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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

BRADLEY PUTMAN, Plaintiff,
v.
BOARD OF EDUCATION OF SOMERSET
INDEPENDENT SCHOOLS, et al., Defendants.
C.A. No. 00-145

UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
INTRODUCTION AND INTEREST OF THE UNITED STATES

This case involves allegations that the Board of Education of Somerset Independent Schools and its Superintendent, agents, and employees deprived the plaintiff of his statutory and constitutional rights to be free from discrimination on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 etseq., and to be free from discrimination on the basis of his sex and actual or perceived sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See 42 U.S.C. § 1983.[1]

Under Title IX and its implementing regulations, see 34 C.F.R. 106.1, 106.31(a)(b), no individual may be discriminated against on the basis of sex in any educational program or activity receiving Federal financial assistance. The Department of Justice has responsibilities for the enforcement of Title IX of the Education Amendments of 1972 in federal court. Federal departments and agencies are charged with the responsibility for promulgating regulations implementing Title IX and for ensuring that recipients of federal funds comply with the statute and regulations. See 20 U.S.C. § 1682. The Department of Education has issued regulations pursuant to Title IX and its Office for Civil Rights issued Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. 62 Fed. Reg. 12034 (1997). The Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980); 28 C.F.R. § 0.51 (1998).

The United States Department of Justice also has significant responsibilities for the enforcement of the Civil Rights Act of 1964, which prohibits equal protection violations on the basis of sex, see Title IV, 42 U.S.C. § 2000c, and the Attorney General may intervene in any lawsuit in federal court seeking relief from a denial of equal protection under the Fourteenth Amendment. See 42 U.S.C. § 2000h-2.

The United States thus has an interest in the orderly development of the law regarding Title IX and the Equal Protection Clause of the Fourteenth Amendment.

COUNTERSTATEMENT OF THE CASE

I. **Procedural Background**

In March 2000, plaintiff filed this Complaint for monetary damages, alleging that defendants discriminated against him by deliberately and intentionally failing to take prompt and effective steps to end the hostile and offensive sexual harassment campaign to which he was subjected from August 1997 through the beginning of the 1998-99 school year. Complaint, ¶ 15. Defendants are the Board of Education of Somerset Independent Schools ("SIS"), the Chairman of the Board for SIS, the Superintendent of Schools, and various school officials at Somerset High School. Complaint, ¶¶ 5,6.

In April 2000, defendants sought to dismiss the Complaint, alleging, inter alia, that (1) plaintiff had failed to state a claim under Title IX because plaintiff's harassment was on the basis of sexual orientation, not on the basis of sex; and

(2) plaintiff had failed to state a claim under Section 1983 because there is no constitutional right to be free from discrimination based on sexual orientation under the Fourteenth Amendment. See Defendants' Motion to Dismiss at 13-15 (4/19/00)("Defendants Motion").[2] In June 2000, plaintiff filed his response, arguing, inter alia, that (1) he has stated a claim under Title IX against the school board because the harassment experienced by plaintiff was harassment on the "basis of sex" within the meaning of Title IX; and (2) that even though homosexuals are not a "suspect class," they are entitled to at least the same protection as any other identifiable group that is subject to disparate treatment by the state. See Plaintiff's Response Memorandum in Opposition to Defendants' Motion to Dismiss Complaint (6/6/00)("Plaintiff's Response"). Two weeks later, defendants filed a reply brief, renewing their claims that (1) plaintiff failed to state a claim against the school district and the individual defendants because Title IX cannot be "stretched" to cover the type of discrimination alleged in this case; and (2) there is no constitutional right to equal protection on the basis of sexual orientation. See Defendants' Reply to Response to Motion to Dismiss at 2-8 (6/26/00)("Defendants' Reply"). Shortly thereafter, the United States notified the parties and the Court of its interest in this case and its intent to seek leave to participate as Amicus Curiae. See United States' Notice of Intent to Seek Leave to Participate As Amicus Curiae (6/30/00).

