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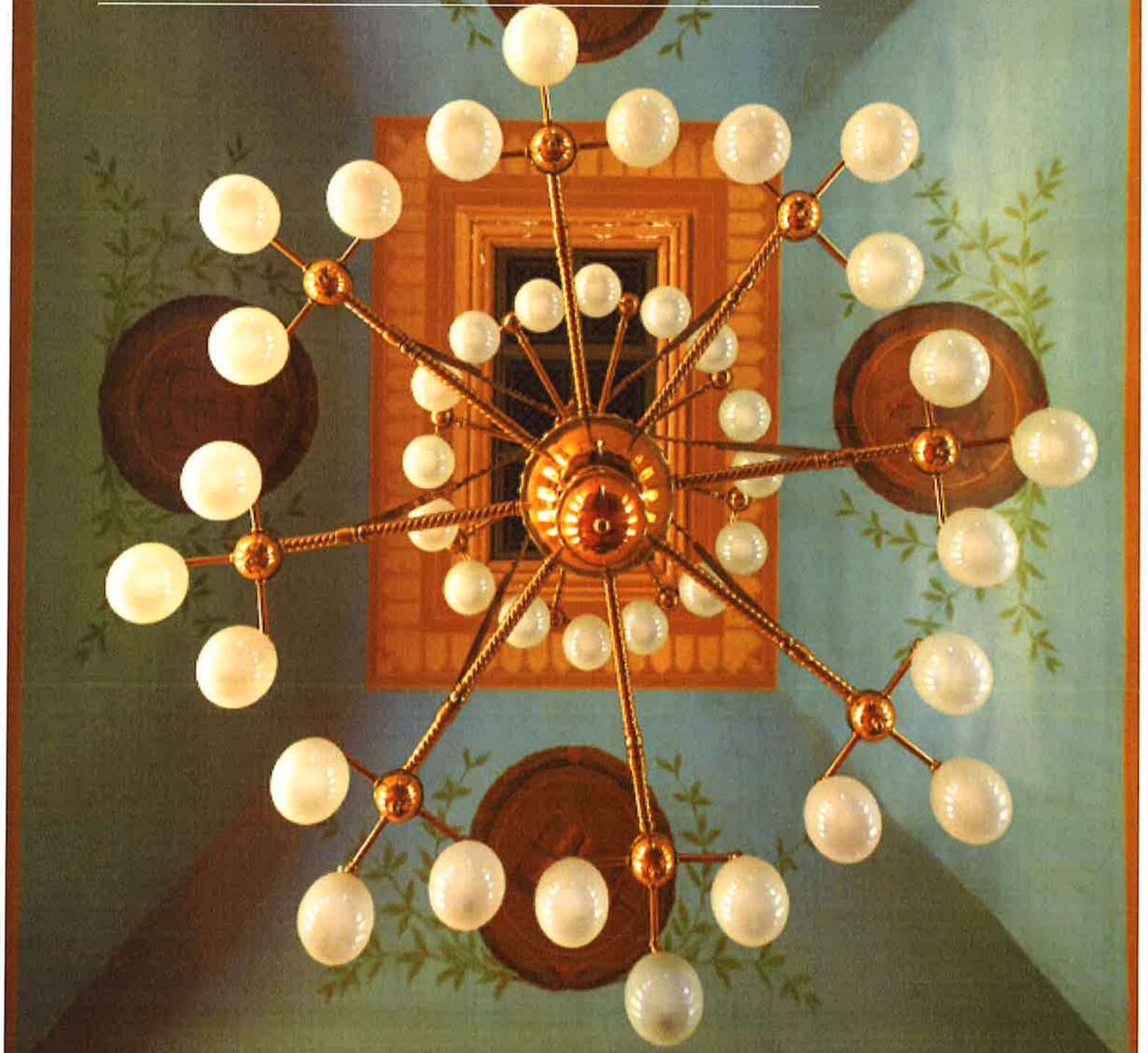

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Cover: The grand chandelier in the Old Superior Courtroom in the Northampton courthouse. Photo by Hon. David S. Ross.

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Sexual Harassment in Education in Massachusetts: Are Schools, Colleges and Universities Strictly Liable for the Conduct of Their Staff?

