situations where discrimination occurred in the context of employment, disability, or familial status as it relates to housing.[149]

The court found that the School District's argument was based on an incorrect reading of the statute.[150] Specifically, the phrase "as it relates to employment" was taken out of context.[151] Within the text of the statute, the phrase only limits age discrimination.[152] Similarly, "disability" is a prohibited basis for discrimination, and the phrase "as it relates to housing" limits familial status discrimination to the housing context.[153]

The court found that the School District had no actual basis for excluding public schools from the context in which the Commission has jurisdiction

142. *Id.* (quoting *J.B. Vending*, 54 S.W.3d at 186-87 (citation omitted)) (internal quotation marks omitted).

143. *Id.* at 49-50.

144. *Id.* at 50 (citing MO. REV. STAT. § 213.010(15)(a)-(f) (2000)).

145. *Id.* (quoting MO. CONST. art. IX, § 1(a)).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* A portion in both sections 213.010(5) and 213.030.1(1) reads "age as it relates to employment, disability, or familial status as it relates to housing[.]" MO. REV. STAT. §§ 213.010.5, 213.030.1(1) (2000).

150. *Doe*, 372 S.W.3d at 50.

151. *Id.*

152. *Id.*; *see also* MO. REV. STAT. §§ 213.010.5, 213.030.1(1).

153. *Doe*, 372 S.W.3d at 50-51.

over claims of sex discrimination.[154] The court supported its finding that the legislature intended the MHRA to prohibit peer sexual harassment in public schools with a reference to the state statutory requirement to adopt an anti-bullying policy.[155] Thus, the court held that the MHRA prohibited sex discrimination in public schools.[156]

C. Peer Sexual Harassment and Indirect Liability

For the third issue, the School District argued that Doe failed to plead facts establishing vicarious liability for the perpetrator's actions under the doctrine of *respondeat superior* because Doe was attempting to hold the School District liable for the perpetrator's conduct.[157] The court agreed with Doe's argument[158] that section 213.065 prohibited sex discrimination based on student-on-student harassment because the plain language of the statute stated that "it is unlawful for 'any person, directly or *indirectly*, to . . . deny any other person . . . any of the accommodations, advantages, facilities, services, or privileges made available in a place of public accommodation, or to . . . discriminate against any such person in the use thereof on the grounds of . . . sex."[159] Because "Doe asserted that the School District was liable under this indirect theory,"[160] and attempted to hold the School District liable for its own conduct, the court found that Doe did not need to establish vicarious liability under the doctrine of *respondeat superior*.[161]

Furthermore, the court reasoned that because a school district has control over its students during school hours, its failure to take action against sexual harassment and assaults indirectly denies the student his right to use of the school.[162] The court found this interpretation of section 213.065 to be "within the spirit of public accommodations law."[163] The court also considered that the MHRA prohibits sexual harassment in the workplace and found

154. *Id.* at 51.

155. *Id.* at 52 n.2 ("This statute indicates that the legislature recognizes that harassment, a form of bullying, is a problem facing the state's educational system. Interpreting [s]ection 213.065.2 to prohibit student-on-student sexual harassment will further promote what the legislature describes as its 'assumption that all students need a safe learning environment.'" (citing MO. REV. STAT. § 160.775)).

156. *Id.* at 51.

157. *Id.*

158. *Id.* at 51-52.

159. *Id.* at 51 (alteration in original) (emphasis added) (quoting MO. REV. STAT. § 213.065.2).

160. *Id.* Added comma to this quotation. Please check format.

161. *Id.*

162. *Id.* at 52.

