UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
SYRACUSE DIVISION

CHARLES PATRICK PRATT and
A.E.P. through her parents and next friends
Bobbi Lynn Petranchuk and
Todd Edward Petranchuk,

Plaintiffs,

v.

INDIAN RIVER CENTRAL SCHOOL DISTRICT; INDIAN RIVER CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION; JAMES KETTRICK, Superintendent of Indian River Central School District, in his official and individual capacities; TROY DECKER, Principal of Indian River High School, in his official and individual capacities; and JAY BROWN, JOHN DAVIS, KENDA GRAY, AMABLE TURNER, and PATRICIA HENDERSON, in their individual capacities,

Defendants.

Case No.: 7:09-cv-411 (GTS/GHL)

UNITED STATES' MEMORANDUM AS *AMICUS CURIAE* IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS/ MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Charles Patrick Pratt alleges that he was the victim of harassment spanning nearly all of his time in primary and secondary schools in the Indian River Central School District ("IRCSD"). Pratt alleges that he was targeted by peers and IRCSD staff because he did not conform to masculine stereotypes and because of his sexual orientation. Pratt filed this lawsuit asserting claims against the IRCSD, its Board of Education, Superintendent, agents, and employees (collectively, "Defendants") for, *inter alia*, violating his statutory and constitutional rights to be free from discrimination on the basis of sex under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq. ("Title IX"), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983.[1] (First Am. Compl. ¶¶ 168-178.)

On June 11, 2010, the Defendants filed a Motion to Dismiss/Motion for Summary Judgment and supporting memorandum ("Defendants' Memorandum"), arguing, *inter alia*, that Pratt failed to state a claim under Title IX or the Equal Protection Clause. (See Defs.' Mem. at 12-22; Defs.' Reply Mem. at 14-17, 19-20.) The United States respectfully requests that this Court allow it to participate as *amicus curiae* to address three incorrect legal arguments posited by Defendants. Specifically, Defendants argue that: (1) harassment based on sex stereotyping is not a legally cognizable claim under Title IX and the Equal Protection Clause; (2) allegations of

[1] Pratt's sister A.E.P., through her parents and next friends Bobbi Lynn Petranchuk and Todd Edward Petranchuk, is also a party to this suit. Pratt and A.E.P. both allege claims under the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment, the Free Speech Clause and the Free Association Clause of Article I § 8 of the New York State Constitution, § 296 of the New York Human Rights Law, and §§ 40-c and 40-d of the New York Civil Rights Law. However, the United States' *amicus* Memorandum addresses only Pratt's claims of harassment based on sex under Title IX and the Equal Protection Clause (the Sixth and Seventh Claims for Relief in the First Amended Complaint).

harassment based on sexual orientation preclude a sex stereotyping claim; and (3) breaks inherent in a student's movement between classes, grades, and schools preclude a hostile environment claim. (See Defs.' Mem. at 12-22; Defs.' Reply Mem. at 14-17, 19-20.) Because none of these arguments is supported by law, the United States respectfully requests this opportunity to address the correct legal standards governing sex-based harassment claims under Title IX and the Equal Protection Clause.

INTERESTS OF THE UNITED STATES

The United States seeks to participate as *amicus curiae* because it has a significant interest in the proper development of the law regarding Title IX and the Equal Protection Clause.

Under Title IX and its implementing regulations, see 34 C.F.R. §§ 106.1, 106.31(a)-(b) (2010), no individual may be discriminated against on the basis of sex in any educational program or activity receiving Federal financial assistance. The U.S. Department of Education is charged with promulgating regulations implementing Title IX and ensuring that recipients of Federal funds comply with the statute and regulations. See 20 U.S.C. § 1682 (2006). The Office for Civil Rights ("OCR") is the office within the U.S. Department of Education charged with enforcing Title IX. The U.S. Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the U.S. 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 U.S. Department of Justice also has significant responsibilities for the enforcement of Title IV 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 (2006), 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 (2006).

The United States has furthered the significant interests noted above by intervening or participating as *amicus curiae* in numerous lawsuits involving claims of sexual harassment under Title IX and/or the Equal Protection Clause. See, e.g., Order Granting Intervention, Junior Doe v. Allentown Sch. Dist., 06-CV-1926 (E.D. Pa. July 8, 2009) (attached as Ex. A); Order Granting Intervention, Lopez v. Metro Gov't of Nashville & Davidson County, 3:07-CV-00799, 2008 WL 4831318 (M.D. Tenn. Nov. 4, 2008) (attached as Ex. B); A.B. v. Rhinebeck Cent. Sch. Dist., 224 F.R.D. 144 (S.D.N.Y. 2004); Lovins v. Pleasant Hill Pub. Sch. Dist., No. 99-0550-CV (W.D. Mo. July 31, 2000) (attached as Ex. C).

