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Extra Legal

Bad Teacher: The Developing Legal Standard In Massachusetts For Teacher-On-Student Harassment

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I. *Introduction*

There is a potential sea change underway in the Commonwealth of Massachusetts relating to the legal standard to be applied when a student sues a municipality or school district alleging sexual harassment against a teacher. Prior to 2016, non-perpetrating municipal defendants have been protected from liability by a heightened standard developed through many years of Title IX jurisprudence. In 2016 and 2017, however, persuasive authority has developed that threatens to dismantle nearly two decades of federal precedent in the school law context, paving way for a weightier standard. The Commonwealth's "catch-all" anti-sexual harassment statute, chapter 214, section 1C of the Massachusetts General Laws, has become the hot topic of several recent Massachusetts state and federal judicial decisions.

The question facing the judiciary in these cases is whether to adopt the Title IX standard for claims brought by students against teachers for sexual harassment in the educational setting or whether to liken sexual harassment of a student by a teacher to supervisor-on-employee harassment in the employment context, as governed by chapter 151B of the Massachusetts General Laws and *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*.[1] Adoption of the chapter 151B standard holds school districts and municipalities strictly liable for the sexually harassing conduct of its teachers, regardless of whether an administrative official with the authority to take corrective measures had notice of the harassment or took remedial action. Looming somewhere in

[1] Mass. Gen. Laws ch. 151B and Coll-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination, 508 N.E.2d 587, 591 (1987) ("In interpreting [M.G.L. c. 151B], we may look to the interpretations of Title VII of the analogous Federal statute; we are not, however, bound by interpretations of the Federal statute in construing our own State statute.") (citations omitted).

the middle of the heightened Title IX bar and the strict liability standard is the potential "notice and reasonableness" standard that has been applied in cases of employee-on-employee harassment under chapter 151B. To date, no court has adopted the intermediate standard and the courts appear to be trending toward the adoption of strict liability. Through the date of this essay, there is no appellate authority on the issue.

If the courts of the Commonwealth continue to apply a strict liability standard in Massachusetts for teacher-on-student sexual harassment, or if the Massachusetts Supreme Judicial Court adopts its *College-Town* rationale in the educational setting, there will inevitably be significant ramifications for school districts. These will take place in the form of substantial and financially crippling verdicts and settlements which very well might be excluded by insurers as a result of the change in the landscape and the dearth of defenses available to municipal defendants. The adoption of a strict liability standard will also inevitably result in a flood of litigation brought pursuant to the catch-all statute chapter 214, section 1C.[2] The uncompromising Title IX standard shielded school districts from having to defend against sexual harassment claims arising out of teacher-on-student harassment except in the most egregious cases, where actual notice and deliberate indifference were proven.[3] Without that barrier in place, school districts will be stripped of almost any viable defense to claims made by students for sexual harassment against teachers or professors in a school that qualifies as an educational institution for purposes of the catch-all statute.

[2] Mass. Gen. Laws ch. 214, § 1C (2016).

[3] *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998) ("[W]e will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.").

II. *Background: Purpose & Scope of Chapter 214, Section 1C*

Chapter 214, section 1C of the Massachusetts General Laws provides that "[a] person shall have the right to be free from sexual harassment, as defined in chapter one hundred and fifty-one B and one hundred and fifty-one C."[4] It "was enacted to expand the class of persons who could seek relief for violations of chapters 151B and 151C."[5]

The statute is not itself a source of substantive rights, but merely provides a method for vindicating rights conferred by chapter 151C, section 2(g) of the Massachusetts General Laws, which states that it shall be an "unfair educational practice for an educational institution to . . . sexually harass students in any program or course of study . . . ."[6] Where a student is sexually harassed as defined by chapter 151C, section 2(g), but is not afforded a private right of action under section 3(a) of that same chapter, then chapter 214, section 1C acts as a "catch-all", providing a cause of action to the student.[7] "Chapter 214 merely expands who is protected by ch. 151C and the remedies available to them, while ch. 151C remains the source of the substantive law."[8]

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[4] Mass. Gen. Laws ch. 214, §1C (2016).