163. *Id.*

that the right of a student to receive an education without sexual harassment is just as important as the employer's right to a harassment-free workplace.[164]

In light of section 213.065, the court held that "a claim against a school district for student-on-student sexual harassment" fell under the public accommodations statute.[165]

D. Standard for Determining Liability

In determining the liability for peer sexual harassment in a public school, Doe argued that the standard should be the "knew or should have known" standard used in determining employer liability under the MHRA for peer sexual harassment in the workplace.[166] The School District and the Missouri School Boards' Association (the Association), as *amicus curiae* for the School District, argued that the "actual knowledge" standard applied in Title IX actions should apply.[167] The Association also argued that the court should not decide this issue because Doe filed his petition under the actual knowledge standard.[168] However, the court did not mention this in the opinion.[169]

The court distinguished the MHRA from Title IX.[170] Under Title IX, a private action for damages against a school board (also, a "funding recipient") is allowed based on student-on-student sexual harassment only where the funding recipient acts with deliberate indifference to known acts of harassment.[171] Because Title IX is an exercise of Congress's spending power, the legislation is contractual in nature.[172] In order to have a private action for damages, adequate notice must be given to a funding recipient because recipients cannot knowingly accept the terms "if they are unaware of conditions imposed or are unable to ascertain what is expected of them."[173] Thus, the actual knowledge standard is consistent with Title IX's requirement of "notice and an opportunity to rectify the violation."[174]

Because the MHRA did not have notice requirements like those in Title IX, the court reasoned that notice concerns were not present in MHRA

164. *Id.*
165. *Id.*
166. *Id.* *See generally* Barekman v. City of Republic, 232 S.W.3d 675, 679 (Mo. App. S.D. 2007) (holding that an employer is liable for peer sexual harassment under section 213.055.1(1)(a) of the MHRA if the employer "knew or should have known of the harassment and failed to take prompt and effective remedial action" (quoting Mason v. Wal-Mart Stores, Inc., 91 S.W.3d 738, 742 (Mo. App. W.D. 2002))).
167. *Doe*, 372 S.W.3d at 53.
168. Amicus Brief for Respondent, *supra* note 36, at 20.
169. *See Doe*, 372 S.W.3d at 52-54.
170. *Id.* at 53-54.
171. *Id.* at 53.
172. *Id.*
173. *Id.*
174. *Id.*

claims.[175] The School District and the Association further argued that the "knew or should have known" standard should not apply to school districts because school districts do not have the same control over its students that an employer has over its employees.[176] The court disagreed with the School District and the Association's arguments,[177] and cited prior case law saying that "[t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace,"[178] and that a school district's power over its students permits "a degree of supervision and control that could not be exercised over free adults."[179]

The court found that students are not entitled to less protection than adults in the workplace and held that a school district can be liable for peer sexual harassment "if it knew or should have known of the harassment and failed to take prompt and effective remedial action."[180]

E. Sufficiency of Allegations to State a Cause of Action

For the final issue, the court found that the allegations in Doe's petition were sufficient to state a cause of action under the "knew or should have known" standard.[181] Doe asserted that the School District knew of the harassment and that it failed to take any action in response to such knowledge.[182] "Doe [further] asserted that the School District's actions and inactions deprived him of the full, free, and equal use and enjoyment of the school and its services."[183]

The School District argued that Doe did not sufficiently state a cause of action because he "did not allege that he was actually denied or refused access to the school."[184] Because Doe sufficiently pled that he was discriminated against in his use of the school, the court found the allegations to be sufficient to state a cause of action.[185] "The School District further argue[d] that Doe failed to state a cause of action" because elementary aged children are incapable of engaging in unlawful sexual conduct as a matter of law.[186]

175. *Id.* at 53-54.
176. *Id.* at 54.
177. *Id.*
178. *Id.* (alteration in original) (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646 (1999)).
179. *Id.* (quoting *Davis*, 526 U.S. at 646).
180. *Id.*
181. *Id.*
182. *Id.* at 54-55.
183. *Id.* at 55.
184. *Id.*
185. *Id.* (noting that section 213.065 only requires the victim be denied access to public accommodations or that the victim be discriminated against in his use of the school); *see also* MO. REV. STAT. § 213.065 (2000).
186. *Doe*, 372 S.W.3d at 55.