By Justice John M. Greaney and Jeffrey E. Poindexter

I. INTRODUCTION

It has been only a year since the #MeToo movement first hit the national stage. In that short span of time, famous entertainers, media moguls and political figures are in disrepute. It is a new moment. The nation has turned a page on how it responds to allegations of sexual assault and harassment. Claims that could have been brushed off in the not-too-distant past may now mean the end of a career.

Schools, colleges and universities are not immune to the problem of sexual harassment and assault. As the #MeToo movement reshapes public attitudes, it becomes increasingly clear that these institutions need to be prepared to investigate and defend claims of sexual harassment and assault, and they may face a legal landscape in which they are held strictly liable for assault and harassment occurring with their institutions.

Three Massachusetts cases are illustrative of the issue:

- The male athletic director of a Massachusetts community college was reported to have provided alcohol to female students in exchange for sexual favors.[1] Several years later, more complaints about his behavior led the college to implement a policy to prevent sexual harassment.[2] Reports of further inappropriate conduct led to an investigation, ultimately leading to an agreement, in 1988, that he would no longer coach female athletic teams.[3] However, the athletic director continued to work at the school and eventually resumed coaching the women's basketball team.[4] Students who had been coached by the athletic director brought claims of sexual harassment against him and against the school.[5]

- During an investigation into the rape of a student by a teacher at a Massachusetts high school, it was disclosed that a male guidance counselor had been involved in sexual misconduct with students.[6] The superintendent of the school district acknowledged that he was aware of continuing reports about the guidance counselor's inappropriate relationships with students after a female student alleged that the counselor had brought her to his home on two occasions and attempted to coerce her into having sex.[7]

- Parents reported the inappropriate conduct of a male middle school science teacher to the vice principal and a guidance counselor.[8] The teacher had made inappropriate comments and touched female students, and had been told by school officials to stop on three occasions.[9] The teacher was fired after an internal investigation, but not before he allegedly molested an 11-year-old student.[10]

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1. Morrison v. N. Essex Cmty. Coll., 56 Mass. App. Ct. 784, 787 (2002).
2. *Id.* at 788.
3. *Id.* at 788-89.
4. *Id.* at 789.
5. *Id.* at 792.
6. Doe v. Fournier, 851 F. Supp. 2d 207, 212 (D. Mass. 2012) (Posner, J.).
7. *Id.* at 212-13.
8. Doe v. Town of Hopkinton, No. 1281CV03399, WL 1553440 at *2 (Mass. Sup. Ct. March 7, 2017) (Kazanjian, J).
9. *Id.*
10. *Id.* at *1.

These cases highlight the need for policies, and prompt discipline, in educational institutions to ensure that students are not subject to unlawful sexual conduct by teachers, counselors, coaches and other personnel. This article will discuss the laws that make Massachusetts educational institutions subject to liability for failing to prevent sexual harassment perpetrated against students and the critical, and currently open, question of whether schools, colleges and universities may face strict vicarious liability for the sexual misconduct of their staff against students.

Overview of Statutes Prohibiting Sexual Harassment in Educational Institutions

Massachusetts General Laws (G.L.) chapter 151C, the Massachusetts Fair Educational Practices Act (MFEPA), provides students who have been subjected to sexual harassment by a teacher, coach, guidance counselor or other school personnel with a cause of action against the educational institution.[11] MFEPA declares that "[i]t shall be an unfair educational practice for an educational institution . . . [t]o sexually harass students in any program or course of study in any educational institution."[12] The statute's enforcement mechanism is through the Massachusetts Commission Against Discrimination (MCAD) (which applies only in the case of defined students[13]) or under G.L. c. 214, § 1C, which gives "[t]he superior court . . . the jurisdiction to enforce" the right to be free from sexual harassment, as defined in chapter 151C.[14] An aggrieved student who does not meet the definition of a plaintiff eligible to seek relief from the MCAD may pursue relief in court against an educational institution that has allowed offensive or inappropriate sexual conduct to occur or has failed to provide a student with an environment free from sexual harassment.[15] Sexual harassment is broadly defined by G.L. c. 151C, § 1(e) as:

> any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile, humiliating or sexually offensive educational environment.[16]

