In the United States Court of Appeals for the Third Circuit

NO. 17-3541

C.K.
Plaintiff/Appellant
v.
CENTRAL INTERMEDIATE UNIT #10
and PHILIPSBURG-OSCEOLA AREA SCHOOL DISTRICT
Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(Honorable Matthew Brann)
Case No. 4:15-CV-00280-MWB

BRIEF OF NATIONAL CENTER FOR VICTIMS OF CRIME AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* National Center for Victims of Crime (NCVC) is an independent, tax-exempt, nonprofit organization, who is not publicly held, does not issue stock and does not have a corporate parent.

STATEMENT OF AMICUS CURIAE

The National Center for Victims of Crime (NCVC), a nonprofit organization based in Washington, D.C., is a leading resource and advocacy organization for all victims of crime. The mission of NCVC is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, advocates for laws and public policies that create resources and secure rights and protections for crime victims. To that end, NCVC has filed *amicus curiae* briefs in cases across the country to advance the rights and interests of crime victims, including victims of sexual assault and harassment.

Amicus has authority to file this brief pursuant to Federal Rule of Appellate Procedure 29 and has filed an accompanying Motion for Leave to file this brief. No party's counsel has authored the brief in whole or in part nor has contributed money in any way in support of this *amicus* brief.

This case involves issues, which are fundamental to the rights and interests of crime victims in the Third Circuit. *Amicus* submits this brief in aid of the Court's task of determining what constitutes "actual notice" under Title IX, 20 U.S.C. § 1681, consistent with *Gebser v. Lago Vista Independent School District*, so that the standard is not set too high and beyond what the Third Circuit and other Courts of Appeals require, suppressing the rights of victims and C.K.

INTRODUCTION

This case involves Appellant, C.K., who at the relevant time was a minor student at Appellee Philipsburg-Osceola Area High School (hereinafter "POAHS"). C.K. was assigned to an emotional support classroom, where Hope Wrye was assigned as a teacher's assistant. Ms. Wrye worked for Appellee Central Intermediate Unit #10 (hereinafter "CIU"), but was assigned to POAHS in the emotional support classroom.

When C.K. was in 9th grade, in approximately the year 2000, Wrye began a romantic relationship with C.K., which included kissing. However, when C.K. was fifteen years old, the relationship progressed to sexual intercourse, eventually resulting in Ms. Wrye's pregnancy fathered by minor C.K.

During the course of the relationship, while C.K. was still a student at Appellee POAHS, Ms. Wrye would often drive C.K. in her personal vehicle and bring C.K. to her home. Ms. Wrye's neighbor and POAHS cafeteria worker, Barbara Neff, reported observing "physical contact, kissing, hugging" and "passionate kissing" between C.K. and Ms. Wrye. Neff's observations was reported to one or more people at POAHS.

During the years of 2000-2002, Ms. Wrye was called to a meeting with POAHS Principal Charles Young, POAHS Special Education Supervisor Gary Springer, and CIU Assistant Executive Director Denny Shanafelt. Shanafelt and

Springer also asked Keri Bloom, another CIU Official, to attend the meeting as well. The contextual timing of the meeting, according to CIU Director Hugh Dwyer, was that it was the same day as Ms. Wrye's neighbor Barbara Neff's report to POAHS Special Education Supervisor Springer.

Appellant filed a Title IX claim, among other claims against Appellees POASD and CIU, however, the District Court dismissed Appellant's Title IX claim in holding that there was not enough evidence to conclude that appropriate persons had actual notice of Ms. Wrye's misconduct. In its analysis and decision, the District Court applied too high a standard for what constitutes "actual notice" as compared to courts in the Third Circuit, as well as other Courts of Appeals.

