APPELLATE DIVISION OF THE SUPERIOR COURT

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L.W., a minor by his mother and natural guardian, L.G., :

Respondent :

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v. :

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SUBURBAN REGIONAL SCHOOL DISTRICT :

Appellant :

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MAJORITY OPINION:

Facts:

As a fourth-grader at Suburban Elementary School, L.W. first heard the taunts -- "you're gay, you're a homo, you're a fag." Initially, L.W. did not understand the teasing and asked his aunt, "what does 'gay' mean? . . . That's what everyone says I am, so what does it mean?" In fifth and sixth grade, the frequency of the ridicule increased from once a month or once a week to almost daily. Only then did school officials learn of the problem. At one point during the fifth grade, L.W. became so upset that he refused to attend school. L.W. returned to school, but the problem continued.

In the fourth grade, classmates began taunting plaintiff L.W. with homosexual epithets such as "gay," "homo," and "fag." The harassment increased in regularity and severity as L.W. advanced through school. In seventh grade, the bullying occurred daily and escalated to physical aggression and molestation. Within days of entering high school, the abuse culminated with a pair of physical attacks. Ultimately, L.W.'s unease prompted him to withdraw from his local high school and enroll elsewhere, at the expense of his school district.

The harassment escalated in 1998 when L.W. enrolled at the Suburban Middle School for seventh grade, a school with an enrollment of 1,400 students. "Almost every single day" classmates directed slurs at L.W. loudly in the halls "so everyone could hear." In the fall, L.W. discovered a piece of construction paper attached to his locker that read, "You're a dancer, you're gay, you're a faggot, you don't belong in our school, get out." L.W. did not immediately report the incident to school officials.

The first reported incident occurred in late January. While in the school cafeteria, a group of ten to fifteen students surrounded L.W. One of those students then struck L.W. on the back of the head and taunted him with "the usual" homosexual epithets. Also in late January, a student approached L.W. in the gym locker room and, with a crowd of students looking on, said, "If you had a p****, I'd f*** you up and down." L.W. was "embarrassed, vulnerable, and ashamed." The insults such as "butt boy, fruit cake, and

fudge packer" did not abate. The remarks were so frequent in seventh grade that L.W. testified that "if I made it through a day without comments, I was lucky."

In addition to reporting the incidents to the Assistant Principal in Charge of discipline, Mr. Bein, L.W. sought the help of his guidance counselor who urged L.W. to "toughen up and turn the other cheek." L.W.'s mother complained to Bein about the guidance counselor's advice.

The harassment at Suburban Middle School peaked in mid-March. While standing in the lunch line, three students approached L.W., calling him "gay" and "faggot." One student then grabbed L.W.'s "private area" and "humped" him, taunting, "Do you like it, do you like it like this?" L.W. escaped, but the student followed him and repeated the molestation as classmates watched. L.W. then fled to the school's main office. Bein spoke with all three attackers, told them that their conduct was "inappropriate" and that, if repeated, "it would be dealt with more severely." The assaulting students then returned to class. Even in the main office, the students teased L.W. Following the cafeteria incident, L.W. did not attend school for several days.

Shortly thereafter another student went up to L.W. laughed and said, "Faggot . . . get out of here, we don't want you here," The student then "whipped" L.W. over the back of his neck with a silver chain. L.W. reported the incident before going home that day. When his mother arrived, L.W. was crying. He had "welts" on his neck, and his cheek was "all red" from the attack. School officials suspended the student for five days. L.W. did not return to school for over a week.

On entering High School South, the epithets continued. To avoid the derision he encountered on the school bus, L.W. decided to walk home after school. However, while walking home from school in early September, and off school grounds, a car approached L.W. and three students exited. One student said, "I heard you have a crush on L.B., and that his family doesn't like faggots, he doesn't like faggots." The student continued, "Well, are you a faggot?" A second student chimed in, "We don't like faggots, our whole family doesn't like faggots." L.W. yelled, "It's none of your damn business." The first student then punched L.W. in the face, knocking him down. L.W. ran away, crying hysterically, but the student chased after him threatening, "If I hear that you said anything about this I'm going to knife you." L.W. subsequently missed a day or two of school.