[5] Doe v. Town of Stoughton, No. CIV.A. 12–10467–PBS, 2013 WL 6498959, at *4 (D. Mass. Dec. 10, 2013). *See also* Lowery v. Klemm, 845 N.E.2d 1124, 1129 (Mass. 2006) ("[Chapter 214, section 1C] gives students who are sexually harassed . . . access to the remedial provisions of G.L. c. 151B, § 9.") (citations omitted).

[6] Mass. Gen. Laws ch. 151C, §2G (2016).

[7] *See* Harbi v. Mass. Inst. of Tech., No. CV 16-12394-FDS, 2017 WL 3841483, at *6–7 (D. Mass. Sept. 1, 2017) ("Section 1C fills a gap in the statutory scheme by 'extend[ing] to employees and students protection that is not otherwise available under [chapter] 151B and [chapter] 151C; it does not duplicate the relief provided by those statutes.'" (quoting Lowery v. Klemm, 845 N.E.2d at 1129). If a plaintiff does not fall within the ambit of the procedural entitlement of chapter 151C, section 3(a) of the Massachusetts General Laws, affording a private right of action solely to students "seeking admission . . . to any educational institution, or enrolled as a student in a vocational training institution", the plaintiff's entitlement to relief is procedurally conferred by chapter 214, section 1C. *Id.* at *6 (quoting Mass. Gen. Laws ch. 151C, § 3(a)) (2016).

[8] Doe v. Bradshaw (*Bradshaw II*), 203 F. Supp. 3d 168, 188–89 (D. Mass. 2016) (citing Lowery v. Klemm, 845 N.E.2d at 1128-29).

Chapter 151C, however, refers only to "educational institutions," whose definition does not include individuals, both expressly and according to judicial interpretation.[9] For this reason, at this juncture, chapter 214, section 1C has been held not to apply to student-on-student harassment.[10] It is conceivable, however, that the scope of chapter 214, section 1C will be interpreted broadly by the courts in the future to extend to student-on-student harassment, similar to the Massachusetts Supreme Judicial Court's extension of chapter 151B protections and employer liability to situations of employee-on-employee or third-party-on-employee harassment in the employment context.[11]

Courts have also recognized the somewhat bizarre interplay between chapter 214, section 1C and chapter 151C, particularly when discussing whether a student must first exhaust his or her administrative

[9] *See* Mass. Gen. Laws ch. 151C, §1 (2016); Doe v. Fournier, 851 F. Supp. 2d 207, 218 (D. Mass. 2012) ("The legislature's decision to include such clear language in chapter 151B imposing individual liability, while omitting any such language from chapter 151C, suggests that individuals cannot be liable in their individual capacity under chapter 151C."). *See also* Bradshaw II, 203 F. Supp. 3d at 188–89; Doe v. Town of Stoughton, No. CIV.A. 12–10467–PBS, 2013 WL 6498959 at *5 (D. Mass. Dec. 10, 2013).

[10] Harrington v. City of Attleboro, 172 F. Supp. 3d 337, 351–52 (D. Mass. 2016) ("The only court in this district that has apparently addressed § 2 in the context of peer-to-peer sexual harassment held that § 2 is inapplicable . . . Section 2(g) 'contemplates a scenario in which the institution itself, through its administrators or employees, acts as the harasser.'") (quoting *Stoughton*, 2013 WL 6498959 at *5)); *See also* Buschini v. Newburyport Public Schools, 18 Mass. Disc. L. Rep. 216, 217 (1996) (rejecting a claim against a town under chapter 151C based on the sexual harassment of one first grader by another). Most recently, in *Schaeffer v. Fu*, No. 17–10238–NMG, 2017 WL 3443215, at *2 (D. Mass. Aug. 10, 2017), Federal District Court Judge Gorton agreed.