Viewing the evidence in the light most favorable to Appellant, the non-moving party, as the District Court was required to do, the facts are as follows:

There was a meeting where "appropriate persons" were present along with Ms. Wrye.[1] Based on the testimony of what happened at this meeting, the appropriate persons were aware that Ms. Wrye was providing rides to and was in a vehicle with C.K.; that Ms. Wrye was giving students a ride in her personal vehicle after school hours; that there was an issue between Ms. Wrye and C.K. and that

[1] The District Court correctly concluded that Principal Young, Special Education Supervisor Springer and Executive Director Shanafelt were "appropriate persons" under Title IX. It should also be noted that the fact that these high-ranking officials, along with CIU Official Bloom, were in attendance at this meeting and the fact that Ms. Wrye was suspended following this meeting, point to the conclusion that there was "actual notice" of Ms. Wrye's behavior at this meeting.

there might be something between them; that Ms. Wrye and C.K. were friends, were something; that C.K. was seen in Ms. Wrye's car and at her home; that Ms. Wrye was in an inappropriate relationship with a student; Ms. Wrye was seen with a student and kissing a student; and that Ms. Wrye was having an affair with one of her students.

The District Court should have considered the testimony of Barbara Neff, a school cafeteria worker and neighbor of Ms. Wrye. Although Ms. Neff is not an "appropriate person" under Title IX, she testified that she saw Ms. Wrye and C.K. passionately kissing and hugging and reported it to people at the school. A reasonable inference is that this report is part of the information that caused the appropriate persons to have a meeting with Ms. Wrye as discussed above, especially with the testimony of CIU Director Dwyer that the meeting took place the same day as Ms. Neff's report.

Regardless of whether the testimony of Ms. Neff is considered, there is more than enough evidence from the meeting between the "appropriate persons" and Ms. Wrye for a jury to conclude that the Appellees had actual notice under Title IX and the District Court's ruling to the contrary should be reversed.

SUMMARY OF ARGUMENT

In the Third Circuit, its District Courts, and in other United States Courts of Appeals, the knowledge of a principal or other appropriate person that an employee is engaged in kissing, having an affair, riding in her car after school hours with a student, and at her home with a student is sufficient to establish "actual notice" of a substantial risk of sexual harassment under Title IX. The decision of the District Court runs contrary to the overwhelming majority of judicial interpretation of the "actual notice" standard, including that of the Third Circuit, and should be reversed.

ARGUMENT

I. Appropriate Persons had Actual Notice that Ms. Wrye was a Substantial Danger to Students.

A. Actual Notice Defined by Precedent

In order to prevail against a school regarding a claim of sexual harassment by a teacher, a plaintiff needs to show, *inter alia*, that an "appropriate person" at the school had "actual notice… of the teacher's misconduct." *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 277 (1998). Actual knowledge[2] exists if the school was aware of facts that indicated a "sufficiently substantial danger to students."

[2] The terms "actual notice" and "actual knowledge" are used interchangeably in the Title IX analysis stemming from *Gebser* and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). When *amicus curiae* refers to "actual notice," it refers to "actual knowledge" as well.

Bostic v. Smyrna, 418 F.3d 355, 361 (3d. Cir. 2005). The substantial risk standard emanates from teacher-on-student Title IX cases, whose requirements are not as rigorous as student-on-student cases. *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629, 653 (1999).

Although *Gebser* makes clear that "actual notice" requires more than a simple report of "inappropriate conduct" by a teacher, "the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student [himself]." *Escue v. N. Okla. College,* 450 F.3d 1146, 1154 (10th Cir. 2006). While knowing of the mere possibility of harassment is not sufficient, absolute certainty that harassment has occurred is not required. *Bostic,* 418 F.3d at 360.

B. Facts similar to those present here are sufficient for actual notice under Title IX in the Third Circuit.

In other cases, the Third Circuit standard has required far less to show actual notice than what the District Court required here. For example, in *Warren v. Reading Sch. Dist.*, 278 F.3d 163 (3d Cir. 2002), Warren, a fourth grade student, was sexually abused by his teacher, Brown, when Brown forced Warren to play the "shoulders" game, which consisted of Warren squatting between Brown's thighs and lifting Brown up and down while Brown's genitals touched the back of Warren's head and neck. *Id.* at 165. Brown would reward Warren with candy or

money for playing shoulders. *Id.* Warren's mother brought a claim under Title IX against the school district for the sexual abuse of her son.

