UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Nancy Marcum, et al., **Plaintiff** **vs** **Bloom-Carroll School District, et al.** **Defendants**	**Case No. 2:08-cv-0909** **District Judge Holschuh** **Magistrate Judge Abel**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT BLOOM-CARROLL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION MOTION FOR SUMMARY JUDGMENT

SUMMARY JUDGMENT STANDARD

Pursuant to FRCP 56(c), summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Summary judgment may be granted if the pleadings, depositions, admissions on file, answers to interrogatories, together with affidavits, if any, show there is a genuine issue of material fact. *Brannam v. Huntington Mortg. Co*., 287 F.3d 601 (6th Cir. 2002). The party seeking summary judgment always bears the initial burden of showing that no genuine dispute as to any material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When reviewing whether the nonmoving party has met his burden, the trial court must construe the evidence and draw all inferences in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 254-55 (1986). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996).

"A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the non moving party.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Thus, '[i]f as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper.'" *Lazard Freres & Co. v. Protective Life Ins. Co.,* 108 F.3d 1531, 1535 (2d Cir. 1997). *Citing Gummo v. Village of Depew*, 75 F.3d 98, 107 (1996).

As argued by defendants, the issue is whether there are any facts where a jury could find that the harassment of C.V. violated Title IX of the Education Amendments of 1972.

ARGUMENT

Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681) "prohibits gender-based discrimination in a wide array of programs and activities undertaken by education institutions….The statute's enforcement machinery includes an implied private right of action …*Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 283-84 (1998)….[S]exual harassment in the educational milieu can constitute gender-based discrimination actionable under Title IX." *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 65 (1st Cir. 2002). A violation would then exist when the victims school experience is "permeated with discriminatory intimidation, ridicule, and insult" which is sufficient to compromise his or her educational experience. *Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525, 540 (1st Cir. 1995). The school must have actual knowledge of such harassment and be deliberately indifferent to the rights of the student. *Vance v. Spencer County Public*

School District, 231 F.3d 253 (6th Cir. 2000); *Warren ex rel. Good v. Reading School District*, 278 F.3d 163 (3rd Cir. 2002).

Plaintiffs Can Establish that Defendants Defendant's Had Actual Knowledge of the Harassment of C.V.

Defendants concede the fact that there is a factual dispute whereby principal Mark Fenick and C.V.'s bus driver were notified of the harassment of C.V. The Defendants do not concede whether or not any person in an authoritative position had knowledge of the harassment of C.V. in the classroom. It is undisputed that C.V.'s school bus driver, Pamela Seymour, had knowledge of harassment based upon her own testimony. (Depo P. Seymour, pgs. 30-31) Plaintiff Nancy Marcum testified that her husband contacted the school or the bus garage later in the evening when the harassment began. Plaintiff also testified that she attempted to contact principal Mark Fenick on several occasions to inform him of the harassment her daughter received. (Depo N. Marcum pgs. 121-122; 127; 170 and 174-175) Further, Plaintiff testified that C.V. would call her from Mr. Fenick's office in tears each of the days she returned to school pleading for her mother to pick her up from school because of the abuse she was receiving from the other students. (Depo Marcum pgs. 224-229)

Therefore, it is clear that the Defendant Bloom-Carroll School District ("BCSD") had actual knowledge of the harassment of C.V. and that Plaintiffs are entitled to the inference that Defendant had actual knowledge of the harassment.

Plaintiffs Can Establish that The Student-on-Student Harassment of C.V. was Severe and Pervasive where it Undermined and Detracted from C.V.'s Educational Experience.

Defendants attempt to persuade this Court with the most severe Title IX cases is unmoving. Defendants argue that there is no evidence to suggest "that the harassment of C.V. or the school district's response to it undermined her educational experience or that C.V. was

effectively denied access to the school district's resources and opportunities." This case begins with an attack of a twelve year old girl on the defendant's school bus by a seventeen year old male. Defendant principal Fenick interviewed Plaintiff C.V. outside the presence of her mother and took notes of the incident which included Plaintiff C.V.'s clear statements that when she was accosted by the student she pulled back, yet the student took his pants off and forced her down on him, and even though she again tried backing away, she was forced to perform oral sex upon him and refused to let her stop despite her protests. Although the defendants are not liable for the initial attack on C.V., they are clearly liable for their actions which stem from this incident and their lack of taking any action to ensure that C.V.'s educational experience would not be disrupted. In fact, principal Fenick took no action to assist C.V. and instead formulated a reason to have her expelled from Bloom-Carroll to rid his problem.