PROCEDURAL HISTORY

On February 19, 2010, after obtaining leave from the Court, the Plaintiffs filed their First Amended Complaint alleging, *inter alia*, that Defendants discriminated against Pratt on the basis of sex in violation of Title IX and the Equal Protection Clause. (First Am. Compl. ¶¶ 168-178.) Pratt alleges that he was subjected to verbal and physical harassment in elementary, middle, and high school because he did not conform to masculine stereotypes and because of his sexual orientation. (Id. at ¶¶ 20, 34-37, 40, 50, 53-54, 57, 59.) Pratt alleges that he was called names such as "gay," "fairy," "faggot," "girl," "pussy," "sissy," "queer," and "fudgepacker," and feminized versions of his name ("Charlotte" or "Charlise"). (Id. at ¶¶ 34-35, 37, 53-54.) Pratt also alleges physical harassment such as grabbing and pinching his buttocks, vandalizing his locker, mocking him with stereotypically female mannerisms and gestures, slamming him into walls and lockers, spitting on him, hurling food and spitballs at him, and knocking belongings from his hands. (Id. at ¶¶ 38-39, 57, 59.) Pratt seeks monetary damages for these alleged

violations of Title IX and the Equal Protection Clause. (First Am. Compl., Prayer for Relief ¶¶ 3-4, 7-9.)

On March 5, 2010, Defendants filed their Answer to the First Amended Complaint. On June 11, 2010, Defendants filed a Motion to Dismiss/Motion for Summary Judgment. Plaintiffs responded on June 28, 2010, with an Opposition and Memorandum of Law ("Plaintiffs' Memorandum"). On July 13, 2010, Defendants submitted their Reply and Memorandum of Law in Support ("Defendants' Reply Memorandum").

ARGUMENT[2]

The parties agree that to state a hostile environment claim for damages under Title IX, a private plaintiff must prove that a school district in receipt of Federal financial assistance was deliberately indifferent to sex-based harassment of which it had actual knowledge, and that the harassment was so severe, pervasive and objectively offensive that it can be said to have deprived him of access to an educational opportunity or benefit. Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629, 650 (1999); accord, Defs.' Mem. at 12; Pls.' Mem. at 19. Similarly, a hostile environment claim under the Equal Protection Clause requires the plaintiff to prove that he "subjectively perceived the environment to be hostile or abusive" and that the environment was "objectively hostile and abusive, that is, that it was 'permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that [was] 'sufficiently severe or pervasive to alter the conditions'" of the educational environment. Hayut v. State Univ. of New York, 352 F.3d 733, 744-45 (2d Cir. 2003) (citations omitted) (relying on Title VII hostile environment precedent to

[2] Defendants filed a Motion to Dismiss/Motion for Summary Judgment without stating the standard of review or identifying which claims are subject to dismissal or summary judgment. The United States construed the Defendants' arguments with regard to the Title IX and Equal Protection Clause claims as a motion to dismiss. (See Def. Mem. at 12-22.)

define the legal standard under the Equal Protection Clause); Sauerhaft v. Bd. of Educ. of the Hastings-On-Hudson Union Free Sch. Dist., No. 05 Civ 09087, 2009 WL 1576467, at *6 n.11 (S.D.N.Y. June 2, 2009) (applying same standard under Title IX and the Equal Protection Clause in its analysis of severity and pervasiveness); see also Defs.' Mem. at 21-22 (Equal Protection Clause is "analyzed in much the same manner as claims brought under Title IX"); Pls.' Mem. at 28.[3]

Defendants incorrectly argue that Pratt fails to state a claim under Title IX and the Equal Protection Clause because (1) a claim of sex-based harassment cannot be based on nonconformity with sex stereotypes; (2) an allegation of sexual orientation harassment precludes a claim based on nonconformity with sex stereotypes; and (3) harassment that spans classes, grades, and schools cannot establish a hostile environment claim due to breaks in a student's education. The United States addresses each of these arguments below.

I. Harassment Based on Nonconformity with Sex Stereotypes is a Legally Cognizable Claim Under Title IX and the Equal Protection Clause.

Defendants contend that "[i]n order to be actionable under Title IX, the alleged harassment must be 'because of sex', and no Title IX claim is stated upon the basis of sexual orientation, perceived sexual orientation, or lack of conformity to gender stereotypes." (Defs.' Mem. at 13.) Defendants go on to assert that "[e]ven if the Plaintiffs had pled facts which support the conclusion that the Plaintiffs were discriminated against based upon nonconformity to gender stereotypes, no such claim exists." (Id. at 14; accord Defs.' Reply Mem. at 14

[3] The United States' *amicus* Memorandum addresses Plaintiffs' Equal Protection Clause claim as it pertains to sex-based discrimination on the basis of a failure to conform to gender stereotypes. Plaintiffs are correct that an Equal Protection Clause claim may also be asserted on the basis of discriminatory treatment (i.e., complaints from boys are treated differently than complaints from girls). (Pls.' Mem. at 28.)