[11] *See* MASS. COMM. AGAINST DISCRIMINATION, GUIDELINES ON 151B: SEXUAL HARASSMENT IN THE WORKPLACE, 6, https://www.mass.gov/files/documents/2017/09/06/2112%20Guideline%20Sexual%20Harassment.pdf (The complainant must show that the employer either knew or should have known about the harassing conduct and failed to take prompt, effective, and reasonable remedial action (citing, *inter alia*, College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination, 400 Mass. 156, 165–66 (1987); Messina v. Araserve, Inc., 906 F. Supp. 34, 38 (D. Mass. 1995); Battenfield v. Harvard University, No. 915089F, 1993 WL 818920, at *4 (Mass. Super. Aug. 31, 1993)); *see also* Modern Cont'l/Obayashi v. Mass. Comm'n Against Discrimination, 833 N.E.2d 1130, 1137–41 (Mass. 2005) (imposing liability on employers for the conduct of third-parties under a "knew or should have known" standard).

remedies before bringing a claim pursuant to chapter 214, section 1C. In *Harbi v. Massachusetts Institute of Technology*, the court held that *exhaustion* was required for claims brought by school applicants and vocational school students under chapter 151C but not for non-vocational students.[12] The court admitted, however, that "[t]he fact that chapter 214 imposes an exhaustion requirement for school applicants and vocational students, but not for students of non-vocational schools, obviously creates 'somewhat of an anomaly.'"[13] Further, the court conceded that it was "difficult to perceive a reasoned basis for the distinction" but that "the plain meaning of the statute controls."[14] Conversely, in *Harrington v. City of Attleboro*, the court declared that exhaustion was required before a claim could be brought under chapter 214, section 1C based on the fact that the statute expressly affords relief pursuant to chapter 151B, section 9 of the Massachusetts General Laws, which contains language relating to the Commonwealth's exhaustion requirement for straight 151B and 151C claims.[15]

Chapter 214, section 1C, as it applies to the educational setting, is presently navigating through its developmental stage. The result is an

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[12] *See* Harbi, 2017 WL 3841483, *6–7.

[13] *Id.*, quoting Guzman v. Lowinger, 664 N.E.2d 820, 822 (1996). "But the Supreme Judicial Court has elsewhere recognized that a plain reading of the exhaustion requirement under ch. 214, § 1C may lead to anomalous results." *Id.* at 572–73 (interpreting an earlier version of chapter 214, section 1C to impose an exhaustion requirement for claims against employers with more than six employees, but not for claims against employers with less than six employees, despite the fact that it was "at a loss to perceive in the statutory framework a reasoned basis for this distinction.").

[14] *Id.* at *7.

[15] Harrington, 172 F. Supp. 3d 337, 351 (D. Mass. 2016) (quoting M. G. L. c. 151B, §9) ("To bring such claims, Plaintiffs must satisfy the administrative exhaustion requirement of Mass. Gen. L. c. 151B, § 9, made applicable to c. 151C under Mass. Gen. L. c. 214, § 1C. Section 9 provides: 'Any person claiming to be aggrieved by a practice made unlawful under . . . chapter one hundred and fifty-one C, . . . may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief . . . .'") (alterations in original).

anomalous and, at times, inconsistent body of law. Until the appellate courts weigh in, chapter 214, section 1C will likely continue to produce non-binding, persuasive authority that is internally in conflict. This has arguably created an unstable legal landscape that is unable to provide dependable guidance to municipal attorneys and school officials.

III. *Discussion: The Shift Towards Strict Liability*

There is no appellate authority prescribing the applicable standard to be applied in the context of claims against teachers brought by students pursuant to chapter 214, section 1C.[16] Prior to 2016, a handful of state superior court and federal district court judges had declined to "enter the fray."[17] However, on August 26, 2016, for the very first time a written decision announcing the applicable standard under chapter 214, section 1C was rendered.[18] Federal District Court Judge Douglas P. Woodlock opined that a strict liability standard should apply under the statute, akin to the supervisor-on-employee standard adopted in the employment context by the Massachusetts Supreme Judicial Court in *College-Town.*[19]

In *Bradshaw II,* Judge Woodlock outright rejected the defendants' argument that the deliberate indifference standard of Title IX was applicable to chapter 151C or chapter 214, section 1C claims.[20] In his

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[16] *See, e.g.* Morrison v. N. Essex Cmty. Coll., 780 N.E.2d 132, 141 n.17 (2002) (acknowledging that the court was not addressing "whether a c. 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.").