Viewed in the light most favorable to the non-moving party there is an abundance of evidence in the record from which a reasonable inference could be drawn in favor of the plaintiff which includes:

1. A twelve year old cannot legally consent to a sexual act.
2. Bloom-Carroll High School and Bloom-Carroll Middle School are on the same campus and within walking distance.
3. C.V. was forced to perform oral sex upon another student and he refused to let her stop despite her protests.
4. Principal Fenick stated that they needed to confirm (that the act was consensual) with minor C.V. at the middle school (without regards to the fact that a twelve year old cannot consent to a sexual act.) (Depo Fenick pg. 80)

5. Principal Fenick knew prior to his interview with C.V. that she was twelve years old. Deposition of M. Fenick pg. 83. Further, principal Mace discovered this act was a felony act when he was contacted by Detective Stephanie Russell of the Fairfield County Sheriff's office. (Depo Mace pgs. 181-182)
6. Principal Fenick wrote the statement "I performed oral sex with Ryan on the bus from school" and made C.V. sign the statement. (Depo Fenick pg. 92)
7. C.V. never admitted to being a willing participant in this act. In fact Fenick testified "[C.V.] said that he wouldn't let me stop. And I wrote it down, and I was like, okay. At that point, I didn't know what all the implications were, it's just the fact that we had confirmation that this did happen by both individuals." (Depo Fenick pg. 94)
8. When Fenick finally spoke to Children Services he stated "we had a sexual incident on the bus, a girl had supposedly given oral sex to a boy. I said, I don't know whether it was forced or not." (Depo Fenick pg. 102)
9. Mr. Fenick learned on the date he was interviewing C.V. that she had been sexually abused as a child. Fenick also stated that this is "going to stay as it is" and "I didn't see how that changed what happened on the bus." (Depo Fenick pg. 109-110)
10. Fenick testified that "anytime you make decision involving discipline, you always consider what educational impact it will have on a student … I felt it did not seem out of character for her to make a poor decision. And I was hoping that as a seventh grader it might send a message, that, you know, I need to straighten her up." (Depo Fenick pg. 115-116)

11. The defendants participated in the pervasive harassment of C.V. by showcasing her and requiring her to sit in the front seat of the bus while her perpetrator had no restrictions to sit in the front seat. (Depo Fenick pg. 117-120)
12. C.V. testified that after the assault Gueli rode the bus with her on at least one occasion. (Depo C.V. pg. 149)
13. Defendant Fenick met with C.V. briefly upon her return to school (after the sexual assault) to welcome her back but said nothing in detail regarding the sexual harassment taunting. (Depo Fenick pg. 123-124) While C.V. had no consideration from Fenick, her perpetrator had a meeting with principal Mace upon his return and that people may perceive him differently and that he is going to be dealing with some difficult times. (Depo Mace Pgs. 195-196) In fact, Mace told Gueli "if anybody's giving you problems about harassment, you tell me and I will take it." (Depo R. Gueli pg. 66)
14. As stated above by Nancy Marcum, the Defendants were notified several times of the harassment C.V. received during her school suspension and when she returned. In fact, defendants admit that when a student is called a slut, a whore, a cum guzzler repeatedly that it amounts to sexual harassment. (Depo Mace pg. 238) However, by defendant Fenick's own admission he stated that he was not made aware of any name calling, taunting or other sexually inappropriate comments. Therefore, Fenick took no corrective action to make the harassment stop. (Depo Fenick pgs. 125-126)

Furthermore, educational expert Martha Moore-McConnell opined in her report that Bloom-Carroll School District violated Title IX in multiple instances whereby principals

Mace and Fenick admit to not receiving child abuse professional development training; there was no action taken by Fenick when the harassment was reported to the school; there was no follow through with C.V. when she returned to school but her perpetrator was protected by principal Mace; Fenick refused to reconsider the suspension of C.V. when informed of her sexual abuse by her step-grandfather; and C.V. was ultimately removed from school while her "abuser" who was charged with multiple criminal charges (and ultimately pled guilty to a felony) was allowed to remain and attend Bloom-Carroll. See affidavit of Martha Moore-McConnell which incorporates by reference her expert report.