The court would not consider the age of the students involved because Doe did not plead the ages and did not consider it relevant because of the procedural posture of the appeal.[187]

In conclusion, the court held that a student could sufficiently plead a cause of action against a public school district for peer sexual harassment under section 213.065 of the MHRA if he alleged he was sexually harassed, and the school district "knew or should have known of the harassment and failed to take prompt and effective remedial action."[188]

V. COMMENT

The cases addressing student-on-student harassment in public schools created a number of problems stemming from the court's application of employment law to an inapposite context: public schools. The result in *Doe* is problematic for Missouri's public schools because it complicates the purpose of the MHRA, ignores the common practice of state and federal courts to give deference to the decisions of school officials, provides no guidance for school officials to avoid liability, and invites an increase in lawsuits to be filed against school districts.

A. What Constitutes the Public Good?

Prior to *Doe*, no Missouri case had considered whether Missouri Revised Statutes section 213.065 of the MHRA covered a claim against a public school based on peer sexual harassment.[189] In deciding whether the statute included a public school district as a public accommodation, the court looked to past cases discussing the statute.[190] Because the MHRA is a remedial statute, it should be broadly interpreted to accomplish the greatest public good.[191]

While it is in the interest of the public good for a student to be able to attend school without being harassed, the implications of a low standard of liability would not serve the greatest public good. If a public school is in fact a public accommodation, then creating a vehicle for an unlimited amount of damages would result in a decrease of the "accommodations, advantages, facilities, services, or privileges made available in the public school."[192]

187. *Id.* at 55-56.

188. *Id.* at 54, 56.

189. *Id.* at 47.

190. *Id.*

191. *Id.* at 47-48 (quoting Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999)).

192. *Id.* at 54.

Actual and punitive damages are available under the MHRA, and Missouri courts allow an award of punitive damages against school districts.[193] In *Doe*, the student sought compensatory and punitive damages.[194] In 2009, when the alleged incident occurred, the Kansas City, Missouri School District required an average of $17,347 per day to operate one of the district's elementary schools.[195] Since 2009, the School District has had to decrease this amount due to budget cuts.[196] With a lower standard of liability and no cap on emotional distress damages, the limitless liability confronting Missouri public schools would impose a significant financial burden on already cash-strapped school districts. The standard adopted in *Doe* is meant to protect a student's right to education, but the implications of such a standard could suck money from the schools and diminish the resources and services that are necessary for the education of all students. While this standard of liability is meant to accomplish the greatest public good, the effects of such a standard could potentially cause more harm to Missouri's public education than good.

B. A Standard of Liability with Arbitrary Guidelines

When the Supreme Court of the United States first considered in *Davis v. Monroe County Board of Education* whether a school district is liable for student-on-student sexual harassment, it expressed reluctance in its decision because such liability invites judges and juries to second-guess the disciplinary decisions of school officials.[197] The reason for this reluctance is that school officials are in a better "position to judge the seriousness of alleged harassment and to devise an appropriate response."[198] Because of *Doe*, a public school district is liable for peer sexual harassment when a student establishes that the district "knew or should have known of the harassment and

193. *See* McCrainey v. Kan. City Mo. Sch. Dist., 337 S.W.3d 746, 752 (Mo. App. W.D. 2011).

194. *Doe*, 372 S.W.3d at 46.

195. *School Finance Report*, MO. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., http://mcds.dese.mo.gov/guidedinquiry/District%20and%20School%20Information/School%20Finance%20Report.aspx?rp:DistrictCode=048078 (select "KANSAS CITY 33 (048078)" from the "District" drop-down menu; check the box next to "2009" from the "School Year" drop-down menu; click the "View Report" button).

196. *School Finance Report*, MO. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., http://mcds.dese.mo.gov/guidedinquiry/District%20and%20School%20 Information/School%20Finance%20Report.aspx?rp:DistrictCode=048078 (select "KANSAS CITY 33 (048078)" from the "District" drop-down menu; check the box next to "2012" from the "School Year" drop-down menu; click the "View Report" button).