Two to three years prior to the conduct with Warren, the principal of the elementary school was told by a parent of another student that Brown had taken his child to Brown's house and "give[n] him money to lift him up and down." *Id.* at 166. The principal denied this conversation took place. *Id.*

The principal also had prepared a supervisory conference memorandum to Brown prior to the incidents with Warren showing that the principal knew Brown had played games with students in the classroom involving physical contact and the principal directed Brown to "stop." *Id.* at 167. There was also a memorandum in Brown's personnel file at the school district that showed the district had knowledge that a prior school had discussed with Brown his "involvement with children after school hours." *Id.*

Even though the notice of Brown's conduct was not overtly sexual in nature, nonetheless, the District Court denied the school district's motion for judgment as a matter of law at trial.[3] It is also important to note that the actual notice for

[3] The school district appealed the trial court's denial of judgment as a matter of law and the plaintiff's jury verdict, however, the Third Circuit only considered the issue of whether a school guidance counselor, who also received the report from the prior parent, was an "appropriate person" under Title IX. It does not change the fact that the Eastern District of Pennsylvania denied the school district's motion for judgment as a matter of law, finding a jury could conclude the district had actual notice on the facts presented, which the jury did.

Warren's claim was based on the teacher's conduct with a different student, but the teacher's prior conduct showed a sufficiently substantial danger to students and was sufficient for actual notice in Warren's Title IX claim.

Other District Courts in the Third Circuit have also found similar facts enough to meet the actual notice standard under Title IX. Here, the District Court highlighted that numerous "appropriate persons" knew that there had been reports about Ms. Wrye giving C.K. personal rides in her vehicle outside school hours. That, alone, should be enough for actual notice.

Similarly, in *E.N. v. Susquehanna Twp. Sch. Dist.*, 2011 WL 3608544 (M.D. Pa. 2011), "appropriate persons" were aware that Frank, a teacher at the high school, was providing individualized driving lessons with only one student in his car, which was a violation of school policy requiring driving lessons to take place with at least two students in the car. *Id.* at 2. Frank took E.N. on a driving lesson alone several times, and on the last lesson, he sexually assaulted her. *Id.* The "appropriate persons" were also aware of a previous report that Frank had asked to see a female student's nipple piercing at a school dance approximately six or seven years prior to Frank assaulting E.N. *Id.* at 3.

E.N. brought a Title IX claim, as well as other claims, against the school district. The District Court held that Frank's driving lesson violations in having

only one student in the car and his comment at the school dance[4] suggested actual notice of misconduct by Frank. *Id.* at 14.

Kissing, which was also present in the deposition testimony of an "appropriate person" in C.K.'s case, is also sufficient for actual notice. *See K.E. v. Dover Area Sch. Dist.*, 2016 WL 2897614, *3 (M.D. Pa. 2017) (court found that where an appropriate person was alerted to a student's report that a teacher "*had kissed* and touched her," there was an issue of fact as to whether the school district had "actual notice" of a substantial risk of sexual harassment requiring the denial of motion to dismiss).

Physical touching between a teacher and student has also been sufficient in numerous cases in our Middle District, Eastern District, Western District as well as the District of New Jersey Courts. *See e.g., Doe v. Boyertown Area Sch. Dist.,* 10 F. Supp. 3d 637, 653 (E.D. Pa. 2014) (court held that the Plaintiff's Complaint, which alleged that the defendant school district had notice of several prior instances of a teacher sexually harassing students, "including prior *instances of touching*," sufficiently alleged "actual knowledge that there was a risk that [the teacher] may sexually assault students"); *Poe v. Southeast Delco Sch. Dist*., 165 F. Supp. 3d 271, 275 (M.D. Pa. 2015) (court held that allegations of an appropriate

[4] The United States Supreme Court in *Gebser v. Lago Vista Ind. Sch. Dist*, 524 U.S. 274 (1998), held that, alone, inappropriate comments to students is not enough for actual notice. Therefore, the added fact in *E.N.* of Frank's car rides alone with students was sufficient to meet "actual notice."

person's knowledge of a student's report that her teacher "was *inappropriately touching* her" satisfied the "actual notice" prong of the *Gebser* analysis); *Doe v. Charleroi Sch. Dist.*, 2014 WL 5426229, *14-15 (W.D. Pa. 2014) (court found that allegations of "*handholding, hugs, and other physical contact*" between a teacher and a student satisfied the "actual notice" prong of Title IX's sexual harassment analysis); *Remphrey v. Cherry Hill Twp. Bd. of Educ.*, 2017 WL 253951 (D.N.J. 2017) (court found that allegations that a teacher "frequently *attempted to obtain hugs*" from a student, "placed his hand on [her] neck, and "made *inappropriate physical contact* and remarks to other female students," were sufficient to claim that the school district had actual notice of a substantial risk of sexual harassment under Title IX).

