

# Student's Physical Assault of Alleged Harasser Does Not Constitute Protected Activity Under Title IX

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***Sanchez v. Brawley Elementary School District*, 719 Fed. Appx. 723 (9<sup>th</sup> Cir. 2018)** The Ninth Circuit Court of Appeals affirms District Court's ruling that a student's conduct of kneeling her alleged harasser did not constitute protected activity for purposes of a Title IX retaliation claim.

## BACKGROUND

Anyssa Sanchez was a sixth grade student in defendant Brawley Elementary School District. There was evidence of students participating in ongoing "games" in which students would attempt to do things such things as "flick" each other in the chest or knee each other in the groin. Anyssa was standing in the lunch line when another sixth grade student, Isaac, approached and flicked a nearby male student in the chest. Seconds later, Isaac touched Anyssa's left breast with a quick flicking motion. Anyssa immediately responded by kneeling Isaac in the groin causing him to collapse to the floor.

Isaac reported to the building vice-principal that Anyssa had kneeed him in the groin. After an investigation of the incident, which included an interview of each student by the building principal, both students received a one-day in-school suspension. During the interview and investigation process, neither Anyssa nor her mother protested the suspension. However, Anyssa's family subsequently challenged the suspension, because during the drive home from school, Anyssa claimed, for the first time, that she had acted in self-defense when she kneeed Isaac.

Anyssa and her family filed a lawsuit challenging her suspension. Her complaint purported to allege violations of Title IX based on peer-on-peer sexual harassment and retaliation. The School District filed a motion for summary judgment. The United States District Court for the Southern District of California granted the motion and dismissed Anyssa's Title IX claims. Plaintiffs appealed to the Ninth Circuit Court of Appeals which affirmed the District Court's decision.

## DISCUSSION

In order for a school entity to be liable under Title IX for peer-on-peer sexual harassment, the plaintiff must establish that the school entity was deliberately indifferent to known acts of sexual harassment which were so severe, pervasive and objectively offensive that it can be said to have deprived the victim of access to the educational opportunities and benefits provided by the school. The Court dismissed Anyssa's peer-on-peer sexual harassment claim because the single incident of alleged sexual harassment, while clearly inappropriate, was not sufficiently severe and/or pervasive so as to have deprived Anyssa of access to the educational opportunities offered by the school.

In order to maintain a Title IX retaliation claim, the plaintiff must establish that he or she participated in protected activity and were subjected to an adverse school related action as a result of the protected activity. Anyssa argued that kneeling Isaac in the groin was "self defense" and was therefore a protected activity under Title IX. The Court dismissed Anyssa's Title IX retaliation claim, holding that Anyssa's conduct was not protected activity in opposition to sexual harassment. The term "protected activity" generally refers to actions taken to protest or oppose statutorily prohibited discrimination. The court noted that Anyssa and her mother did not claim that she was subjected to sexual harassment, or that her conduct was "self defense," until after she was suspended. The Court also ruled that Anyssa's conduct did not constitute self-defense as she admitted that, at the time she kneeed Isaac, she did not think that he was going to touch her again and that she could have walked away and reported his conduct.

**PRACTICAL ADVICE**

Under both Title VII and Title IX, Courts have generally held that opposition to discriminatory or harassing conduct “does not constitute a license to engage in physical violence to protest discrimination.” Although there certainly can be situations in which a victim of harassment may be legally privileged to use physical force as self defense to prevent continuation of the harassing conduct, the use of physical force as self defense typically is not recognized as protected activity in opposition to discrimination or harassment.

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