197. 526 U.S. 629, 648 (1999) (citing New Jersey v. T.L.O., 469 U.S. 325, 343 n.9 (1985)).

198. *Id.* at 678 (Kennedy, J., dissenting).

failed to take prompt and effective remedial action."[199] However, the court was silent as to what conduct equals unwelcome sexual harassment and what action would be considered effective.

1. What Constitutes Actionable Harassment?

The School District in *Doe* argued that an elementary student could not have a cause of action under Missouri Revised Statutes section 213.065 because elementary-aged children are not capable of "conduct constituting unlawful sexual harassment as a matter of law."[200] Because the ages of the students involved in *Doe* were not pled, the court would not consider the students' ages, but stated that it was relevant in determining if the harassment was actionable.[201] However, the court should have provided school districts with further guidance. The opinion does state that the harassment must have "refused, withheld from, or denied, or attempted to refuse, withhold from, or deny [a student] any of the accommodations, advantages, facilities, services, or privileges made available in the public school, or . . . discriminated against him in the use thereof on grounds of . . . sex[.]"[202] While this was an attempt to limit what is actionable, it failed to narrow what kind of conduct sparks liability.

The court gave little factual background of the case in its opinion and the nature of the harassment is unknown beyond the mention that the perpetrator had "inappropriate and sexualized behavior and . . . aggressive tendencies."[203] In this context, it is easy to forget that by "perpetrator," the court is referring to a young child.[204] It is commonplace in the legal system that children, especially young children, are not fully accountable for their actions because they lack the capacity to exercise mature judgment.[205]

Some consideration should be given to the fact that children have limited life experiences to have an understanding of appropriate behavior. There is no surprise that a school will have students who display inappropriate behavior because schools serve as the venue where students learn to interact with their peers. The standard of liability imposed by the court ignores the role schools play in teaching appropriate behavior. Because of the lower standard, school officials would be compelled to label inappropriate conduct as sexual harassment even if such behavior really only constitutes immature, childish behavior.

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199. *Doe*, 372 S.W.3d at 54.

200. *Id.* at 55.

201. *Id.* at 55-56. The court chose to not consider the ages of the students because of the procedural posture of the appeal. *Id.*

202. *Id.* at 54.

203. *Id.* at 46.

204. *See id.* at 55.

205. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 4.2, 4.4 (4th ed. 2004) (discussing why minors lack the capacity to enter contracts).

The court supported imposing a lower standard on school districts because schools have a greater control over students that could not be asserted over adults in the workplace.[206] Outside of Missouri, it has been acknowledged that "schools are different from workplaces," and "a reasonable response to [harassment] among grade-schoolers may be inadequate . . . among teens."[207] By not addressing the age of the students involved or determining what harassment is actionable, the court invited judges, juries, and litigants to second-guess the determinations of school officials as to what behavior from children constitutes unlawful sexual harassment without any guidance.

2. How Effective Must the Remedial Action Be?

Upon actual or constructive notice of harassment, school districts are required to take "effective remedial action" in response to the conduct.[208] The court agreed with Doe's allegations that because school officials allowed the perpetrator to continue using the restroom at the same time as other students, the School District indirectly denied Doe the benefits of public accommodation.[209] However, Doe did not claim that school officials did nothing in response to the conduct.[210]

Aside from the facts of *Doe*, schools are faced with disciplinary decisions on a daily basis. A school official could take immediate action in response to sexual harassment, but short of expulsion, there is little that a school official can do to guarantee an immediate remedy of the harassment. Because the Missouri Constitution guarantees students a free primary and secondary public education, schools are obligated to educate all students in the state and cannot screen or select students in the way an employer would when hiring.[211]

Furthermore, the law imposes restrictions on school disciplinary actions that could limit the remedial action school officials may take. For example, the Supreme Court of the United States has held that due process requires schools give notice and some kind of hearing to a student facing suspension.[212] The Individuals with Disabilities Education Act[213] (IDEA) has strict

206. *Doe*, 372 S.W.3d at 54 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646 (1999)). However, based on the *Doe* court's reasoning that a public school is a public accommodation, the holding would appear to also apply to public universities that do not have the same control over adult students. *See id.* at 48-50.