II. **Factual Background**

Plaintiff, Bradley Putman, a former student at Somerset High School, alleges in his Complaint that for more than one year defendants discriminated against him on the basis of his sex and his actual or perceived sexual orientation by failing to take steps reasonably calculated to end a campaign of sexual harassment by his peers. Complaint, ¶¶ 13-15.

From approximately August 1997 until plaintiff's parents moved their residence to a different school district at the beginning of the 1998-99 school year to protect their son, plaintiff allegedly was subjected to harassment by other students, without appropriate intervention from defendants, and which included the following:

- three written death threats within the span of a few months, Complaint, ¶¶ 16 (m),(p);
- repeated, unwanted sexual contact, including one student grabbing plaintiff's groin area and making other offensive sexual suggestive gestures, and another student wrapping his arms around plaintiff to see, in the student's words, "if plaintiff would hug back," Complaint, ¶¶ 16 (b),(c);
- daily harassment, including pursuit in the hallways, asking him if he was gay, using loud voices that could be overheard by other students, other name calling, whistling and throwing objects at him, Complaint, ¶¶ 16 (a),(d);

- offensive and hostile verbal abuse, including calling plaintiff derogatory and demeaning names, Complaint, ¶ 16 (d),(h); and
- sexual intimidation and humiliation including distributing a fabricated Christmas card containing sexually explicit language from plaintiff to another male student, and spray painting two male stick figures engaged in a sexual act and the inscription, "This is for you Brad Butman," on the surface of the parking lot of Somerset High School. Complaint, ¶¶ 16 (h),(q).

Plaintiff and/or his parents went to six different school officials on at least nine separate occasions over the course of a year and a half to seek help in ending this campaign of sexual harassment. Instead of taking prompt, reasonable and effective action to end the harassment, school officials told plaintiff, among other things, to change his routine and walking habits to avoid the harassing students, "not to pay attention to these students," that "boys will be boys," to "hold his head high," and that even though the plaintiff "clearly" was experiencing sexual harassment, they were not sure what they could do for him because the school system's policy against sexual harassment did not cover same-sex sexual harassment. Complaint, ¶¶ 16 (a),(g),(i),(k),(n).[3]

In sum, plaintiff alleges that defendants refused to enforce their own policies to prevent harm to him because of his sex and his actual or perceived sexual orientation. Complaint, ¶ 17. In contrast, according to plaintiff, where the victims were female, where the victims and perpetrators were of different sexes, and where the actual or perceived sexual orientation of the student victims was heterosexual, defendants routinely enforced their policies and procedures to remedy the type of discrimination suffered by plaintiff. Complaint, ¶ 18.

ARGUMENT

The Sixth Circuit has set forth the standards in which a district court can dismiss a complaint under Rule 12(b)(6):

The Supreme Court has stated that 12(b)(6) motions should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief. Our duty is to construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein.

Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 724 (6th Cir. 1996)(citations and internal quotations omitted). As discussed below, defendants have failed to meet their burden.

I. Plaintiff Has Stated A Claim Under Title IX Based On Allegations That The Nature and Severity Of The Harassment He Suffered Constitutes Harassment On The Basis Of Sex.

The Supreme Court has recognized a private right of action to recover money damages under Title IX for peer sexual harassment on the basis of sex. Davis v.Monroe County Bd. Of Educ., 526 U.S. 629, 650-54 (1999).[5] Defendants first argue that the harassment alleged by plaintiff was not "on the basis of sex" because, according to them, plaintiff at most alleges discrimination on the basis of sexual orientation, not sex, and harassment involving taunts or conduct that connotes homosexuality cannot constitute harassment on the basis of sex. SeeDefendants' Motion at 14. Defendants are wrong.

