MEMORANDUM TO THE CONFERENCE

Re: 97-843, Davis v. Monroe County

At last week’s conference discussion, my effort to find some definable limits to school district liability under Title IX focused on the statutory reference to discrimination "under any education program or activity." My idea was that to reach the level of liability, the school district’s deliberate indifference must be to student-student harassment so pervasive as to infect a program. It struck me that this might occur if a substantial number of students were harassers or a substantial number were victims of harassment. I thought that harassment of one student by one other, with nothing more, should not result in liability, and on that basis I gave my tentative vote as being to affirm.

I have since been over the pleadings again, and am not so sure that at this stage of the litigation the case may be understood as a case of merely one victim, one perpetrator. Paragraph ten of the complaint (page 96a of the Petition Appendix) alleges that a group of the girls in the plaintiff’s class wished to go to the principal to complain about the perpetrator but were prevented from doing so by their teacher. At this preliminary stage of the litigation, I think this is probably enough to keep the plaintiffs in court under my view of program infection as necessary for liability. I therefore change my vote from a tentative affirmance to a tentative reversal.

Yours sincerely,

[Signature]

Davis