The District Court here described the testimony supporting actual notice as too "vague and amorphous"…to support a finding of actual knowledge. *See* Memorandum Opinion at page 9. However, in *G.S. v. Sch. Dist. of Monessen*, 2012 WL 1328566, *2 (W.D. Pa. 2012), the court had to consider plaintiff's claim of actual notice of an appropriate person that the teacher "engaged in similar acts and conduct directed toward other students" at the school. *Id.* at 1. Her claims were that the teacher "engaged in inappropriate conduct with the minor plaintiff, including but not limited to contact of a sexual nature, actively seeking an intimate relationship with the minor plaintiff by words and gestures directed to the minor

plaintiff, inappropriately touching the minor plaintiff in a sexual manner and engaging in explicit conversations of a sexual nature with the Plaintiff...." *Id*.

Despite the plaintiff providing no specificity as to the prior actions of the teacher constituting actual notice, other than stating that it was "similar" to what she had experienced, the court found in *G.S.* that plaintiff met the actual notice requirement. Similar to *G.S.,* since C.K.'s evidence is more specific and stronger than the evidence presented by *G.S.,* the District Court here should have found actual notice was met.

C. Courts of Appeals in other Circuits have also held that facts similar to those present here are sufficient for actual notice under Title IX.

In the case of *Oden v. N. Marianas College,* 440 F.3d 1085, 1087-89 (9th Cir. 2006), the Ninth Circuit found that a student's report that her teacher "*rubbed [her] back*," "*touched her buttocks*," and "*kissed [the student] on the lips* and forced his tongue in her mouth" constituted actual notice of a substantial risk of sexual harassment.

In the Eleventh Circuit, *Doe v. School Board* held that reports that a teacher had "physically lifted up [a student's] skirt to look at her stomach" and touched another student's leg while trying to hold her hand and telling her to lift up her shirt satisfied the "actual notice" element of the Title IX sexual harassment analysis. 604 F.3d 1248, 1258 (11th Cir. 2010). *See also, KB v. Daleville City Bd. Of Educ.*, 536 Fed. Appx. 959, 963 (11th Cir. 2013), where the Eleventh Circuit

again found "actual notice" of a substantial risk of sexual harassment where a teacher allegedly *touched the buttocks* of a student, despite the teacher's claim that his actions were inadvertent.[5]

The Second Circuit in *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 84 (2d Cir. 2011), found that a report that a teacher deliberately *rubbed her hand against a student's genitals* "provided a more-than-sufficient basis for a reasonable jury to conclude that [the defendants] were on 'actual notice'" of a substantial risk of sexual harassment, despite the teacher's insistence that the physical contact was inadvertent.

The Fourth Circuit is also consistent in what constitutes actual notice, as in *Baynard v. Malone*, the Court found actual notice in the knowledge of an "appropriate person" that a teacher "was very physical with his students, often putting his arms around them in the hall, and that the teacher had been observed

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[5] Inadvertent touching does not typically amount to actual notice. *See, e.g. Escue v. N. Okla. College*, 450 F.3d 1146 (10th Cir. 2006) (two episodes of a teacher's alleged sexual impropriety towards a student "[did] not provide [the college] with actual notice that [the teacher] presented a 'substantial risk of abuse' to other students" because one of the incidents "involved no physical contact whatsoever" and the teacher claimed that the *physical contact in the other incident was inadvertent*); *Davis ex rel. Doe v. Dekalb County Sch. Dist.*, 233 F.3d 1367, 1373 (9th Cir. 2000) (a complaint of an incidental touching during an athletic event and a perceived imminent touching could not, as a matter of law, apprise Defendants to the possibility that [a teacher] was sexually molesting [students]).

with a student "sitting on [the teacher's] lap in a manner [the witness] believed to be inappropriate." 268 F.3d 228, 235 (4th Cir. 2001).