While it is clear that discrimination in violation of Title IX must be "on the basis of sex," numerous courts and the Department of Education, which is charged with administratively enforcing Title IX and which investigated the underlying facts of this case, have also made clear that a plaintiff may state a valid Title IX claim alleging facts like the ones present here. The defendant simply cannot deny that this court has jurisdiction over the Complaint because actions connoting homosexuality were part of the sexually hostile environment alleged by plaintiff.

First, groin grabbing, hugging, throwing objects, whistling, graffiti, Christmas cards, and death threats that are "of a sexual nature" are sexual harassment violative of Title IX. Furthermore, plaintiff alleges that he was harassed because he was perceived by other students to not conform to the behavior or mannerisms of a stereotypic boy. The Supreme Court has held, in the Title VII context,(6) that "sex stereotyping" of the kind alleged here can constitute harassment on the basis of sex. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989). In Price Waterhouse, plaintiff was denied partnership in an accounting firm, due, in part, to "sex-stereotyping." Prior to the final decision to deny plaintiff partnership, senior partners described her as "macho" and advised her to wear makeup, jewelry and to dress in more feminine clothing. See id. at 235. The Court explained:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender * * * * As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the spectrum of disparate treatment of men and women resulting from sex stereotypes.

Id. at 250-51 (citations and internal quotations omitted).

Although the Sixth Circuit does not appear to have addressed sex-based harassment on the basis of stereotyping, other circuit courts have. The First Circuit recently found that sex stereotyping can constitute harassment on the basis of sex in the Title VII context. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999). While on the job, plaintiff in Higgins suffered frequent verbal abuse including slurs such as "you faggot," and "he'll give us AIDS," and physical abuse and threats, such as one co-worker shaking plaintiff violently and threatening to kill him, and other co-workers throwing hot cement on him. Higginsv. New Balance Athletic Shoe, Inc., 21 F. Supp.2d 66, 69 (D. Me. 1998).

On appeal, the First Circuit rejected the district court's holding that such facts could never constitute discrimination on the "basis of sex." Although plaintiff failed to present the "sex-stereotype" argument to the district court and thus waived the argument on appeal, the First Circuit found that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, see Price Waterhouse, 490 U.S. at 250-51, 109 S. Ct. at 1775, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." 194 F.3d at 261 n.4; Galdieri-Ambrosini v. National Realty & Development Corp., 136 F.3d 276, 289 (2nd Cir. 1998)("Evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender.")(citing Price Waterhouse, 490 U.S. at 250-51;Lindahl v. Air France, 930 F.2 1434, 1439 (9th Cir. 1991)(sex-stereotyping comments suggested that employer made hiring decision on the basis of stereotypical images of men and women); Sheehan v. Purolator, Inc., 839 F.2d 99, 106-77(2d Cir.)(Kearse, J., dissenting), cert. denied, 488 U.S. 891, 109 S.Ct. 226 (1988)).

Second, contrary to defendants' assertions, Title IX need not be "stretched" to cover the type of discrimination suffered by plaintiff. Title IX prohibits sex-based harassment; the harassing conduct is not somehow insulated because it relates, in part, to the victim's perceived or actual sexual orientation. An actionable Title IX claim may include taunts of being a homosexual or epithets connoting homosexuality when they are part of a sexually hostile environment. Quick v.Donaldson Co., 90 F.3d 1372, 1379 (8th Cir. 1996) (reversing summary judgment for the defendant in a Title VII sexual harassment case based, in part, on evidence that plaintiff was also subjected to verbal harassment including taunting about being a homosexual).

In Schmedding v. Tnemec Co. Inc., 187 F.3d 862 (8th Cir. 1999), plaintiff alleged that he was sexually harassed by his fellow employees because they, among other things, patted him on the buttocks; asked him to perform sexual acts; called him derogatory names such as "homo" and "jerk off"; and subjected him to the exhibition of sexually inappropriate behavior such as unbuttoning clothing, scratching of crotches and buttocks, and simulating a sexual act using the doorframe to Schmedding's office. 187 F.3d 865. In dismissing the complaint,

the district court, like defendants in this case, relied on the argument that such facts constituted harassment on the basis of sexual orientation, rather than sex. The Eighth Circuit reversed, stating:

We do not think that, simply because some of the harassment alleged by Schmeding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation.