Morrison v. Northern Essex Community College is the only reported Massachusetts appellate decision involving a claim under chapter 151C by students against an educational institution.[17] The case concerned two female athletes who alleged that they were sexually harassed by the male athletic director and basketball coach.[18] On the college's motion, the Superior Court entered summary judgment against the plaintiffs, concluding that the action was barred by the statute of limitations.[19] The Appeals Court vacated the judgment and remanded for a determination of whether the period of limitations had been delayed due to the continuing nature of the alleged conduct.[20] The Appeals Court decision left open several questions about the application of chapter 151C, including whether consent, under certain circumstances, might be a factor in determining the liability of educational institutions,[21] whether peer-to-peer sexual harassment is actionable,[22] and, the subject of this article, whether educational institutions can be held strictly vicariously liable under G.L. c. 151C for sexual harassment.

Other causes of action are also available to victims of sexual harassment in a school setting.[23] An aggrieved student may bring constitutional claims against a school under 42 U.S.C. § 1983, when the school is a municipal entity, or under G.L. c. 12, §§ 11H-11J, the Massachusetts Civil Rights Act, which applies to private

11. G.L. c. 151C, § 2(g) (2018).

12. *Id.*

13. Enforcement by the Massachusetts Commission Against Discrimination (MCAD) is authorized directly by G.L. c. 151C, § 3(a) but only in narrow circumstances, namely cases where the plaintiff is "seeking admission as a student" or "enrolled as a student in a vocational training institution." *Id.*

14. G.L. c. 214, §1C (2002) (allowing for "damages and other relief provided in the third paragraph of [G.L. c. 151B, § 9]"); *see Fournier*, 851 F. Supp.2d at 216 ("The proper vehicle for bringing claims of violations of § 2(g) by plaintiffs who do not fall under section 3(a) is G.L. ch. 214, § 1C").

15. *See Morrison*, 56 Mass. App. Ct. at 786.

16. G.L. c. 151C, § 1(e) (2002).

17. 56 Mass. App. Ct. at 786.

18. *Id.* at 785.

19. *Id.*

20. *Id.* at 200.

21. The issue of consent, as a defense, was raised directly by a school district and another defendant in Chancellor v. Pottsgrove School Dist., 501 F. Supp. 2d 695 (E.D. Pa. 2007), which involved a claim pursuant to Title IX. There, a former student at Pottsgrove High School brought suit against the defendant and the high school principal. *Id.* at 698. The student, during her junior and senior years, had numerous consensual sexual encounters with the school's male band director. *Id.* at 698-99. The plaintiff was 17 and 18 years of age during the relationship. *Id.*

The court rejected the defense of consent, concluding, based on the custodial and in loco parentis relationships between a school and its staff and its students, that consent could not be a defense as matter of law because the student, although not a minor, still lacked the legal capacity to consent. *Id.* at 712; *see also Fournier,* 851 F. Supp. 2d at 220 (holding open the possibility that consensual sexual relations with a student over the age of consent may constitute a substantive due process violation due to "[t]he inherent imbalance of power between a guidance counselor in a public school and a student [which] may render opportunistic sexual predation sufficiently shocking, even with a 'consenting' student over 16, to form the basis of a substantive due process claim").

22. *See* Harrington v. City of Attleboro, 172 F. Supp.3d 337, 351-52 (D. Mass. 2016) (Casper, J.).

23. The exclusive remedy for sexual harassment in the workplace is G.L. c. 151B, *see* Green v. Wyman-Gordon Co., 422 Mass. 551, 557-58 (1996), but no court has held that G.L. c. 151C is similarly exclusive. *See* Rinsky v. Trs. of Bos. Univ., No. 10-cv-10779-NG, 2010 WL 5437289, *7 (D. Mass. Dec. 27, 2010) (Gertner, J.).

institutions. The constitutional bases for such claims would be the right to bodily integrity or the right to equal protection.[24] A student may bring a Title IX claim of sexual harassment claim against an educational institution[25] that receives federal funding.[26] Other tort claims, such as negligent hiring, negligent supervision or negligent infliction of emotional distress, may also be brought against an educational institution that failed to provide a student with a learning environment free of sexual harassment.[27]