("Defendants point out that Plaintiff attempts to allege a claim pursuant to Title IX which is not contemplated by Title IX, and that the entirety of Plaintiff's Title IX allegations state no discrimination based upon gender, but attempt to state that Plaintiff was discriminated against based upon homosexuality and/or gender stereotypes, neither of which are [sic] contemplated by Title IX.").) Defendants likewise argue that harassment based on nonconformity with sex stereotypes cannot support a sex-based claim under the Equal Protection Clause. (Defs.' Mem. at 21-22; Defs.' Reply Mem. at 19-20.)

While Defendants cite to five Title VII cases for the proposition that "no Title IX claim is stated upon the . . . lack of conformity to gender stereotypes," none of the cases supports this proposition.[4] Two of the cases, West v. Mt. Sinai Medical Center, No. 00 Civ. 6191, 2002 WL 530984, (S.D.N.Y. Apr. 9, 2002), and Elgamil v. Syracuse University, No. 99-CV-611, 2000 WL 1264122 (N.D.N.Y. Aug. 22, 2000), do not mention, much less discuss, claims based on sex stereotyping. In the remaining three cases, Dawson v. Bumble & Bumble, 398 F.3d 211, 217-21 (2d Cir. 2005), Simonton v. Runyon, 232 F.3d 33, 36-38 (2d Cir. 2000), and Rissman v. Chertoff, No. 08-Civ.-7352(DC), 2008 WL 5191394, at *2 (S.D.N.Y. Dec. 12, 2008), the courts did not preclude sex stereotyping claims. To the contrary, each court recognized that a sex stereotyping claim is legally cognizable under Title VII, but went on to hold that the plaintiffs failed to allege facts that would support such a claim. Dawson, 398 F.3d at 218 (five years after Simonton, the Second Circuit noted that "individual employees who face adverse employment

[4] Similarly, these cases do not support Defendants' proposition that a sex-based hostile environment claim under the Equal Protection Clause cannot be based on nonconformity to sex stereotypes, and the Defendants do not cite any other cases in support of this proposition. (Defs.' Mem. at 21-22; Defs.' Reply Mem. at 19-20.) Defendants simply ask the court to rely on their Title IX arguments to similarly dismiss Pratt's Equal Protection Clause claim. (Defs.' Mem. at 21-22; Defs.' Reply Mem. at 19-20.)

actions as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII."); Simonton, 232 F.3d at 38 ("We do not have sufficient allegations before us to decide Simonton's claims based on stereotyping because we have no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation. Moreover, because this theory was not presented to the district court, we are without the benefit of lower court consideration."); Rissman, 2008 WL 5191394, at *2 ("[I]ndividuals may maintain a claim under Title VII for adverse employment actions caused by their lack of conformity to gender stereotypes.").

Moreover, the Defendants' reliance on Title VII is of no avail because the Supreme Court has authoritatively recognized a sex stereotyping claim. Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989) (holding that harassment based on sex stereotyping constituted discrimination on the basis of sex under Title VII). The lower court cases cited by the Defendants do not and could not cast any doubt on this holding. See Dawson, 398 F.3d at 218; Rissman, 2009 WL 5191394, at *2. Similarly, harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX.[5] See, e.g., Doe v. Brimfield Grade Sch.,

[5] Courts examine Title VII precedent when analyzing discrimination "on the basis of sex" under Title IX. Davis, 526 U.S. at 631 (holding that Title VII agency principles do not apply under Title IX, however Title VII precedent was relevant to expound on gender-based harassment); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74 (1992) (Title VII precedent was the basis for recognizing a Title IX private cause of action for sexual harassment). The standards for proving gender-based harassment under Title VII that were enunciated in Oncale are often cited by courts reviewing similar claims under Title IX. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (holding that same-sex harassment is actionable under Title VII); see, e.g., Davis, 526 U.S. at 651; Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000)

552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) ("Discrimination because one's behavior does not 'conform to stereotypical ideas' of one's gender can amount to actionable discrimination 'based on sex.'"); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006) ("The language set forth in the OCR Guidance and the holding in Oncale clearly support the conclusion that a female student, subjected to pejorative, female homosexual names by other female students, can bring a claim of sexual harassment under Title IX."); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 964-65 (D. Kan. 2005) (recognizing that a gender stereotyping[6] claim may be used to establish that same-sex harassment is based on sex under Title IX); Montgomery, 109 F. Supp. 2d at 1090-93 (relying on Price Waterhouse, Oncale, Davis, and the relationship between Title VII and Title IX to hold that the plaintiff had stated a cognizable harassment claim for nonconformity with sex stereotypes under Title IX).