Id. at 865. See Quick, 90 F.3d at 1375 (reversing summary judgment for defendants on a Title VII sexual harassment claim where plaintiff was subject to sexually harassing conduct including demeaning comments such as "pocket lizard licker" and "queer").(7)

In sum, analogous Title VII cases make clear that plaintiff has stated a claim based on allegations that the nature and severity of the harassment -- being repeatedly victimized by conduct of a sexual nature -- constituted harassment on the basis of sex. Furthermore, taunts or conduct that connote homosexuality because he was not perceived to act as a "typical" boy do not transform a complaint alleging discrimination on the basis of sex to one alleging discrimination on the basis of sexual orientation.(8) All students, including students who are, or are perceived to be, homosexual, are protected by Title IX from sexual harassment and the unsafe hostile environment that such discriminatory harassment creates. Under Title IX, it is clear that plaintiff has stated an actionable claim and the defendants motion to dismiss must be denied.

II. Plaintiff Has Stated A Claim Under Section 1983 By Alleging That Defendants Violated His Fourteenth Amendment Equal Protection Rights By Discriminating Against Him On The Basis Of His Actual Or Perceived Sexual Orientation.

The threshold question in a Section 1983 claim is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" Lillard, 76 F.3d at 723(citing Baker v. McCollan, 443 U.S. 137, 140 (1979)). The Equal Protection Clause grants to all "the right to be free from invidious discrimination in statutory classifications and governmental activity." Harris v. McRae, 448 U.S. 297, 322 (1980). Defendants challenge the sufficiency of plaintiff's Section 1983 equal protection claim on three grounds: (1) that there is no "federal right" to be free from discrimination on the basis of sexual orientation;

(2) that homosexuals are not an "identifiable class" for purposes of equal protection analysis; and (3) that there is no factual evidence that defendants deliberately treated students differently based on their sexual orientation.(9) See Defendants' Motion at 14; Defendants' Reply at 6-8. As discussed more fully below, all three arguments are without merit.

First, defendants suggest that any group not afforded a suspect classification, such as gays and lesbians and plaintiff herein, are not protected by the Fourteenth Amendment. See Defendants' Reply at 7 n.5 (citing Romer v. Evans, 517 U.S. 620 (1996)). Such an interpretation is unsupportable. On the contrary, by striking down an amendment to the Colorado Constitution ("Amendment 2") that repealed local ordinances designed to protect homosexual persons from discrimination, Romersupports the proposition that homosexuals, as a class, have a right to be free from irrational discrimination. Id. at 633. The Court declared: "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. ((citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)); Nabozny, 92 F.3d at 458 (finding that a student could maintain equal protection claims alleging discrimination, interalia, on the basis of sexual orientation); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp.2d 1160, 1169 (S.D. Ohio 1998)("Homosexuals, while not a 'suspect class' for equal protection analysis, are entitled to at least the same protection as any other identifiable groups which is subject to disparate treatment by the state.").

Thus, contrary to the assertions of defendants, plaintiff may maintain his Section 1983 equal protection claim because he has sufficiently alleged that he has been denied the "federal right" of being free from invidious discrimination on the basis of his actual or perceived sexual orientation. See Romer, 517 U.S. at 633.

Second, defendants argue, relying on Equality Found. of Greater Cincinnati, Inc. v.City of Cincinnati, 54 F.3d 261 (6th Cir. 1995)("Equality Found. I") that "the Sixth Circuit has rejected the contention that homosexuals are an identifiable class for purposes of equal protection analysis." See Defendants' Reply at 7-8. Defendants' reliance on Equality Found. I is misplaced in light of the Sixth Circuit's more recent decisions in Stemler v. City of Florence, 126 F.3d 856, 872-874 (6th Cir. 1997), cert.denied, 523 U.S. 1118 (1998), and Equality Found. of Greater Cincinnati, Inc. v.City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998) ("Equality Found. II").