Federal Law: Liability Under Title IX

The federal counterpart of chapter 151C is Title IX. Enacted in 1972, Title IX provides 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 Federal financial assistance."[28] To prevail on a claim under Title IX, a plaintiff must prove that the sexual harassment or misconduct occurred with actual knowledge and deliberate indifference on the part of an educational institution.[29] Sexual harassment can constitute sex discrimination under Title IX,[30] but, unlike G.L. c. 151C, the statute does not provide an explicit definition of sexual harassment. The United States Supreme Court, however, has determined that there are two different theories for possible recovery based on a claim of sexual harassment under Title IX:

> One theory, popularly known as "quid pro quo" harassment or discrimination, occurs most often when some benefit or adverse action, such as change in salary at work or a grade in school, is made to depend on providing sexual favors to someone in authority; the other theory, under the rubric "hostile environment," applies where the acts of sexual harassment are sufficiently severe to interfere with the workplace or school opportunities normally available to the work or student.[31]

The first case in which sexual harassment was recognized as sex discrimination actionable under Title IX was *Alexander v. Yale University* in 1977.[32] Reviewing an array of student and faculty claims related to sexually harassing conduct, the court held that some directly harassing conduct could support a Title IX claim, concluding, "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education . . . ."[33] After this decision, in the words of feminist legal scholar Catherine A. MacKinnon, "many steps forward in policy and culture commenced, as educational institutions reasonably recognized that they faced exposure to risk of loss — perhaps substantial liability, at least litigation — if they failed to address sexual harassment that occurred on their campuses."[34] The progress was halted in 1998, however, by the Supreme Court's imposition of a higher burden for plaintiffs suing an educational institution under Title IX in *Gebser v. Lago Vista Independent School District*.[35]

In *Gebser*, a female high school student and her parents sued the student's school district, seeking monetary damages under Title IX for a teacher's sexual harassment of the student.[36] The Supreme Court held that an implied private right of action for monetary damages under Title IX by reason of a school's staff member's sexual harassment of a student will not lie in the absence of: 1) actual notice on the part of the school district; and 2) a showing that the school district "fail[ed] to adequately respond" to the defendant's conduct after actual notice of the conduct, and instead was "deliberately indifferen[t]" to the conduct. [37] The Court affirmed the grant of summary judgment in favor of the school district because the district lacked actual notice of the sexual relationship between the teacher and the student, and, therefore, could not have been deliberately indifferent.[38]

Since *Gebser*, an appropriate official of an educational institution must have actual knowledge of sexual harassment by its personnel in order for the institution to be held vicariously liable for sexual harassment under Title IX, and then only after acting with deliberate indifference toward the perpetrator of the harassment.[39] A finding of deliberate indifference requires that the indifference be "reckless or callous."[40] "The causal link between supervisor action or inaction and subordinate wrongdoing must be tight: Deliberate indifference will be found only 'if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights.'"[41]

24. *See Rinsky*, 2010 WL 5437289, at *7.
25. 20 U.S.C. § 1681 (1986).
26. *See* Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 65 (1st Cir. 2002).
27. The Massachusetts Tort Claims Act (MTCA) permits a plaintiff alleging sexual harassment to bring negligence claims against public entities. Doe v. Bradshaw, 203 F. Supp.3d 168, 186-88 (D. Mass. 2016).
28. 20 U.S.C. § 1681(a) (1986).
29. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).
30. *See* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 75 (1992).
31. Willis v. Brown Univ., 184 F.3d 20, 25 (1st Cir. 1999) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986)); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).
32. 459 F. Supp. 1 (D. Conn. 1977).
33. *Alexander*, 459 F. Supp. at 4.
34. Catherine A. MacKinnon, *Restoring Institutional Liability for Sexual Harassment in Education,* 125 Yale L.J. 2038, 2062-63 (2016), available at http://www.yalelawjournal.org/pdf/h.2038.MacKinnon.2105_d85guon3.pdf.
35. 524 U.S. 274, 289-90 (1998).
36. *Id.* at 278.
37. *Id.* at 290.
38. *Id.* at 291.
39. *See Id.* at 285 ("[W]e conclude that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.").
40. Doe v. Bradshaw, 203 F. Supp. 3d 168, 178 (D. Mass., 2016).
41. *Id.* at 178 (quoting Pineda v. Toomey, 533 F.3d 50, 54 (1st Cir. 2008)).