In the wake of the attack, L.W.'s mother informed high school officials of the mistreatment her son endured in middle school. According to L.W.'s mother, the educators seemed unaware of L.W.'s past. The District suspended M.F. for ten days, and he later pled guilty to a charge of assault. School officials advised L.W. to take the bus home in the future.

The final incident occurred in mid-September when L.W. went to downtown Toms River for lunch, as many students did. L.T. approached L.W., who was sitting on a curb outside a 7-Eleven convenience store. Unprovoked, L.T. pushed L.W. to the ground and

grabbed L.W.'s shirt. L.T. warned L.W. that if he ever heard that L.W. had a crush on him or his friends again that he'd "kick [L.W.'s] a**." The aggressor then "completely covered" L.W. with dirt. The District suspended L.T. for ten days.

L.W. never returned to High School South, but instead withdrew from the District to attend school elsewhere.

Procedural History:

This complaint was originally heard by an administrative law judge within the Division of Civil Rights. The Administrative Law Judge (ALJ) concluded that a cause of action against a school district for student-on-student sexual harassment was not cognizable under the LAD. Further, even assuming that the LAD recognized such a cause of action, the ALJ opined that L.W.'s claim should be governed by Title IX standards.

The Director of the Division on Civil Rights reviewed and rejected the ALJ's dismissal of the complaint, finding that L.W. was subjected to severe or pervasive harassment on the basis of his perceived sexual orientation. The Director found that the LAD recognized hostile environment claims against a school district. Applying the principals espoused in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), he concluded that L.W. was entitled to recovery. The Director ordered equitable measures, requiring the District to revamp its policies and procedures regarding the prevention of peer sexual harassment. He also awarded $50,000 in emotional distress damages to L.W. and $10,000 in emotional distress damages to his mother. Finally, the Director assessed a $10,000 penalty against the District and granted plaintiffs' application for attorneys' fees.

"Freedom from discrimination is one of the fundamental principles of our society." Lehmann, supra, 132 N.J. at 600. With that bedrock principle in mind, "the overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimination.'" Fuchilla v. Layman, 109 N.J. 319, 334 (quoting Jackson v. Concord Co., 54 N.J. 113, 124 (1969)), cert. denied, 488 U.S. 826, 109 S. Ct. 75, 102 L. Ed.2d 51 (1988). In short, the LAD is the Legislature's attempt to "protect society from the vestiges of discrimination." Cedeno v. Montclair State Univ., 163 N.J. 473, 478 (2000).

The first question presented in this appeal is whether the LAD recognizes a cause of action against a school district for student-on-student harassment based on perceived sexual orientation. Because that question entails statutory interpretation, we begin with the statute's plain language -- our polestar in discerning the Legislature's intent.

The LAD provides, in pertinent part:

> All persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual

> orientation, familial status, disability, nationality, sex or source of lawful income used for rental or mortgage payments. . . . This opportunity is recognized as and declared to be a civil right.

Pursuant to the LAD, it is unlawful "[f]or any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof" on the basis of that person's "affectional or sexual orientation." N.J.S.A. 10:5-12(f). "Affectional or sexual orientation" is defined by the Act as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." N.J.S.A. 10:5-5(hh). Further, "place of public accommodation" expressly includes "any . . . primary and secondary school, . . . high school, . . . or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey." N.J.S.A. 10:5-5(l).