D. Facts that involve no physical contact between teacher and student can also be sufficient to satisfy actual notice under Title IX.[6]

Even though, here, Ms. Wrye engaged in physical contact of passionately kissing and hugging student C.K, case facts that include no physical contact have also been sufficient to satisfy actual notice under Title IX. Specifically, in *Bostic v. Smyrna,* 418 F.3d 355 (3d Cir. 2005), Bostic, a high school sophomore, was sexually harassed and abused by Smith, her high school track coach. The principal of the school had knowledge that Bostic and Smith were alone together in a car at night. *Id.* at 356. There was also a report that Smith and Bostic were standing closely together in the school hallway on two occasions. *Id.* at 357-58. Smith's wife also saw Smith and Bostic in a classroom together alone and told the principal. *Id.* at 358.

When Smith was confronted by the principal about these rumors, Smith denied any improper relationship with Bostic. *Id.* At summary judgment, the

[6] While reports of physical contact are nearly always *sufficient* for a finding of "actual notice" under Title IX, they are not always *necessary* for a finding of actual notice under Title IX. Non-physical conduct may also provide actual notice of a substantial risk of sexual harassment under Title IX.

District Court held that there were material issues of fact with regard to whether the relevant officials had "actual knowledge" of the relationship.[7]

Other Courts of Appeals have also found that conduct that did not involve physical touching was sufficient for actual notice. *See Mary M. v. North Lawrence Community Sch. Corp.*, 131 F.3d 1220, 1222-25 (7th Cir. 1997) (finding "sufficient evidence that a school [principal] knew of sexual harassment by one of [his] employees" where the principal was alerted to reports that a minor student was planning to skip school with an adult cafeteria worker from the school). *See also, S.B.L. v. Evans*, 80 F.3d 307, 307 (8th Cir. 1996) (finding "a disputed issue of fact" as to "actual notice" where an appropriate person "was aware that [a teacher] took male students from school to his house").

It is clear that the Third Circuit, as well as other Courts of Appeals have found actual notice was sufficient even absent evidence that there was physical contact or touching. Similarly, here, this Court should reverse the holding of the District Court as it is contrary to established precedent.

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[7] *Bostic v. Smyrna* ultimately went to trial, resulting in a defense verdict against the school and a plaintiff's verdict against Smith. Plaintiff appealed the defense verdict based, in part, on the jury instruction for actual notice, but the Court affirmed the judgment. The defense verdict does not change the fact that the evidence was sufficient to deny summary judgment, as the Court should do here.

CONCLUSION

Case law from the of Courts of Appeals, including the Third Circuit, indicate that the "actual notice" element of Title IX sexual harassment analysis is satisfied by an appropriate person's awareness of allegations of intentional and inappropriate touching of a student by a teacher. The evidence presented in the case at hand, when taken in the light most favorable to C.K., shows that no fewer than three "appropriate persons"-- Principal Young and CIU Supervisors Shanafelt and Bloom-- were made aware of allegations that Ms. Wrye was engaged in passionate kissing and hugging, having an affair with a student and having that student at her house and in her car after school hours. The allegations against Ms. Wrye were at least as specific in their detail as all of the allegations in the cases discussed above, and were more severe in their nature than most of those allegations.

The District Court's decision to dismiss C.K.'s claims for failure to satisfy the actual notice standard runs contrary to overwhelming majority of judicial interpretation of that standard and sets far too high a standard in light of the imbalance of power between the minor victims and the adults obligated to protect them. *Amicus curiae* urges this Court to reverse the decision of the District Court.

Respectfully submitted,

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Dated: March 5, 2018

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and is limited to fifteen (15) pages. I also certify that the word count is 3,741. I further certify that the electronic copy of this brief filed with the Court is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Norton Anti-Virus software program.

FREIWALD LAW, P.C.

By: __s/ Aaron J. Freiwald__________
AARON J. FREIWALD, ESQUIRE

Date: March 5, 2018

CERTIFICATION PURSUANT TO LOCAL RULE 46.1(e)

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

FREIWALD LAW, P.C.

By: __s/ Aaron J. Freiwald__________
AARON J. FREIWALD, ESQUIRE

Date: March 5, 2018

CERTIFICATE OF SERVICE

I, AARON J. FREIWALD, hereby certify that service of a true and correct copy of the attached Brief of *Amicus Curiae* was served upon counsel of record on this date via United States Mail, as follows:

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