It is undisputed that a felony sex assault took place on the defendant's bus between a seventeen year old male high school student and a twelve year old female middle school student. Both students, even though series of events conflict and one student was twelve, received 10-day suspensions. Upon return to school, Plaintiff C.V. was required to sit in the front seat of the bus while Gueli could sit where he pleased. Even though the act was a felony committed by Gueli he was permitted to continue attending Bloom-Carroll Schools. Gueli received the support from his principal Roger Mace upon his return to school while C.V. received nothing from her principal Mark Fenick. In fact, Fenick testifies that he never learned from either C.V. or her mother Nancy Marcum that harassment has taken place and therefore he could not have taken any action to remedy the situation.

Courts have found that even absent actual post-assault harassment, the fact that the perpetrator and victim attended school together "could be found to constitute pervasive, severe, and objectively offensive harassment." *Doe v. Derby Board of Education*, 451 F.Supp. 2d 438, 452 (2006). In yet another case where the victim had no interactions with, and was not harassed by the perpetrator his "presence on campus and the accompanying risk

that she might encounter him created a hostile environment that effectively deprived her of the educational opportunities or benefits provided by the school. *Kelly v. Yale Univ.,* 2003 U.S. Dist. LEXIS 4543 (D. Conn. Mar. 26, 2003).

Plaintiffs are entitled to the inference that a reasonable jury could conclude that the harassment of C.V. was severe, pervasive and, by defendants own admission they did nothing to correct or take steps in limiting the harassment.

Plaintiff C.V. Can Establish that Defendant Bloom-Carroll School District was deliberately indifferent to Plaintiff's complaints of student-on-student harassment.

As the defendant points out, deliberate indifference is demonstrated "only where the [school district's] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis v. Monroe Bd. Of Educ*. (1999), 526 U.S. 629, 645. Defendants continue to point out that the Sixth Circuit adopted the standards in Davis in *Vance v. Spencer County Pub. Sch.Dist*., 231 F.3d 253 (6th Cir. 2000). The *Vance* court wrote:

> [A] minimalist response is not within the contemplation of a reasonable response. Although no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably in light of the known circumstances.

Vance , at 261.

Plaintiff and the school bus driver Pamela Seymour confirm the fact that at the very least, the superintendent of the bus garage was contacted regarding the sexual harassment of C.V. At which point the bus driver addressed the "hollering" of comments out of the window when they would pass C.V.'s home.

Defendant continues its argument with a mystifying premise that principal Fenick somehow handled, addressed or responded to the harassment as reported by C.V. and her

mother. The Defendant now wants to accept the facts as testified to by C.V. because there is alleged evidence that principal Fenick talked to the students shortly after the harassment was reported to him and that "Mr. Fenick's initial response to the problem can in no way be characterized as inadequate." What is most troubling is how do you address a problem of sexual harassment when you claim you don't even know about the problem. Mr. Fenick was asked five different times in his deposition of whether he had any knowledge of whether or not C.V. was a victim of sexual harassment by fellow students and he responded that he had no knowledge of the harassment that C.V. was receiving. By the Defendants own admission he did not address the sexual harassment of student-on-student harassment received by C.V.

Plaintiffs are entitled to the inference that Defendant Fenick knew of the alleged harassment of C.V. and did nothing to address the situation and if Fenick did address the harassment that it was unreasonable.