Because of the Act's plain language, its broad remedial goal, and the prevalent nature of peer sexual harassment, we conclude that the LAD permits a cause of action against a school district for student-on-student harassment based on an individual's perceived sexual orientation if the school district's failure to reasonably address that harassment has the effect of denying to that student any of a school's "accommodations, advantages, facilities or privileges." See N.J.S.A. 10:5-12(f). A contrary conclusion would be incongruous with the LAD's prohibition of discrimination in other settings, including the workplace, because "[t]he right of a student to achieve an education free from sexual harassment is certainly as important as the rights of an employee in a work setting." K.P. v. Corsey, 228 F. Supp.2d 547, 550 (D.N.J. 2002), rev'd on other grounds, 77 Fed. Appx. 611 (3d Cir. 2003).

We do not suggest, however, that isolated schoolyard insults or classroom taunts are actionable. Rather, in the educational context, to state a claim under the LAD, an aggrieved student must allege discriminatory conduct that would not have occurred "but for" the student's protected characteristic, that a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and that the school district failed to reasonably address such conduct.

In Lehmann, this Court established that under the LAD an employer will be liable for compensatory damages for a hostile work environment in three circumstances: (1) when the employer grants a supervisor authority to control the workplace and the supervisor abuses that authority to create a hostile environment, id. at 620; (2) when the employer negligently manages the workplace by failing to enact anti-harassment policies and mechanisms, id. at 621-22; or (3) when the employer has actual or constructive knowledge of the harassment and fails to take effective measures to end the

discrimination, id. at 622-23. It is the last circumstance that is relevant in this appeal. The Lehmann Court stated that liability may be appropriate "if the employer had actual knowledge of the harassment and did not promptly and effectively act to stop it." Id. at 622. The Court continued:

> When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser. "Effective" remedial measures are those reasonably calculated to end the harassment. The "reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment."

The School District, maintains that the applicable standard of liability should mirror the standard applied in Title IX actions -- the "deliberate indifference" standard. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed.2d 839 (1999). Title IX of the Education Amendments of 1972 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." 20 U.S.C.A. §1681(a). In rejecting a mere negligence standard and establishing that high bar to recovery, the Supreme Court noted that the claim at issue was an implied private right of action under a statute enacted pursuant to Congress' authority under the Spending Clause. Id. at 639-40, 119 S. Ct. at 1669, 143 L. Ed. 2d at 851.

We reject the Title IX deliberate indifference standard because we conclude that the Lehmann standard should apply in the workplace and in the school setting. We find no need to impose a separate standard because the discrimination is in a school.

There are substantial differences in scope between the LAD and Title IX. Title IX is narrower than the LAD on three fronts. First, Title IX prohibits discrimination based on sex only. 20 U.S.C.A. §1681(a). That limitation must be juxtaposed against the expansive list of characteristics protected by the LAD, including "affectional or sexual orientation" -- the crux of this appeal. See N.J.S.A. 10:5-4. Second, Title IX prohibits only recipients of federal educational funds from discriminating against students based on sex. See Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 286, 118 S. Ct. 1989, 1997, 141 L. Ed.2d 277, 289 (1988). Indeed, Title IX was enacted pursuant to Congress' authority under the Spending Clause, thereby implicating contract principles. Davis, supra, 526 U.S. at 640, 119 S. Ct. at 1669, 143 L. Ed. 2d at 851-52. Conversely, the LAD, as does our State Constitution, enforces the guarantee of civil rights, see N.J.S.A. 10:5-2, and applies universally to "places[s] of public accommodation," a defined term that includes schools regardless of their source of funding, N.J.S.A. 10:5-5(l). Third, although courts have found an implied private right of action under Title IX, see Cannon v. Univ. of Chicago, 441 U.S. 677, 709, 99 S. Ct. 1946, 1964, 60 L. Ed. 560, 582 (1979), the LAD expressly empowers

aggrieved persons to file private causes of action seeking a full range of legal and equitable remedies. N.J.S.A. 10:5-13.

