

Carmichael v. Galbraith **2014 WL 2767590 (5th Circuit Court of Appeals)**

June 19, 2014

Background

Bullying, sexual violence and harassment and other acts of student-on-student aggression are becoming more and more commonplace. This trend, in turn, has led to greater scrutiny of school districts' responses to such behavior and imposition of liability for failing to address and ameliorate such conduct. As previously reported, the Department of Education's Office of Civil Rights now applies Title IX to transgendered and gender non-conforming discrimination and harassment. As a consequence, school districts can be, and most likely will be, held liable for violations of Title IX when they fail to address this type of discrimination.

In this case, the Appellate Court for the 5th Circuit (overseeing Texas) analyzed the requirement for alleging a Title IX violation for student-on-student, same sex, sexual harassment. The plaintiffs alleged that their son was subject to sexual harassment by other students for the perceived failure of their son to conform to a male gender-based stereotype. The complaint alleged that the son was subject to incessant bullying and was accosted by several boys on numerous occasions while school officials (*i.e.* the football coaches) observed and failed to intercede. The parents alleged that when they complained to school officials, the administrators asserted that "boys will be boys." Ultimately, the son committed suicide as a result of the bullying and harassment.

The trial court dismissed the action on the basis that the complaint did not state a viable claim for a Title IX violation. In a rather strong opinion, the 5th Circuit reversed the trial court finding the trial court essentially cherry-picked from the complaint and "did not analyze or even mention [those] portions of the" complaint that supported the claim under Title IX.

Holding

The Appellate Court explained that Title IX prohibits discrimination, based on sex, in any education program or activity receiving federal financial assistance. In addition, Title IX may be enforced privately for the recovery of monetary damage. The U.S. Supreme Court, however, has limited Title IX claims based on student-on-student sexual harassment to claims that encompass only "pervasive" and "widespread" conduct that has the "systemic effect of denying a victim equal access to an educational program or activity." In other words, single instances or random, unrelated events will not give rise to Title IX liability *unless* there is a consistent practice of ignoring the incidents.

Finding that the complaint alleged “numerous” bullying episodes and referred to “incidents” (plural) of sexual assault, the Appellate Court chastised the trial court judge for failing to analyze or even mention these allegations in erroneously concluding that the complaint did not state a cause of action.

Moreover, the Appellate Court confronted the issue of what constitutes “sexual harassment” under Title IX. Finding it irrelevant that both the victim and harassers were of the same sex, the Appellate Court concluded that finding sexual harassment depends upon “the constellation of surrounding circumstances, expectations and relationships” that will inform the decision maker on whether the conduct in question constitutes sexual harassment. Thus, to constitute actionable conduct under Title IX, the conduct must be more than “insults, banter, teasing, shoving, pushing and gender-specific conduct” that is understandable in the school setting.

As a consequence, the Appellate Court reversed the trial court and found the plaintiffs had alleged a viable Title IX claim.

Learning Point:

This case demonstrates that courts are taking a harder look at “bullying” activities that take place in school and the school districts’ responses to these incidents. Schools cannot adopt a laissez-faire attitude of “kids will be kids” when confronted with this type of behavior. Bullying, student-on-student sexual harassment and discrimination based on gender non-conforming characteristics are increasingly being recognized and addressed by parents and the Office of Civil Rights. Given this intolerance for condoning or otherwise ignoring bullying behavior, schools must tackle issues straight away. To assist, SLRMA has published checklists and self-audits that should assist your district tackle these issues:

- *District Transgender and Gender Non-Conforming Student Practice and Policy: Self-Audit Checklist and Best Practices (May 2014), and*
- *Addressing Bullying and Harassment: A District Self-Audit Guide (March 2011).*

In addition, look for SLRMA’s upcoming *District Transgender and Gender Non-Conforming Student Practice and Policy – Extracurricular Activities* to be published this fall.