In *Morrison*, the Appeals Court commented on the considerations behind the Supreme Court's *Gebser* decision to require actual knowledge:

> In *Gebser*, the court concluded that, under Title IX, the "funding recipient" must have actual notice of discriminatory behavior before being required to take remedial action. The court distinguished between Title IX, which conditions Federal funding on an educational institution's promise not to engage in discriminatory behavior, [and] Title VII, which creates an outright prohibition against discriminatory behavior. The court also observed that Title IX encompasses an implied private right of action for monetary damages, while Title VII encompasses an explicit private right of action for monetary damages.[42]

The difficult standard stated in *Gebser* severely limits the ability of plaintiffs to recover against educational institutions by restricting their rights to recover damages when school officials are unaware of the sexual harassment taking place or when they act with less than prompt and complete remediation. As Justice John Paul Stevens explained in his dissent in *Gebser*, "[a]s long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability."[43]

Liability Standard Under Chapter 151C

With Title IX liability limited by the federal funding contingency, and further restricted by the difficult standard governing recovery, plaintiffs will look to state law to seek redress for sexual harassment in the school environment. Because enforcement by the MCAD is limited to cases of sexual harassment where the plaintiff is "seeking admission as a student" or "enrolled as a student in a vocational training institution,"[44] the most available direct remedy will be found in chapter 151C, section 2(g), which, by its terms, categorically prohibits "sexual harass[ment] of students in any program or course of study in any educational institution" and provides, as noted, a broad definition of the term "sexual harassment."[45]

The immediate problem raised by G.L. c. 151C is whether, similar to Title IX, actual knowledge on the part of a school administrator coupled with deliberate indifference to remedying the harassment is required or whether G.L. c. 151C imposes strict liability for the institution once the harassment is disclosed. The Supreme Judicial Court (SJC) has not yet provided an answer to this question and only three decisions — one state and two federal — have spoken about the problem, and then, only ambiguously.

In *Morrison v. Northern Essex Community College*, as discussed above, the principal issue was whether the G.L. c. 151C claim was barred by the applicable three-year statute of limitations.[46] The only reference to the standard for liability under chapter 151C was a footnote, where the court stated that "[w]e . . . do not address whether a chapter 151C claim against an educational institution requires that its administrators have knowledge of harassment perpetrated by its coaches or teachers, a requirement imposed on claims under Title IX."[47]

The first federal decision to address the liability standard under G.L. c. 151C was *Doe v. Bradshaw*.[48] In *Bradshaw*, a school paraprofessional and soccer coach was accused of sexually abusing the plaintiff, and others, and it was alleged that school officials both knew about the sexual harassment and had failed to take appropriate action to correct it.[49] The plaintiff brought a variety of federal and state statutory and common law claims against the town, the school committee and school officials.[50] Among those claims were one under G.L. c. 151C, § 1(e), and one under G.L. c. 214, § 1C.[51] The plaintiff claimed that G.L. c. 151C and G.L. c. 214 imposed "'strict vicarious liability on an educational institution for sexual harassment by any employee vested with authority to care for and/or supervise students.'"[52] The defendants argued that the Title IX standard of actual knowledge and deliberate indifference on the part of a school administrator governed chapter 151C sexual harassment claims.[53]

Judge Douglas P. Woodlock denied a motion for summary judgment brought by the defendants.[54] He observed that the Appeals Court in *Morrison* had reserved the question of whether chapter 151C claims require that school administrators have knowledge of the harassment and there was no definitive guidance from the Massachusetts courts on the deliberate indifference versus strict liability standard.[55]

42. Morrison v. N. Essex Cmty. Coll., 56 Mass. App. Ct. 784, 795 n.17 (2002) (citing and quoting *Gebser*, 524 U.S. at 280-90).

43. 524 U.S. at 300-01 (Stevens, J., dissenting).

44. *See supra* note 6.