A school district's "first imperative must be to do no harm to the children in its care. A board of education must take reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children." Frugis v. Bracigliano, 177 N.J. 250 (2003). A school cannot be expected to shelter students from all instances of peer harassment. Nevertheless, reasonable measures are required to protect our youth, a duty that schools are more than capable of performing. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655, 115 S. Ct. 2386, 2392, 132 L. Ed. 2d 564, 576 (1995) (noting that state's power over schoolchildren "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults"); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1417 n.7 (11th Cir. 1997) (Barkett, J., dissenting) ("The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace."), rev'd, supra, 526 U.S. 629, 119 S. Ct. 791, 142 L. Ed.2d 655. Because we do not create a strict liability standard, a district is not compelled to purge its schools of all peer harassment to avoid liability. Rather, we require school districts to implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment. Appropriate and reasonable measures will reinforce the basic principle that student-on-student sexual harassment is unacceptable.

In assessing the reasonableness of a school district's response to a hostile educational environment, we are mindful that schools are different from workplaces. The United States Supreme Court recognized as much, stating:

> Schools are unlike the adult workplace and . . . children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Davis, supra, 526 U.S. at 651-52, 119 S. Ct. at 1675, 143 L. Ed. 2d at 859.

We hereby affirm the decision of the Director of the Division on Civil Rights affirming the award of damages as set forth the L.W., the award of damages to L.G., the directive that the school district conduct such remedial measures as directed in reformulating its student and personnel handbooks and training to eliminate the complained of harassment, bullying, and unacceptable behavior. We further affirm the award of attorney's fees and direct that this matter be remanded for a further hearing in accordance with this decision to determine appropriate counsel fees to be awarded.

DISSENTING OPINION:

I accept as complete and accurate the recitation of the facts and procedural history as contained in the majority opinion. However, I am concerned that the record that is before us is incomplete and cannot support the findings contained therein. As I will discuss below, the record before the Administrative Law Judge within the Division of Civil Rights to be lacking in substance and completely absent of any comparative information. Accordingly, I find no basis for the Director of the Division of Civil Rights to have rejected the decision of the Administrative Law Judge and subsequently no basis for the award of damages or attorney fees.

I am unable to join fully in the views of my colleagues. My divergence is based upon the crux of the majority decision to the extent that it relies on Lehman, supra, and to the extent that the majority has affirmed the award of damages and counsel fees to L.W. and separate damages as to L.G., and I therefore respectfully dissent. Certainly, I join my colleagues in recognizing that harassment of a public school student based on his or her sexual orientation is forbidden by the LAD, and also that vigorous steps are warranted to accomplish its eradication. Similarly, bullying of students also should be rooted out. Nor do I mean to minimize the anguish and fear that the complained-of incidents of harassment and bullying must have inflicted on L.W. and his mother.

It may be that the remedial measures taken by the school in this case ultimately were not as effective as we would have preferred. But the real question is whether there was a "hostile school environment," and this involves considerations that may not have been given their full due. When the efforts of the school staff and administration are reckoned, they dispel, at least to a substantial extent, the portrayal of the entire school environment as hostile. The incidents that led to the disciplining of offending students were occasional, not pervasive, and hostility did not characterize the conduct or attitude of the school. Further, disciplinary efforts entertained by the school, which may or may not have had the full effect that this Court would desire, must be considered as they attempted to address the issue with punishment of the offenders in increasing severity in response to the untenable actions of those students.

Thus, incidents of discrimination against L.W. took place, not in a vacuum, but in the context of actions by the school and its responsible officials that on balance were supportive of L.W., aimed at making his school environment congenial, and designed to punish those who engaged in the harassment. When the efforts of the school staff and administration are reckoned, they dispel, at least to a substantial extent, the portrayal of the entire school environment as hostile. The incidents that led to the disciplining of offending students were occasional, not pervasive, and hostility did not characterize the conduct or attitude of the school.

Indeed, when evaluating the conduct of the school and its officials, it is helpful to recognize how different the situation here was from the facts that obtained in Frugis v. Bracigliano, 177 N.J. 250, 268 (2003). In Frugis, the facts were dominated by incidents of recurring abuse of students by a principal, often right in his school office and in rather conspicuous circumstances. Although the principles enunciated in Frugis are indeed

valuable, the dramatic difference between the circumstances here and those in Frugis limits the usefulness of the comparison.

