

Federal Court Allows Title IX Claim to Proceed Based Upon Allegations That Student Harassed By Peers for Failure to Conform to Gender Norms

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Russell Bittendener, et ux. v. Bangor Area School District, Case No. 15-6465 (E.D. Pa. 2017). The United States District Court for the Eastern District of Pennsylvania refused to dismiss a complaint alleging that a school district violated Title IX for failing to address harassment of a student by her peers for failing to conform to female gender norms.

Summary Background

According to a complaint filed in federal district court by her parents, a female student (S.B.) alleged that she suffered offensive verbal sexual harassment and physical assault by other students while attending Bangor Area School District between the third and eighth grades. The student alleged that the harassment began when she was in third grade but became a “serious” problem during her fourth grade year. S.B. stated that she was called offensive terms and pushed because she did not conform to the harassers’ perception of female gender norms. This included being called a “slut” or “lesbian” when she played football with male students. S.B. reported the harassment to a guidance counselor and her teacher.

Prior to the start of S.B.’s fifth grade year, S.B.’s parents conversed with and sent a letter to the principal about the offensive conduct. S.B. asserts that during the fifth grade, the offensive conduct diminished in the classroom but continued elsewhere. She contends that “the sex-based comments” increased, with persistent commentary about S.B.’s sexual orientation. There were continued instances of physical assault. S.B. spoke to the guidance counselor about creating a bullying prevention club because S.B. was a victim of bullying.

During her sixth grade year, S.B. gave a speech in front of the school board about her bullying experience. The principal of S.B.’s elementary school was present for this speech. During her seventh grade year and the following summer, S.B. alleges that the frequency and severity of bullying increased with continuing comments about her sexuality. S.B. organized a student club to combat bullying and consulted the guidance counselor about the sexual harassment she was experiencing during this process. S.B. alleges that the sexual harassment persisted through the summer before and during her eighth grade year.

On one occasion during her eighth grade year, the sexual harassment required S.B. to remove herself from class and go to the main office to speak with the principal, guidance counselors, and school psychologist. S.B. alleges that she shared with them the details of the bullying at this meeting, including what was said to her and the effects on her. At one point, S.B. signed into the Lehigh Valley Hospital Behavioral Health Unit for ten days of treatment because she was contemplating suicide. On September 27, 2013, S.B.’s parents developed a “safety plan” with school officials. On November 12, 2013, however, the school informed S.B.’s parents that it was removing the escort protection provided to S.B. under the safety plan. Subsequently, S.B.’s parents relocated to New Jersey where S.B. now attends school.

In February 2016, S.B. filed a complaint alleging that she was subject to sexual harassment and discrimination and that the school district and various school officials violated Title IX by failing to address the ongoing harassment of S.B. by her peers. The school district filed a motion to dismiss S.B.’s complaint, contending that she failed to state a viable Title IX claim. The federal district court denied the school district’s motion and allowed the student to proceed with her claim.

Discussion

Title IX (20 U.S.C. § 1681(a)) provides that “No person . . . 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.” As recipients of federal funds, public school districts are subject to Title IX.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the United States Supreme Court concluded that, pursuant to Title IX, a school and school officials may be held liable for severe and pervasive student-on-student harassment or abuse where the school had knowledge of harassment but failed to take reasonable steps to address or prevent continued abuse. Whether student-on-student sexual harassment rises to the actionable level of “severe and pervasive” depends upon a “constellation of surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.” To support a Title IX sexual harassment claim, a plaintiff must demonstrate that the alleged “conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

The court concluded that S.B. alleged adequate facts to demonstrate that the harassment suffered was of a sexual nature. The alleged verbal harassment was premised upon her sexual orientation and gender with comments regularly targeting her because she did not conform to female gender stereotypes and because the harassers believed she was lesbian. In these circumstances, sexuality was the crux of the harassment that led to repeated comments such as “slut,” “lesbian,” “gay,” and “you have a disease because you’re a lesbian.”

A plaintiff asserting a Title IX violation also must demonstrate that an “appropriate person” had actual notice of the alleged conduct and the appropriate person failed to respond adequately to the discrimination. Actual notice occurs when an appropriate person at the school has information sufficiently indicating a significant danger to the student so that the school can reasonably be said to be aware of the danger. An appropriate person is, at a minimum, a school official having the ability to take remedial action and terminate the discrimination. The Third Circuit has recognized a principal of a school as an appropriate person for Title IX purposes.

S.B. alleged that she and her parents informed various teachers, guidance counselors, principals, a school psychiatrist, school security and the superintendent that she was experiencing harassment. Accordingly, the court concluded that S.B. sufficiently pleaded that an appropriate person was informed of the harassment.

Practical Advice

The *Bittenbender* decision is demonstrative of the trend of courts’ interpretation of the term “sex” in federal discrimination statutes to encompass transgender and sexual orientation. Since the 1980’s, in employment contexts, courts have held that adverse action prompted by the failure of an employee to conform to gender stereotypes can be the basis of a sexual harassment or discrimination claim. The interpretation of the term “sex” as used within Title IX is a logical extension of a similar rationale.

When peer harassment among students is observed or reported, school employees have the obligation to report such incidents to school administration. School administrators are responsible for the investigation of any such reports and the development and implementation of reasonable remedial actions to mitigate against the continuation of abuse. Periodic reinforcement of these obligations through school staff in-service is a prudent investment against institutional indifference or unresponsiveness to student complaints of harassment and potential liability for schools and school officials.

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