Contrary to the allegations of defendants, the Sixth Circuit has recently held that sexual orientation is an identifiable group for purposes of an equal protection analysis. Stemler, 126 F.3d at 874. In Stemler, a female motorist alleged that five officers arrested her, and not another motorist who was clearly intoxicated, for driving under the influence because they believed she was a lesbian. 126 F.3d at 861-863. Based on information provided by the other motorist, the officers repeatedly informed witnesses at the scene that the plaintiff was a lesbian. Id. In finding that the plaintiff had stated a claim based on sexual orientation, the Sixth Circuit explained that the record showed that the officers had singled out the plaintiff as a "perceived lesbian," and selectively prosecuted her in violation of the equal protection clause. Id. at 874; see Glover, 20 F. Supp.2d at 1170-74 (finding that plaintiff, as an identifiable homosexual, had been discriminated against on the basis of his sexual orientation in violation of the equal protection clause).

The findings in Stemler are consistent with the Sixth Circuit's Equality Found.cases. The 1995 case cited by defendants, Equality Found. I, was vacated and remanded for reconsideration in light of the Supreme Court's decision in Romer.See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996). On remand, the Sixth Circuit held that a city charter amendment removing municipally-enacted special protection for gays and lesbians was rationally related to legitimate goals. Equality Found. II, 128 F.3d at 301. Implicit in the Sixth Circuit's decision, however, is the concept that the city's ordinance discriminated against the identifiable class of homosexuals. The court found that "[the amendment] prevented homosexuals, as homosexuals, from obtaining special privileges and preferences . . . from the City." Id. at 296. In other words, for the court to reach the rational basis standard, it first found that the law singled out an identifiable group for disparate treatment, which triggers judicial scrutiny.[10]

The Supreme Court supports this finding that sexual orientation can be used to identify a group for purposes of equal protection analysis. Indeed, it was critical inRomer to the Supreme Court's determination that Colorado's law was unconstitutional: "[w]e must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot deem a class of persons a stranger to its laws." 517 U.S. at 635 (emphasis added). As laid out by the Sixth Circuit and the Supreme Court, plaintiff has stated an actionable equal protection claim because he has alleged that he was discriminated against based on his actual or perceived sexual orientation.[11]

Third, defendants argue, relying on Lillard and Nabozny, that there is insufficient evidence for the Court to infer either (1) disparate treatment or (2) that the discriminatory treatment was motivated by plaintiff's sexual orientation. SeeDefendants' Reply at 7-8. However, a review of both cases shows that plaintiff in this case has stated sufficient facts to state a claim. To begin with, Lillard is instructive, but not for the proposition stated by defendants. In Lillard, three students and their parents filed a Section 1983 claim against various school officials claiming that a teacher sexually harassed and abused them, in violation of the First and Fourteenth Amendments. 76 F.3d at 716-721. The Sixth Circuit began by explaining that a complaint must be construed liberally in the plaintiff's favor but cautioned that "conclusory allegations" of unconstitutional conduct without specific factual allegations fail to state a claim under Section 1983. Id. at 726. Utilizing this standard, defendants urge this Court to dismiss the instant claim because plaintiff has failed to allege sufficient facts to show intentional discrimination on the basis of sexual orientation. However, the Sixth Circuit had only the

following facts in its case when it cautioned against "conclusory allegations": one of the plaintiffs, Lillard, claimed that the teacher "held her chin with one hand and slapped her across the face," id. at 719; the other plaintiff, Little, claimed that the teacher stared at her, made kissing noises, and once passed her in the hallway, rubbing her stomach telling her "he had a arranged for permission for her to come to his class . . . after the last exam," id. at 720-21. Thus, on these limited facts, the Sixth Circuit found that these plaintiffs had failed to state a claim for sexual harassment.