[17] Doe v. Bradshaw, (*Bradshaw I*), No. 11–11593–DPW, 2013 WL 5236110, at *14 (D. Mass. Sept. 16, 2013). *See also* Bloomer v. Becker Coll., No. 09–11342–FDS, 2010 WL 3221969, at *7 (D. Mass. Aug. 13, 2010) (recognizing that there is no Massachusetts authority "stating that knowledge of the misconduct is a necessary element for recovery under Chapter 151C.").

[18] Bradshaw II, 203 F. Supp. 3d at 189–90.

[19] *Id.*

[20] *Id.*

decision, Judge Woodlock first acknowledged that the "Massachusetts courts have not answered this question for either chapter 214 or chapter 151C" and that "the Massachusetts Appeals Court has expressly reserved the issue whether ch. 151C claims require that the school administrators have some knowledge of the harassment."[21] However, in the absence of state law on which to rely, Judge Woodlock felt an "obligation" to "predict what standard the state courts would apply . . . ."[22] He concluded that the state courts would likely choose a strict liability standard, explaining "I notice 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. Recognizing that discomfort, I will apply a strict vicarious liability standard at this stage."[23] Judge Woodlock's 2016 decision has become the central authority on this undeniably important and pressing question.

On March 7, 2017, in denying summary judgment for the defendants and declining to adopt either the "actual knowledge/deliberate indifference" standard of Title IX or the "notice/reasonableness standard" for employee-on-employee sexual harassment adopted by the Massachusetts Supreme Judicial Court for purposes of chapter 151B, Superior Court judge Helene Kazanjian concurred with Judge Woodlock's analysis, holding that "chapter 151C claims are distinguishable from Title IX claims since 'Title IX impose[s] quasi-contractual funding conditions rather than directly regulating

[21] *Id.* at 189 (citing Morrison, 780 N.E.2d at 141 n.17; Bloomer, 2010 WL 3221969, at *7 ("There is thus, apparently, no authority stating that knowledge of the misconduct is a necessary element for recovery under Chapter 151C.")).

[22] *Id.*

[23] *Id.* at 190.

behavior[,] making notice particularly important . . . .'"[24] Quoting Judge Woodlock, Judge Kazanjian reasoned that "[u]nlike Title IX, chapters 214 and 151C are not based on a funding condition."[25] Judge Woodlock's and Judge Kazanjian's decisions both favor the "funding condition" distinction between Title IX and chapter 214, section 1C in abrogating any requirement of notice to school officials before liability is imposed. Their opinions also draw distinctions between Title IX and chapter 214, section 1C based on the fact that the former provides only a judicially implied, rather than a statutorily express, cause of action.[26] Whether either of those points is salient enough for the imposition of strict liability is certainly open for debate.

While acknowledging that the analogy between supervisor-on-employee harassment and teacher-on-student harassment "is not perfect" because the imposition of supervisory liability in the employment context was "grounded in the statutory language,"[27] Judge Kazanjian declined to interpret chapter 151C strictly on its express language, which—unlike 151B—omits the term "agents" from its purview, and instead favored the policy arguments advanced by majority in *College-Town*.[28] Judge Kazanjian held that, while "G.L.c. 151C, § 2 does not contain similar language [to Chapter 151B, § 4(16A)]," the Massachusetts Supreme Judicial Court noted in *College-Town* that 'it is the authority conferred upon a supervisor by the employer that makes the supervisor particularly able to force

[24] Doe *ex rel.* Doe v. Town of Hopkinton, 34 Mass. L. Rptr. 137, 138–140 (Mass. Super. 2017) (quoting Bradshaw II, 203 F. Supp. 3d 168, 189 (D. Mass. 2016)).

[25] *Id.* at 138.

[26] *Id.*

[27] *Id. at 139*. (citing College-Town Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination 508 N.E.2d 587, 591 (Mass. 1987)).