45. G.L. c. 151C, §2(g) (2018).

46. 56 Mass. App. Ct. at 795

47. *Morrison*, 56 Mass. App. Ct. at 795 n. 17. A recent Superior Court decision, Doe v. Town of Hopkinton, applied the strict liability standard. In *Town of Hopkinton*, claims were brought by a student and her parents, who alleged that a teacher at the student's middle school assaulted her repeatedly. Although there was evidence introduced that there had been repeated reports of inappropriate conduct by the teacher that put the school on notice, and that the school had not responded adequately to that notice, the court did not conclude that proof of the school's knowledge was necessary for an imposition of liability, but rather, held that "a school is strictly liable under c. 151C for the sexual harassment of a student by a teacher." Doe v. Town of Hopkinton, No. 1281CV03399, WL 1553440 (Mass. Sup. Ct. March 7, 2017) (Kazanjian, J).

48. 203 F. Supp. 3d at 189.

49. *Id.* at 173.

50. *Id.* at 176.

51. *Id.* at 188.

52. *Id.* at 189-90.

53. *Id.* at 189-90.

54. Doe v. Bradshaw, 203 F. Supp. 3d 168, 192 (D. Mass., 2016).

55. *Id.* at 189.

Judge Woodlock then addressed the applicable standard of liability under a G.L. c. 151C claim.[56] He held that the legislature's intent could not be gleaned by "[t]he text of ch. 151C" or "the origins of the strict liability and deliberate indifference standards in related statutory schemes."[57] "Strict liability for the sexual harassment of agents does exist under chapter 151B, which prohibits sexual harassment in the workplace, and which, like chapter 151C, can support chapter 214 claims," the judge recognized.[58] "However, strict liability was found there based on statutory language present in 151B but not 151C," he observed.[59]

At the same time, Judge Woodlock found "the reasons for imposing a 'deliberate indifference' standard on Title IX sexual harassment claims [to be] equally inapplicable."[60] As he explained, "[t]he Supreme Court emphasized that a deliberate indifference standard was important because Title IX imposed quasi-contractual funding conditions rather than directly regulating behavior, making notice particularly important, and because liability from Title IX's implied remedies should not exceed that from its express remedies, where notice was required."[61] But, the judge noted, "[u]nlike Title IX, chapters 214 and 151C provide an express cause of action that is not couched as a funding condition."[62]

In light of his "obligation to predict what standard the state courts would apply," Judge Woodlock noted "that Justice Duffly, then speaking for the Appeals Court [in *Morrison*], while reserving the question, did dwell on the distinctions between Title IX and chapter 151C, indicating a discomfort with the deliberate indifference standard."[63] "Recognizing that discomfort," he decided to "apply a strict vicarious liability standard" at that stage of the litigation.[64]

The second federal decision was *Harbi v. Massachusetts Institute of Technology*.[65] *Harbi* was brought by a student who alleged sexual harassment by a professor while she was enrolled in an online course he was teaching.[66] Judge F. Dennis Saylor IV noted that it is "an unsettled question under Massachusetts law what the proper standard is for determining institutional liability for sexual harassment claims made pursuant to chapter 214, 1C, where those claims are defined by G.L. c. 151C."[67] Citing to *Morrison* and *Bradshaw*, Judge Saylor stated that he would defer consideration of MIT's claim that a deliberate indifference standard, rather than a strict liability standard, should apply to the trial stage of the litigation.[68]

Arguments for and Against Strict Vicarious Liability

How might the SJC decide the open issue of the standard of liability under chapter 151C? There are a number of possible arguments for, and against, imposing strict vicarious liability, including the following.

One argument for strict liability is that subsection 2(g) of chapter 151C proscribes "sexually harass[ing] students in any program or course of study in any educational institution."[69] The language constitutes a categorical prohibition on educational institutions permitting sexual harassment of their students. An imposition of strict liability conforms to this prohibition and is supported by the application of principles of statutory construction.[70]

Second, the statute is intended to protect a vulnerable population from harm by those entrusted with their care. As such, it is entitled to a liberal interpretation in favor of the class it is designed to protect. Furthermore, school officials are in the best position to prevent and correct problems, and, as matter of public policy, it is sensible to subject schools to strict liability for sexual harassment of students by school employees vested with authority to care for and/or supervise students.[71]

Third, there is no reason to construe liability under chapter 151C differently from liability under chapter 151B. Statutory construction principles recognize the value of drawing on "the meaning that has settled on the same language in other legislation" and that such referencing is particularly appropriate "when the two statutes relate to the same class or persons or things or share a common purpose."[72] If strict liability for sexual harassment of an employee by a supervisor is appropriate under chapter 151B to protect employees, who are typically adults, it is certainly appropriate to impose strict liability in student sexual harassment cases when the harasser is a school employee vested with authority to care for and supervise students, who are often minors.

