



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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FOURTH CIRCUIT BALANCES SPECIAL EDUCATION STUDENT'S NEEDS AGAINST INSTRUCTIONAL AIDE'S SEXUAL HARASSMENT CLAIM

"This appeal arises out of an employee's allegations of sexual harassment by one of her special education students. It brings to light the difficult balance that schools must find between ensuring that all students have access to a public school education while simultaneously maintaining a nonhostile work environment for all employees – the impact of which is felt by special educators serving at the intersection of these two rights."

With that quote, the Chief Justice of the United States Court of Appeals for the Fourth Circuit opened the Court's June 28, 2022, opinion in *Webster v. Chesterfield County School Board*. There, a special education aide alleged she was subjected to severe or pervasive sexual harassment when the school division assigned her to work with an 8-year-old boy, S.M., with Down's Syndrome and ADHD who frequently touched her inappropriately. On appeal the Fourth Circuit affirmed a trial court holding that the aide failed to establish a hostile work environment under Title VII of the Civil Rights Act of 1964. To support her claim for a hostile work environment, plaintiff had to establish that S.M.'s conduct was: (1) unwelcome, (2) based on sex, (3) sufficiently severe or pervasive to create an abusive environment, and (4) attributed to the school division. The courts agreed that she established the first, but that the aide failed to establish the other three criteria.

The plaintiff instructional aide, Webster, worked in a classroom that served emotionally

disturbed (ED) students. She specifically was assigned to work with students with moderate intellectual disabilities. Webster alleged that S.M. sexually harassed her almost daily between the fall of 2018 and March 2019, by putting his hands up her dress and touching her private parts. Even when re-directed, S.M. touched her "front private crotch area and her bottom over the outside of her clothes." Webster alleged that the sexual conduct occurred even after she stopped wearing dresses. The school kept documentation of S.M.'s behavior and offered to provide additional support, including offering to have another educator switch roles with Webster (to work with S.M.), which Webster declined. The principal agreed to meet with Webster to discuss potential solutions, which she also declined. In November 2018, the assistant principal separated Webster from S.M. for approximately two weeks. Several times Webster requested that she be returned to the class to

which she previously was assigned, which the school denied based on then-current staffing demands – but advised Webster it would revisit staffing at the end of the school year. In January of 2019, Webster began filing injury reports; however, she did not report the daily incidents of S.M.'s inappropriate touching because she said that her Chesterfield Education Association representative did not instruct her to do so.

After an egregious incident in March 2019, the school principal (1) altered Webster's bus assignment to ensure she did not ride the bus with S.M.; (2) shifted her schedule so she no longer accompanied S.M. alone; and (3) increased

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monitoring to reduce Webster's time spent alone with S.M. The principal later proposed transferring Webster to a new classroom. These measures terminated her exposure to S.M.'s conduct; therefore, the courts determined that her hostile work environment claim spanned from September 2018 through March 13, 2019.

The district court described the case as "delicate" and underscored the difficulty of Webster's claim as it demonstrates the daily challenges special educators face. During oral argument, the school division offered expert testimony, who explained that S.M.'s behavior was common for a child with his age and disabilities and that he was incapable of distinguishing between sexes. They opined further that a reasonable instructional assistant would not view S.M.'s conduct as sexual harassment. Because she offered only her own opinion in rebuttal, the district court determined that Webster could only establish one of the four elements of a hostile environment claim – unwelcomeness – and granted the division's motion for summary judgment.

Addressing each of the remaining elements on appeal, the Fourth Circuit agreed with the expert testimony offered to the district court: "It is not reasonable for a special education IA to conclude that a young child with Down's Syndrome and ADHD, who responds negatively to instructions or commands by grabbing and squeezing body parts, is engaged in sexually harassing behavior. The student is merely trying to escape the instruction or command . . . This is what any objectively reasonable special education IA would conclude based on S.M.'s behavior and his disabilities. *His behavior had nothing to do with Ms. Webster's gender.*" The Fourth Circuit recognized that Webster was challenged in presenting comparator evidence (e.g., that women were treated differently than men) due to the female-dominated special education staff, but nonetheless relied on the experts who opined S.M.'s conduct was not based on sex.

To satisfy the "severe and pervasive" element of the hostile work environment test, Webster had

to show that, in addition to her own subjective reaction to the conduct, a reasonable person in her position would have found the environment objectively hostile or abusive. The Fourth Circuit acknowledged that Webster satisfied the subjective prong: that S.M. touched her on a constant, almost daily basis and that the physical nature and frequency of the incidents showed that the conduct was severe and pervasive. The Court recognized that she felt humiliated, embarrassed and cried at work numerous times. However, nothing in the record suggested that a reasonable person in her position – an experienced instructional assistant working in special education – would find S.M.'s conduct to be severe or pervasive.

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Liability for a hostile environment may be attributable to the school board – the final element – when it "knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment."

Here, "the School Board has a more limited set of remedies available given that they must balance maintaining a nonhostile work environment with ensuring that children have access to public education. . . . This case exemplifies the difficulty of addressing a situation like Webster's, because while separating Webster and S.M. stopped him from touching her, S.M. was still touching other students. But if S.M. was behaving as an eight-year-old with Down's Syndrome and ADHD would, then the school must maintain the nonhostile work environment while still respecting S.M.'s right to obtain an education – a right held by all children." The Court held that the school division responded to Webster's complaints with appropriate remedial steps.

These cases require context-specific analysis. School principals should work closely with special education administrators in developing plans to serve the needs of the special education students while ensuring a work environment free from sexual harassment for the educators who work with them. Conferring with legal counsel may be necessary, too.