Plaintiff C.V. Can Establish that Defendants Retaliated Against Plaintiff C.V. by Expelling C.V. from School

Plaintiff C.V. was subjected to a sexual assault on a school bus and then subjected to a vicious, unrelenting hostile sexual school environment by Defendants Fenick and Dildine's deliberate indifference as alleged herein. Plaintiffs C.V. and Nancy Marcum complained to Defendant Mark Fenick and then acting Superintendent Lynn Dildine about the failure of the Bloom-Carroll Middle School administration and teaching staff to take any action to protect Plaintiff C.V. from the perpetrator of the sexual assault and from the sexual taunts and bullying to which Plaintiff C.V. was being subjected to by fellow students.

As Plaintiff Nancy Marcum intensified her complaints about the devastating effect of the torrent of sexual taunts and bullying to which Plaintiff C.V. was being subjected and the

administration's abject failure to take any action to remedy this situation. Defendant Fenick became increasingly hostile toward Plaintiffs C.V. and her mother Plaintiff Nancy Marcum. Once Mr. Fenick recommended expulsion for C.V. and was confronted by Nancy Marcum, Mr. Fenick smirked, pushed he seat back and said "I usually always get what I want. I'm going for expulsion." (Depo Marcum pg. 276)

It is alleged that the Defendants retaliated against her for her and her mother's complaints and protestations by prosecuting and then expelling Plaintiff C.V. on the false charge of theft of in IPod which, as alleged herein, was never removed from school property by Plaintiff C.V. but instead given by her to an upperclassman who kept the IPod, took it home with her and on information and belief returned it and falsely implicated Plaintiff C.V. when the true thief's parents discovered the IPod and interrogated her about it.

Mr. Fenick described the event whereby the upperclassman returned an ipod to him and initially told Mr. Fenick that she found it at the bus. (Depo Fenick pg. 162) The upperclassman then changed her story and implicated C.V. as the individual who gave her the ipod. (Id. at 168) Mr. Fenick testified that he did not speak with the upperclassman's parents because it was the high school's issue not his. (Id. at 169) Without speaking to another person regarding the so-called theft of the ipod, and because of the other allegations against C.V., Mr. Fenick surmised that C.V. stole the ipod and therefore he was going to expel her from school. (Id. at 179) In fact, Mr. Fenick testifies that he favored a student who is not in his school because "I think [she] had been through some tough times … I felt she (the upperclassman) had made somewhat of a mistake in taking it (the ipod) home or whatever, but she was trying to keep going on that path towards being right. And that's the feeling I had. Whether there's anything to support it or not, not really" completely disregarding the

fact that the twelve year old who he is going to recommend expulsion was sexually assaulted on the school bus not more then a month earlier and that she was a victim of constant sexual abuse as a child. (Id.) Mr. Fenick then continues to testify that he does not even really know the upperclassman because he is new to the school and its only been one month. (Id. at 180) Even more egregious is the fact that the upperclassman who physically took the ipod off school grounds in violation of school policies did not even get suspended, only C.V. was suspended and ultimately expelled. (See Transcript from Expulsion hearing pg. 15)

It is alleged that Defendants directly and maliciously retaliated against Plaintiff C.V. for making the sexual harassment complaints that she and her mother and step-father had made and were pursuing by taking steps to manufacture a basis for expelling Plaintiff C.V. from the Bloom-Carroll Middle School. Plaintiffs are entitled to the inference that Defendants retaliated against them by expelling C.V. using a trumped up charge of an alleged theft of an ipod because of the failure of Defendants to remedy the sexual harassment of C.V.

Plaintiffs C.V. Can Establish a Violation of Substantive Due Process Arising Out of a Deprivation of the Right to be Free From Gender Discrimination Resulting From Peer-on-Peer Sexual Harassment in Public Schools

Defendant Board of Education of Bloom-Carroll Local School District has and had a duty to provide Defendant Mark Fenick with proper training and supervision on how to recognize, investigate and remediate student-on-student sexual harassment, including without limitation training and supervision to insure, at the bare minimum, that Defendant Fenick implemented the sexual harassment policies and procedures outlined in the student handbook and to follow, at a bare minimum, the rules actually set forth in the student handbook.