Finally, the liability standard from Title IX should not be applied to chapter 151C, because Title IX is only implicated where federal funding is involved, and, as the *Bradshaw* court noted, in the Title IX context, "[t]he Supreme Court emphasized that a deliberate indifference standard was important because Title IX imposed quasi-contractual funding conditions rather than directly regulating

56. *Id.*

57. *Id.*

58. *Id.* (citing Coll.-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination, 400 Mass. 156, 163-64 (1987)).

59. *Id.* (citing Coll.-Town, 400 Mass. at 163-64, and noting as an example its indication that "'G.L. c. 151B, § 4, prohibits discrimination by 'an employer, by himself or his agent.'").

60. Doe v. Bradshaw, 203 F. Supp. 3d 168, 189 (D. Mass., 2016).

61. *Id.* (citing *Gebser*, 524 U.S. at 286-90).

62. *Id.* at 189.

63. *Id.* at 190.

64. *Id.*

65. No. 16-cv-12394-FDS, 2017 WL 3841483 (D. Mass. Sept. 1, 2017) (Saylor, J).

66. *Id.* at *1.

67. *Id.* at *5 n. 2.

68. *Id.*

69. G.L. ch. 151C, § 2(g) (2018).

70. *See* Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass 406, 418 (2007) (remedial statute is one "intended to address misdeeds suffered by individuals, rather than one that punishes public wrong").

71. *See* Currier v. National Bd. of Med. Examiners, 462 Mass. 1, 18 (2012) (remedial statute should be given liberal construction favoring intended purpose).

72. Commonwealth v. Smith, 431 Mass. 417, 420 (2000).

behavior, making notice particularly important, and because liability from Title IX's implied remedies should not exceed that from its express remedies, where notice was required."[73] Chapter 151C contains no such explicit notice requirement, nor is it conditioned on funding, but rather, it is framed as an express prohibition on sexual harassment in education.[74] In addition, Title IX's liability standard is not suited to the remedial purposes of chapter 151C.

Arguments against strict liability also rely on statutory construction and public policy. In regard to statutory construction, use of different language in chapter 151C and chapter 151B means they should be interpreted differently. "[C]anons of statutory construction teach[] that related statutes are to be construed together to produce a harmonious, systemic whole and that differences in language between such statutes must reflect different intended meanings."[75] Strict liability for sexual harassment of students, no matter the perpetrator, is poor public policy because it places too great a burden on educational institutions.

Second, as a matter of public policy, educational institutions, many of which must educate any and all students who wish to attend, should not be burdened with having to oversee all employee-student interactions to prevent sexual harassment from occurring.[76]

Conclusion

While the liability standard under G.L. c. 151C remains unsettled, there is a significant possibility that schools, colleges and universities will be judged under a strict liability standard. In view of the remedial purposes of the statutory scheme, the SJC may impose strict liability when the harasser is a person with authority to care for and supervise students in order to protect students from sexual harassment and exploitation by those most readily positioned to prevent it — the educational institutions the students attend. As a result, it is advisable for all schools, whether or not they receive federal funding, to keep their sexual harassment, disciplinary and hiring policies up to date, to appropriately train and supervise their employees to protect students from the conduct prohibited under G.L. c. 151C, and to act quickly and decisively when faced with a complaint of sexual harassment to remediate any misconduct. To do otherwise is to violate the special relationship between vulnerable students and those who are mandated to protect them as part of the educational process.

73. *Bradshaw*, 203 F. Supp. 3d at 189.

74. G.L. ch. 151C, § 2(g) (2018).

75. Martha's Vineyard Land Bank Comm'n v. Bd. of Assessors of W. Tisbury, 62 Mass. App. Ct. 25, 30 (2005).

76. *See* Luoni v. Berube, 431 Mass. 729, 734-35 (2000); Cremins v. Clancy, 415 Mass. 289, 296 (1993) (O'Connor, J., dissenting) ("We owe to everyone a duty not to act in such a way as to put him or her at risk unreasonably, but ordinarily we do not owe others a duty to take action to rescue or protect them from conditions we have not created").