

Paula S. Rosenstein, Esq. (SBN 126264)
Bridget J. Wilson, Esq. (SBN 167632)
ROSENSTEIN, WILSON & DEAN, P.L.C.
1901 First Avenue, Suite 300
San Diego, California 92101
Telephone: (619) 232-8377
Facsimile: (619) 238-8376

Attorneys for Plaintiffs
MEGAN DONOVAN and JOSEPH RAMELLI

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

MEGAN DONOVAN and JOSEPH
RAMELLI,

Plaintiffs,

v.

POWAY UNIFIED SCHOOL
DISTRICT, by and through its Board of
Education; DONALD A. PHILLIPS,
Superintendent; SCOTT FISHER,
Principal; ED GILES, Assistant
Principal; and DOES 1-25, inclusive;

Defendants.

CASE NO.: GIC 823157

PLAINTIFFS' MEMORANDUM OF
LAW REGARDING THE DEFINITION
OF "DELIBERATE INDIFFERENCE"

I/C/J: Hon. Steven R. Denton

Trial Date: 5/16/05

Time: 9:00 a.m.

Dept.: 48

Plaintiffs Megan Donovan and Joseph Ramelli hereby submit the following
Memorandum regarding the definition of "deliberate indifference".

I. INTRODUCTION

One of the key terms in the jury's assessment of liability in this matter is
"deliberate indifference". Plaintiffs and Defendants have a difference of opinion as to
an appropriate instruction regarding the definition for submission to the jury. The
purpose of this Memorandum is to provide the court with Plaintiffs' argument and the
basis therefor.

// //

// //

II. "DELIBERATE INDIFFERENCE" - DEFINITION

The definition of "deliberate indifference" as it relates to the Education Code violations should be a combination of the standard to which employers are held under the California Fair Employment and Housing Act and the discussion of "deliberate indifference" in the Ninth Circuit case of Flores v. Morgan Hill Unified School District (2003) 324 F 3d 1130.

The FEHA standard should be taken into consideration as it is an anti-discrimination scheme crafted by the State Legislature based upon the priority of eliminating discrimination and harassment from the workplace. The State Legislature has taken an equally strong viewpoint as to the elimination of discrimination and harassment in the educational environment, as demonstrated in Education Code § 200, et seq. Flores applies the "deliberate indifference" standard to a fact situation which is very similar to that which we have here and therefore the court's reasoning in that matter is instructive to all, including the jury.

Under FEHA, an employer is responsible for harassment of which it knew or should have known if it fails to take immediate and appropriate corrective action. Government Code § 12940(j)(1). Defendants would have the court use a "clearly unreasonable" standard instead. Further, Defendants would raise the bar even more by saying that "a response by the Defendant that is merely inept, erroneous, ineffective or negligent does not amount to deliberate indifference". (Defense Special Instruction No. 4: Deliberate Indifference) Defendants take this language from Federal pattern jury instructions and modify it using language from Davis v. Monroe County Board of Education (1999) 527 US 629 and Gebser v. Lago Vista Independent School District (1998) 524 US 274.

Plaintiffs contend that borrowing from these two cases, which clearly analyzed Title IX in a restrictive manner which would raise the bar very high for Plaintiffs to succeed in a discrimination or harassment lawsuit, is the incorrect standard. Rather, "where the distinctive language of the FEHA evidences a legislative intent different

1 from that of Congress” or where Title VII case law “appears unsound or conflicts with
2 the purposes of FEHA”, California courts should decline to follow federal decisions. Page
3 v. Superior Court (1995) 31 Cal App 4th 1206, 1215-1216; Fisher v. San Pedro Peninsula
4 Hospital (1989) 214 Cal App 3d 590, 606. The application of the “deliberate
5 indifference” standard under the Education Code is an appropriate place to depart from
6 the federal court interpretation of Title IX.

7 A. Federal v. State Language:

8 Title IX states, in part: “No person in the United States shall, on the basis of sex,
9 be subjected to discrimination ...” While this language is strong, the remainder of the
10 section goes on to identify who is excluded. 20 U.S.C. § 1681.

11 The California Education Code, on the other hand, places an “affirmative
12 obligation to combat ... sexism, and other forms of bias ...” on California’s public schools.
13 (Education Code § 201(b)) This language evidences an intention to go much further than
14 Title IX.

15 B. Immediate and Appropriate Corrective Action:

16 Using the FEHA standard of failing to take immediate and appropriate corrective
17 action is appropriate under the Education Code. In California, it is apparent that the
18 state Legislature and the courts have attempted to keep the bar at a reasonable level
19 so as to further the public policy of eliminating discrimination and harassment in
20 employment and educational situations. As such, the appropriate instruction to the jury
21 should be the following:

22 “Deliberate indifference” is found if the school administrator
23 failed to take immediate and appropriate corrective action
24 in response to harassment it knew or should have know about.
25 For instance, failure to take reasonable steps to investigate
26 and stop the harassment would support a finding of deliberate
27 indifference, as does the failure to take further steps once he
28 knew his remedial measures were inadequate. Another example
would be failure to do anything reasonable about the ongoing
harassment supports an inference of deliberate indifference.”
Government Code § 12940(j)(1); Flores, supra.

The proposed jury instruction is attached hereto as Exhibit “A”.

1 The examples contained in the last two sentences of the instruction are taken
2 from Flores, supra and provide guidance to the jury as to what type of actions would be
3 insufficient under the standard. While Defendants may not like these examples, they
4 are actually a higher bar as they are based upon the Title IX standard of “clearly
5 unreasonable in light of the known circumstances” stated in Flores. Nonetheless, they
6 can provide helpful guidance to the jury and it is the case most closely on point to the
7 instant situation.

8 III. DEFENDANTS’ DEFINITION IS CONTRARY TO CALIFORNIA LAW.

9 Defendants’ definition fails in two respects. A copy of Defendants’ instruction is
10 attached as Exhibit “B”. Defendants’ instruction is erroneous in that it relies on Davis
11 and Gebser to say that the Defendants’ response if it is inept, erroneous, ineffective or
12 negligent is insufficient for a finding of liability. This would frustrate the California
13 State Legislature’s goal of eliminating harassment if a Defendant could try anything at
14 all and, even if it were ineffective or ludicrous, it would still satisfy the standard. It is
15 clear that California wishes to take a harder line against discrimination and
16 harassment and that is why the law has developed that the action to be taken by the
17 party in control must be both immediate and appropriate corrective action. Defendants’
18 proposed standard is in keeping with the high bar set by the U.S. Supreme Court on
19 Title IX actions, but it is contrary to the goals of California’s public policy.

20 Defendants’ instruction is also inappropriate as Defendants have not argued that
21 the students who were harassing Plaintiffs were not in the school district’s control or
22 that they did not have disciplinary authority over the person. Therefore, adding the
23 second paragraph, as Defendants wish to do, would only serve to confuse the jury and
24 cause them to have to consider an issue which is truly not before them.

25 // //

26 // //

27 // //

28 IV. CONCLUSION

1 Based upon the foregoing, it is clear that the jury instruction attached by
2 Plaintiffs as Exhibit “A” is the appropriate definition of “deliberate indifference” and
3 that which should be provided to the jury for its deliberations.

4 Dated: _____, 2005.

Respectfully submitted,

ROSENSTEIN, WILSON & DEAN, P.L.C.

By:

Paula S. Rosenstein, Esq.
Bridget J. Wilson, Esq.
Attorneys for Plaintiffs
Joseph Ramelli and Megan Donovan

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28