207. L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 550-51 (N.J. 2007).

208. *Doe*, 372 S.W.3d at 54.

209. *Id.* at 54-56.

210. *See id.* at 55.

211. *See* MO. CONST. art. IX, § 1(a) ("[T]he general assembly shall establish and maintain free public schools . . . .").

212. Goss v. Lopez, 419 U.S. 565, 579 (1975).

213. 20 U.S.C. § 1400 (2006).

limitations on the discipline allowed against students with behavior disorder disabilities, even if the behavior disorder was not diagnosed prior to the conduct requiring discipline.[214] Without a guideline for what remedial action must be taken, schools imposing discipline on a student harasser who might assert a IDEA claim will have statutory provisions and federal regulation limiting its discretion. Such a conflict requires officials to juggle a number of considerations in an effort to avoid liability. This shifts the focus from what is best for students to the school district's interest in avoiding liability.

Because the court in *Doe* does not provide definition of the "prompt and effective remedial action," the disciplinary decisions will be second-guessed by those who are not in the best position to judge what an appropriate response would be.

C. Suggested Alternatives

Because there are other vehicles for victims to pursue relief, establishing a cause of action under the MHRA was not necessary. However, if a cause of action must be established, then an actual notice standard should apply and such a cause of action should not fall under the public accommodations section of the MHRA. Instead, schools should be treated differently from other public accommodations as well as the workplace, and it should be left to the legislature to address this distinction.

1. The Court Should Have Used an Actual Notice Standard

In his petition, Doe relied on an actual knowledge standard and pled that school officials knew of the harassment.[215] Because appellate courts "will not consider matters outside the pleadings" when reviewing a motion to dismiss,[216] the court in *Doe* should not have addressed the issue of the applicable standard. A federal district court in Minnesota reasoned that there was no need to determine the standard of liability under the state's human rights act because even under the more scrupulous actual knowledge standard, the student established evidence of the school district's actual knowledge and failure to remedy the problem.[217] Thus, the evidence was sufficient to state a claim under the actual knowledge standard.[218] The facts alleged in *Doe* would have been sufficient to plead a claim under the actual knowledge standard, but the

214. *See generally id.* § 1415.

215. Petition for Damages, *supra* note 34, at 4.

216. Devitre v. Orthopedic Ctr. of St. Louis, L.L.C., 349 S.W.3d 327, 331 (Mo. 2011) (en banc).

217. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1094-95 (D. Minn. 2000).

218. *Id.* at 1095.

Doe court provided an unnecessary decision with significant consequences that will not effectively meet the purpose of the MHRA.

2. Harassment in Public Schools Should Be Expressly Addressed by Statute

Beyond the adoption of the standard of liability, the court should not have interpreted section 213.065 to include public schools as a public accommodation. In interpreting the statute, the court referenced Missouri Revised Statues section 160.775, which requires each school district to adopt an anti-bullying policy.[219] The court reasoned that interpreting section 213.065 to prohibit peer sexual harassment in schools would further the state legislature's "assumption that all students need a safe learning environment."[220] However, the court overlooked some key aspects to the statute. First, the statute allows for "age-appropriate differences" in the policies.[221] This shows that the legislature is aware that the problems public schools face with bullying and peer harassment will vary based on the age of the students involved. Second, the statute prohibits a district from creating policies that "contain specific lists of protected classes of students who are to receive special treatment" and requires that all students be treated equally.[222] This shows that the legislature has an interest in protecting all students from bullying and harassment no matter the basis for such harassment. By including public schools under the MHRA and creating a low standard of liability, the court in *Doe* sends the message that harassment based on gender is worse than other forms of harassment when the goal of the legislature is to eliminate all harassment in public schools.[223] Finally, the statute does not create a cause of action for students who are bullied.[224] If the legislature had intended school districts to be held liable for peer harassment, then perhaps a cause of action would have been made available under the anti-bullying statute.