[28] *Id.*

subordinates to submit to sexual harassment.'" [29] Judge Kazanjian concluded that a school is strictly liable under chapter 151C or chapter 214, section 1C for the sexual harassment of a student by a teacher because the rationale articulated by the Court in *College-Town* with regard to supervisory personnel cloaked with the authority of the employer "applies equally to claims involving sexual harassment of a student by a teacher, in that a teacher, like a supervisor, is conferred with authority over his or her students."[30]

Most recently, on September 1, 2017, Federal District Court Judge Dennis Saylor declined to accept Judge Woodlock's 2016 holding that strict liability was the appropriate standard under chapter 214, section 1C, recognizing that it is still "an unsettled question of law in Massachusetts."[31] Instead, Judge Saylor adopted "the approach taken in [*Bradshaw I*], deferring consideration of [the School's] claim that a deliberate indifference standard, as opposed to a strict liability standard" applied to claims for teacher-on-student harassment under chapter 214, section 1C.[32]

Should the *Harbi* case proceed through discovery and to the summary judgment stage, it is likely that Judge Saylor will be forced to render the third non-binding, but persuasive, decision on this issue. If he adopts the reasoning offered by Judge Woodlock and Judge Kazanjian, his decision will serve to advance the plaintiff-friendly argument in favor of the application of strict liability in the Commonwealth for teacher-on-student sexual harassment, and the authority on this issue will continue

[29] *Id.* (quoting College-Town Div. of Interco, Inc., 508 N.E.2d. at 593).

[30] *Id.* (citing Sch. Comm. of Lexington v. Zagaeski, 12 N.E.3d 384, 396 (Mass. 2014)).

[31] Harbi v. Mass. Inst. Tech., No. 16-12394-FDS, 2017 WL 3841483, at *5 n.2 (D. Mass. Sept. 1, 2017).

[32] *Id.*

to trend away from any standard affording school districts notice and the opportunity to take corrective action in response to claims of sexual harassment brought by students against instructors in the educational setting.

IV. *Implications: A Clear Departure From Federal Law*

Judge Woodlock's 2016 decision that strict liability was the appropriate standard and Judge Kazanjian's adoption of that holding in 2017 represented a sea change in how sexual harassment lawsuits filed by students against schools, arising out of alleged sexual harassment by a teacher, must be evaluated. Up until last year, such claims were, by and large, governed by the heightened Title IX standard of actual notice and deliberate indifference, as articulated by the Supreme Court in 1998 in *Gebser v. Lago Vista Independent School District*.[33] In *Gebser* and its progeny, the Supreme Court arguably sought to protect public schools from a plethora of sexual harassment lawsuits by predicating the liability of a municipal school district on whether a school official had actual knowledge of the harassment and had acted deliberately indifferent to it. A strict liability standard renders any defense based on notice—actual or constructive—no longer viable.

Besides the statutory construction argument against adopting a strict liability standard for claims brought under chapter 214, section 1C,[34] recognized but ultimately rejected by Judge Kazanjian in favor of

[33] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 280, 290 (1998) (holding that damages may not be recovered for teacher-on-student sexual harassment in an implied private action under Title IX unless a school district official who, at a minimum, has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct). *See also* Davis v. Monroe Cty. Bd. of Ed., 526 U.S. 629, 642 (1999).

[34] Chapter 151B, section 4(16A) prohibits sexual harassment in the workplace by an employer or its "agents." In *College-Town*, the Massachusetts Supreme Judicial Court relied heavily on agency principles and the express inclusion of the term "agents" in the statute to arrive at its holding that employers should be held vicariously (strictly) liable

policy-based considerations, [35] there are compelling public policy arguments disfavoring the adoption of a strict liability standard for teacher-on-student harassment. First, proceeding under a strict liability standard—effectively abrogating any notice requirement—would undermine years of federal precedent with arguably no express statutory or authoritative basis for doing so. Once valid defenses, based on a lack of actual knowledge or deliberate indifference preventing the plaintiff from sustaining a viable claim, formerly available to school districts will become obsolete.