The substantive component of the Due Process Clause protects against abusive governmental power as exercised by a school. *Doe v. Claiborne County Board of Educ*., 103 F.3d 495, 506 (6th Cir. 1996). United States Supreme Court in a case not mentioned by Defendants has now held that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) does not preclude an action under peer-on-peer sexual harassment alleging unconstitutional gender discrimination in schools. The Amended Complaint fairly can be construed to allege that C.V. a victim of peer-on-peer sexual harassment was deprived of rights secured by the constitution or laws of the United States (i.e., the constitutional right to freedom from gender discrimination in schools and cognate right secured by Title IX. *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788, 172 L. Ed. 2d 582 (2009). *See Doe v. Claiborne County, Tenn.*, 103 F.3d 495 (6th Cir. 1996)(cited by Defendant Fenik holding that substantive Due Process establishes a right to be free from sexual abuse at the hands of a public school teacher.

From the testimony of then acting Superintendent Dildine, current Superintendent Mace and Defendant Mark Fenik there is an institutional pattern and custom of ignoring anything that resembles proper Title IX compliance including a total lack of any training for administrators or teachers on how to deal with peer-on-peer sexual harassment and a total lack of any colorable compliance with the administrative compliance provisions of Title IX. (Depo. Fenik, 17, ll. 22-25; 18, ll 1-3) (Depo Dildine 23. ll. 7-11; 60, ll. 21-24; 61, ll. 1-8; 67, ll. 11-16, ll. 23-24) (Depo. Mace 231, ll. 13-16; 231, ll.17-20; 233, ll. 14-22) As such Plaintiffs have identified fundamental rights protected by the Constitution and laws of the United States which raises a triable issue of whether Plaintiffs have stated a substantive due process claim against Defendant Mark Fenik.

Plaintiffs are entitled to have the evidence construed most favorably to their cause. Defendant Mark Fenik was notified of sexual taunting both on the school bus as it passed by C.V.'s home in the afternoons, and of sexual taunting directed by fellow students toward C.V. in school after she returned from her suspension. The sexual taunting was confirmed by the bus driver, Pamela Seymour (who admitted she was contacted by the superintendent of transportation, Mr. Kennedy). (Depo. Seymour 30, ll. 3-16) The sexual taunting was further corroborated by Rosemary Costello, a witness who was on the bus on the afternoon of the incident. (Depo. Costello 59, l.24; 60, ll. 1-3)

Defendant Mark Fenik, however, denied any knowledge of taunting of any kind against C.V. both in his deposition and in his affidavit in support of his motion for summary judgment. Defendant Mark Fenik stated that he had no recollection of C.V. or anyone else advising hims that C.V. was being harassed or taunted by other students at BCMS after she returned to school on October 17, 2006. Affidavit of Fenik ¶ 15. In deposition he flatly denied that he any information that C.V. was experiencing name calling, taunting, sexually inappropriate comments by other students. (Depo. Fenik 125, ll. 4-24; 126, ll. 1-12)

Plaintiffs are entitled to the inference that Defendant Mark Fenik was fully informed of the sexual taunting being visited upon C.V. but did nothing to address the sexual taunting whether at school or from the school bus. That being so, Plaintiff C.V. can advance facts establishing that Defendant Mark Fenik violated C.V.'s right to be free of sexual harassment in the school setting and thus violated Plaintiff C.V.'s substantive due process rights in violation of § 1983.

CONCLUSION

For the reasons stated, Defendant Bloom-Carroll School District Motion for summary judgment should be overruled.

Respectfully submitted,

s/s E. Joel Wesp, Trial Attorney
WESP/BARWELL, L.L.C.
E. Joel Wesp (0019317)
Gregory P. Barwell (0070545)
Attorneys at Law
6400 Riverside Drive Suite D
Dublin, OH 43017
Ph: (614) 341-7576
Fax: (614) 540-7466
Email: ejwesp@wesplaw.com
Email: gbarwell@wesplaw.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on April 15, 2010 a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

s/s E. Joel Wesp (Trial Attorney)
E. Joel Wesp (0019317)