When comparing the MHRA to Missouri's anti-bullying statute, it is not clear whether the legislature intended schools to be included under the MHRA, so instead of broadly applying the statute to areas where there would be severe implications, the court should have left the decision to the legislature.[225] It would be in the best interest of the administrators, teachers, and

219. Doe *ex rel.* Subia v. Kan. City., Mo. Sch. Dist., 372 S.W.3d 43, 52 n.2 (Mo. App. W.D. 2012) (citing MO. REV. STAT. § 160.775 (Supp. 2011)), *transfer denied*.

220. *Id.* (quoting MO. REV. STAT. § 160.775.3).

221. MO. REV. STAT. § 160.775.3.

222. *Id.*

223. *See Doe*, 372 S.W.3d at 52.

224. *See* MO. REV. STAT. § 160.775.3.

225. In the Minnesota Human Rights Act, the legislature addressed unfair discriminatory practices in educational institutions. MINN. STAT. ANN. § 363A.13 (West, Westlaw through 2013 Reg. Sess. Ch. 3). In the Michigan Human Rights Act, the legislature included "education facilities" in its statute outlining the actions based on

students if the state legislature separately defined causes of action for discrimination in public schools whether it is under the MHRA or Missouri's anti-bullying statute. Because the MHRA does not have a cap on available damages, public school districts could face serious financial consequences as a result of their mismanagement of one student.

VI. CONCLUSION

The Supreme Court of the United States stated that the purpose of the public school system is to prepare students for citizenship to "inculcate the habits and manners of civility as values in themselves conducive to happiness."[226] Because of the impressionable and immature state of students in the care of public schools, the emphasis should be on prevention of harassment rather than its consequences. While students should learn that there are consequences for inappropriate behavior toward their peers, the reason students should refrain from such behavior should not be to avoid getting in trouble but instead to learn that our society values mutual respect among peers.

The standard imposed on public schools in *Doe* places a focus on avoiding liability rather than protecting students and teaching socially acceptable behavior. The fear of a sexual harassment suit has the potential to cause Missouri's school districts to overreact to minor incidents that do not amount to sexual harassment. A student's ability to comprehend the distinction of what is and what is not sexual harassment will vary based on the age of the student, and the role of education professionals is to use their discretion in addressing such behavior in the different age groups. *Doe* leaves little room for such discretion and elevates a district's concern of avoiding liability over its true purpose of educating students and guiding their social development.

All parties aggress that there is no room for sexual harassment in public education whether the perpetrator is a teacher or a student. In resolving the problem of peer sexual harassment, the focus should be on teaching students the consequences and harm that can result from such conduct. Instead, *Doe* imposes a low standard of liability that will breed a fear of lawsuits in Missouri public schools causing school officials to ambiguously label inappropriate conduct to be sexual harassment even if such conduct is typical for the age. Aside from ambiguity of what is actionable harassment, the disciplinary decisions of school officials are more likely to be called into question in order to determine whether effective remedial action has been taken. Balancing

sexual harassment. MICH. COMP. LAWS. ANN. § 37.2102(1) (West, Westlaw through 2012 Reg. Sess.). Florida school boards are required to have school policies making students aware not only of the disciplinary consequences of sexual harassment within the school but also of the criminal penalties that could be imposed. FLA. STAT. ANN. § 1006.07(2)(j) (West, Westlaw through 2012 2nd Reg. Sess.).

226. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

this standard against the restrictions on disciplinary actions imposed on school officials by other laws will leave school districts with little guidance in avoiding liability. Instead of applying the MHRA in a way that would accomplish the greater public good, *Doe* has created another obstacle for Missouri public schools with implications that have the potential of negatively impacting all students.