Second, the application of strict liability to instances of teacher-on-student harassment marks a stark departure from federal law in the educational context, which will result in inconsistency between claims brought under Title IX versus those brought under Chapter 214, Section 1C, even though Title IX and Chapter 151C define and prohibit precisely the same conduct in the school context in a similar manner, with the breadth of the protections afforded under Title IX and that of M.G.L. c. 151C being nearly identical. State courts, including those in the Commonwealth, customarily favor the adoption of federal precedent in these circumstances,[36] particularly when weighing policy concerns.[37]

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for supervisor-on-employee sexual harassment. Chapter 151C, section 2(g) on the other hand, the source of substantive rights available to students for vindication through chapter c. 214, section 1C, prohibits solely sexual harassment by an "educational institution." While the omission of the term "agents" from Chapter 151C, Section 2(g) might not appear significant at first glance, multiple judges have already relied on this very principle in rejecting individual liability under chapter 214, section 1C. *See also* Section I, *supra*; Fournier, 851 F. Supp. 2d at 218; Bradshaw II, 203 F. Supp. 3d at 188–89; Stoughton, 2013 WL 6498959, at *5.

[35] Doe *ex rel.* Doe v. Town of Hopkinton, 34 Mass. L. Rptr. 137, 139 (Mass. Super. 2017).

[36] *See* Wheatley v. AT&T, 636 N.E.2d 265, 268 (Mass. 1994) (affirming that it is the practice of the Massachusetts Supreme Judicial Court to apply federal case law construing federal anti-discrimination statutes in state anti-discrimination statutes where state standard is unclear) (citing Wheelock College v. Mass. Comm'n Against Discrimination, 355 N.E.2d 309 (Mass. 1976)). *See also* Wynn & Wynn, P.C. v. Mass. Comm'n Against Discrimination, 729 N.E.2d 1068, 1080, n.29 (Mass. 2000) (adopting

Third, the adoption of a strict liability standard for teacher-on-student harassment will undoubtedly result in a flood of litigation against municipalities. The heightened Title IX standard shielded school districts from having to defend against sexual harassment claims brought by students except in the most egregious cases, where actual notice and deliberate indifference were proven; that once formidable barrier to liability will effectively no longer function as a safeguard to school districts and as a conservator of judicial resources. Instead, claims based on arguably "benign" touch will no longer be weeded out on summary judgment.

Further, there are important differences between a minor's claim of sexual harassment by a teacher and a claim by a student who has reached the age of majority alleging harassment by a high school teacher or college and/or higher education professor. For example, the level of control that the instructor is able to exert over the student at the hands of the institution is a consideration that certainly warrants attention and, perhaps, a distinction in the standard to be applied. A blanket strict liability standard for teachers does not account for the differences between educational institutions or atmospheres, or the influence of teachers over students based on age and circumstance.

Finally, the potential financial implications for schools will be significant. Not only will the adoption of strict liability likely result in

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the United States Supreme Court's allocation of burdens of proof in mixed-motive discrimination cases and declaring that the Massachusetts Supreme Judicial Court should look to federal court interpretations of federal statutes for guidance of similar state statutes where state law is not clear), *overruled on other grounds*, Stonehill Coll. v. Mass. Comm'n Against Discrimination, 808 N.E.2d 205 (Mass. 2004).

[37] Mass. Elec. Co. v. Mass. Comm'n Against Discrimination, 375 N.E.2d 1192, 1198 (Mass. 1978) (noting that the interpretation of a federal statute which is similar to the state statute under consideration and does not contain materially distinguishable language is warranted in evaluating policy considerations).

express insurance policy exclusions for sexual harassment of students by teachers, the change has the potential to result in severe financial strain on municipal budgets by way of substantial uninsured verdicts and settlements, coupled with significant defense costs.

V. *Conclusion*

Ultimately, absent legislative direction, the appropriate standard to be applied under chapter 214, section 1C, where a student alleges to have been sexually harassed by a teacher, is a question of law that will have to be resolved by the Massachusetts Supreme Judicial Court. The question is one that is ripe for review and that arguably should be certified to the Supreme Judicial Court by the federal judiciary presently opining on the subject.