I agree with the school district that the applicable standard of liability should mirror the standard applied in Title IX. The standard clearly requires the "deliberate indifference" standard as set forth in Davis, supra. In Davis, supra, the United States Supreme Court considered whether a private action for damages could be brought against a school board under Title IX in cases of student-on-student sexual harassment. 526 U.S. at 632, 119 S. Ct. at 1166, 143 L. Ed. 2d at 847. The Court held that such an action exists "only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities . . . that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." Accordingly, I would not recognize a separate cause of action under a lesser standard and would therefore remand for hearings consistent with the Davis standard.

Based on the standard as set forth in Davis, it is my opinion that the Respondent herein failed to meet their burden of showing a "deliberate indifference" to their situation. The record below is clear that the school district employed a system of punishment commensurate with the offenses presented. First time offenders were warned of their improper behavior and that the same would not be tolerated, second time offenders were dealt with more severely, as were those that committed physical or more abusive attacks upon respondent. It is noted that some of the more severe responses included suspension, expulsion and criminal charges. Accordingly, it cannot be said that the school district exhibited a "deliberate indifference" to the respondent, but rather, the school district actually displayed a reasoned, rational and increasing severe response to the situations that presented themselves.

Considering, further, the directive of the decision of the Director of the Division on Civil Rights relating to the revamping its policies and procedures regarding the prevention of peer sexual harassment, I believe the Director has overstepped his limits. I agree with the Director that the statements in the student/parent handbooks should have included an explicit prohibition of discrimination and harassment on the basis of sexual orientation. But I am not convinced that this deficiency is a sufficient basis to impose compensatory damages upon the district. In short, the absence of an explicit statement in the student handbooks that discrimination and harassment on the basis of sexual orientation is not a basis for the award of monetary damages where, as here, the written materials provided by the schools were sufficient to place students on notice that physical assaults and harassment of any kind were prohibited.

In the instant case, the Director ordered the district to provide mandatory training for all administrators, the affirmative action staff, counselors, school nurses and others who deal with student complaints of discrimination and harassment based on actual or perceived sexual orientation. The Director further required the dissemination and publication of the district's anti-discrimination policies to all parents, students, teachers and the public. I am not persuaded that the record supports the imposition of these

remedial measures. Although not a direct result of this case, but after the events that have taken place and before there was a decision from the Director in this matter, the Commissioner of Education adopted regulations which are intended to ensure that all students are provided equal access to educational programs and services. N.J.S.A. 6A:7-1.1 to -1.10. These regulations deal with eliminating discrimination and harassment based upon "affectional or sexual orientation." The record is devoid of any indication as to whether the school district's current policies, in accordance with the directives of the Commissioner of Education, already accomplished the goals intended with these remedial measures.

Further, the Director's determinations with respect to the reasonableness or unreasonableness of the remedial actions of the school and its staff cannot be sustained on the present record. The Director's determinations necessarily assume that those actions were unreasonable. But in the absence of proofs regarding how problems of this nature are addressed, including with respect to the nature of the discipline imposed on students who have discriminated, by at least some of the hundreds of other schools in the State, there is no basis for comparing this District with others, and thus no real standard of judging the reasonableness of what was done here. The same can be said for the lack of any meaningful information in this record as to how the District's actions compared to what may or may not have been required at the time by the Commissioner of Education. To judge the District and its staff in the absence of such proofs, which must have been readily obtainable by the Director, is in essence arbitrary. The Director cannot reliably know that the type of incidents that occurred here were reasonably stoppable by the school without proof that they were stoppable by other similarly situated schools.

Accordingly, I dissent from the majority in directing these measures from being imposed.

Based upon the record before us, I vote to reverse the decision of the Director, vacating the award of damages to both L.W. and L.G., vacating the award of attorney fees, and vacating the requirement that the appellant be required to revamp its training and policy handbooks as required by the Director's decision.