Here, in contrast, plaintiff has pled in detail facts that give rise to an inference -- sufficient to deny a motion to dismiss -- that he suffered disparate treatment by defendants because of his sex and his actual or perceived sexual orientation. Plaintiff alleges that, in response to his complaints, school officials told him that even though he was "clearly" experiencing sexual harassment, they were not sure what they could do for him because the school system's policy against sexual harassment did not cover same-sex sexual harassment, that "boys will be boys," to "hold his head high," to "not to pay attention to these students," and to change hisroutine and walking habits to avoid the harassing students, Complaint, ¶¶ 16 (a),(e),(g),(i),(j),(k),(n),(o),(q).

Nabozny likewise affirms that these facts, at a preliminary stage such as a motion to dismiss, are sufficient to state a Section 1983 equal protection claim. In Nabozny, the district court granted school officials' motion for summary judgment on a claim that they failed to protect Nabozny -- because of his sexual orientation -- from harm by other students. On appeal, the Seventh Circuit reviewed similar facts to the instant case, and stated:

Nabozny was continually harassed and physically abused by fellow students because he is a homosexual. Both in middle school and high school Nabozny reported the harassment to school administrators. Nabozny asked the school officials to protect him and to punish his assailants. Despite the fact that the school administrators had a policy of investigating and punishing student-on-student battery and sexual harassment, they allegedly turned a deaf ear to Nabozny's requests. Indeed, there is evidence to suggest that some of the administrators themselves mocked Nabozny's predicament.

92 F.3d at 449. Like the instant facts, the deliberate indifference of the administrators rose to the level of intentional discrimination based on sexual orientation.[12] The court held that based on this record, a reasonable fact-finder could find that defendants had violated Nabozny's Fourteenth Amendment right to equal protection by discriminating against him on the basis of his sexual orientation.Id. at 460. Plaintiff here has pled sufficient facts to state an actionable equal protection claim. Defendants' motion to dismiss on this basis should be denied and plaintiff permitted to proceed with discovery.

CONCLUSION

For the forgoing reasons, Defendants" Motion to Dismiss should be denied.

Respectfully submitted,

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Dated: July 28, 2000.

1. Plaintiff also alleges violations of 42 U.S.C. § 1985(3), Sections 1, 2, and 3 of the Kentucky Constitution and the Kentucky Civil Rights Act. See Complaint ¶ 3. The United States will limit its discussion to the Title IX and equal protection claims.

2. Defendants also argue that this action is barred in this forum against the school board on the basis of Eleventh Amendment immunity. See Defendants Motion to Dismiss at 15-16. In Kentucky, as this Court has held, school boards are not "arms of the state" and thus are not entitled to the State's Eleventh Amendment immunity. Creager v. Bd. of Educ. of Whitley County, 914 F. Supp. 1457, 1460-61 (E.D. Ky. 1996); see also Cunningham v. Grayson, 541 F.2d 538, 543 (6th Cir. 1976); Blackburn v. Floyd County Bd. of Educ., 749 F. Supp. 159, 163 (E.D. Ky. 1990). Moreover, individual defendants are not entitled to qualified immunity against plaintiff's section 1983 claims. Oona R.S. v. McCaffrey, 143 F.3d 473, 478 (9th Cir. 1998), cert. denied, 526 U.S. 1154 (1999)(Title IX); Nabozny v. Podlesny, 92 F.3d 446, 456 (7th Cir. 1996)(Equal Protection Clause).

3. As a result of the failure of school officials to take prompt and corrective action, plaintiff's mother filed a complaint in April 1998 with the U.S. Department of Education concerning the ongoing harassment of her son. See Letter from Brenda Johnson, Team Leader, U.S. Department of Education, Office for Civil Rights, to Regina Cooper (May 14, 1998)(Plaintiff's Response, Exhibit B). Following its investigation, the Department obtained specific "commitments" from the District to implement policies, practices and procedures to ensure that SIS and its employees take prompt and reasonable steps in the future to eliminate peer-on-peer sexual harassment.(4)

4. Such relief does not preclude plaintiff's claim, as he seeks monetary damages. SeeComplaint, ¶ 1. '

5. Because plaintiff has thoroughly briefed all of the Davis standards, see Plaintiff's Response at 5-22, the United States will limit its discussion to whether the harassment was "on the basis of sex" under Title IX.

6. Defendants' arguments that Title VII caselaw is inapplicable here, seeDefendants' Reply at 3-4, is without merit. Many of the legal principles applicable to sexual harassment in the workplace are applicable to sexual harassment claims in the educational context. Olmstead v. L.C. ex rel. Zimring, 119 S. Ct. 2176, 2195 n.1 (1999)("This Court has . . . looked to its Title VII interpretations of discrimination in illuminating Title IX"). Moreover, the Supreme Court's distinction of the Title IX and Title VII liability standards in Davis does not stand for the proposition that conduct that constitutes discrimination on the basis of sex is different in the two contexts. Instead, Davis distinguished the circumstances for which schools can be held liable under Title IX from the circumstances for which employers can be held liable under Title VII. Davis, 526 U.S. at 651.

7. In addition, defendants argue that plaintiff has failed to state a claim because not all instances of the harassment alleged by plaintiff are sex-based. See Defendants' Reply at 4 (counting only two incidents which could "arguably be construed as sexual conduct"). The Eighth Circuit, however, has recognized that not all

instances of harassment must be apparently sex-based. "All instances of harassment need not be stamped with signs of overt discrimination to be relevant under Title VII if they are part of a course of conduct which is tied to evidence of discriminatory animus." Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999).

8. Even if the discrimination was motivated by animus on the basis of sex and plaintiff's actual or perceived sexual orientation, a valid Title IX claim of discrimination on the basis of sex does not require that "sex" be the only motivating factor. See Price Waterhouse, 490 U.S. at 241.

9. Because plaintiff has thoroughly briefed all of the equal protection claims, seePlaintiff's Response at 23-29, the United States will limit its discussion to discrimination on the basis of sexual orientation under the Equal Protection Clause.

10. The court reasoned that the charter amendment was rationally related to the legitimate goal of conserving public costs that accrued from investigating and adjudicating sexual orientation discrimination complaints. 128 F.3d at 300. This case presents an entirely different situation. See Nabozny, 92 F.3d 458 ("We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation").

11. Although the Supreme Court has declined to apply a heightened level of scrutiny for classifications based on sexual orientation, it distinguished "the ordinary equal protection case calling for the most deferential of standards" from the Romer case which denied homosexuals basic equal protection. 517 U.S. at 632-33. See also Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998)(finding that in the civilian context, Romer used a higher level of review for sexual orientation because the Court was willing to "examine the benign reasons advanced by the government to consider whether they masked an impermissible underlying purpose"); Nabozny, 92 F.3d at 458 (distinguishing the military and civilian contexts for rational basis review).

Moreover, courts in the Sixth Circuit appear more willing to forbid classifications based on sexual orientation post-Romer. See Stemler, 126 F.3d at 872-874(reversing the district court's dismissal of plaintiff's claim for selective prosecution in violation of the equal protection clause on the basis of perceived sexual orientation); Glover, 20 F. Supp.2d at 1168-1175 (finding that a school board discriminated against a school teacher based upon his sexual orientation when it decided not to renew his teaching contract); but see Equality Found. II, 128 F.3d at 301(holding that city's charter amendment, removing municipally acted special protection for gays and lesbians was rationally related to city's valid interest in conserving public costs that accrued from investigating and adjudicating sexual orientation).

12. Such circumstantial evidence of intent is typical in a discrimination case where it is "rare that the decision-maker will admit to discriminating and it is impossible to get inside the decision-maker's mind." Glover, 20 F. Supp.2d at 1174.