Additionally, OCR has recognized the sex stereotyping theory in its guidance on sexual harassment and enforcement under Title IX. The most recent guidance, issued on January 19, 2001, states as follows:

> [G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.

Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties ("2001 OCR Guidance") at 3, 66 Fed. Reg. 5512 (Jan. 19, 2001).[7]

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[6] "Sex stereotyping" and "gender stereotyping" are used interchangeably by courts.

[7] The 2001 OCR Guidance was issued pursuant to the U.S. Department of Education's authority under Title IX and its implementing regulations to eliminate discrimination based on sex in education programs receiving Federal financial assistance. 20 U.S.C. §1681; 34 C.F.R. §

In light of the relevant case law and the 2001 OCR Guidance, it is clear that harassment based on sex stereotyping is discrimination on the basis of sex under Title IX and the Equal Protection Clause. Defendants cite nothing to the contrary. This Court should therefore dispense with the Defendants' argument.

II. Allegations of Harassment Based on Sexual Orientation Do Not Defeat a Sex Stereotyping Harassment Claim.

Defendants argue that "[t]he remarks which Plaintiff alleges evidence 'gender stereotype' discrimination do not, as Price-Waterhouse requires, allege discrimination based upon gender, but rather attempts [sic] to allege discrimination based upon sexual orientation." (Defs.' Reply Mem. at 14.) Defendants, in essence, argue that Pratt cannot assert harassment based on both sexual orientation and sex stereotyping.[8]

Plaintiffs, in response, correctly note that harassment "based on sexual orientation does not immunize these Defendants from liability under Title IX for harassment and discrimination based on sex." (Pls.' Mem. at 21.) Courts that have encountered similar claims allow plaintiffs

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106.31(a). Courts have routinely looked to OCR's guidance because it constitutes a body of informed judgment from the federal agency charged with administering Title IX. See, e.g., Davis, 526 U.S. at 647-648, 651-652 (noting that its holding on student-on-student harassment is consistent with OCR's guidance on Title IX); Riccio, 467 F. Supp. 2d at 226 (relying on the 2001 OCR Guidance to determine the scope of sex-based harassment under Title IX).

[8] The cases cited by the Defendants do not support their argument, particularly at the motion to dismiss stage. First, in Martin v. New York State Department of Correctional Services, the court granted the defendant's motion for summary judgment because the plaintiff, David Martin, failed to offer any evidence of sex stereotyping, specifically that the alleged harassment was aimed at his masculinity or perceived lack thereof. 224 F. Supp. 2d 434, 446-47 (N.D.N.Y. 2002). Second, in Trigg v. New York City Transit Authority, the court granted the defendant's motion for summary judgment because the plaintiff stated in a deposition that the harassment was based on sexual orientation. No. 99-CV-4730, 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001). Of particular relevance to Section I of the Argument supra, both Martin and Trigg accepted that sex stereotyping was a legally cognizable claim under Title VII. See Martin, 224 F. Supp. 2d at 446-47; Trigg, 2001 WL 868336, at *5-6.

to prove that the alleged harassment was based on sex even when some of the allegations appear to be related to sexual orientation discrimination. For example, in Riccio, Stefanie Andree, alleged that she was called derogatory names such as "bitch," "dyke," "freak," "lesbian," "Nazi," "gay," and "gothic", and was subjected to physical violence such as having a pencil thrown at her during lunch and paper balls tossed at her during class. 467 F. Supp. 2d at 221-24. The defendant, the New Haven Board of Education, challenged Andree's Title IX claim as one based on sexual orientation rather than sex by arguing that "the majority of the name-calling and ridicule targeted at Andree contained pejorative homosexual references" and that "the thrust of the slurs were of a sexual orientation nature and not gender specific." Id. at 225. The court disagreed, noting that Oncale held that similar harassment constituted discrimination on the basis of sex:

> Despite the Board's assertion that Oncale precludes Andree's claim because the slurs were largely regarding sexual orientation, Oncale is analogous to Andree's claim. In Oncale, the plaintiff was a male being harassed physically and verbally by other males. The derogatory language directed at Mr. Oncale was homosexual in its nature, as in Andree's case. Despite the language being of a homosexual nature in Oncale, the Supreme Court concluded that the harassment constituted sexual harassment.

Id. at 226 (citations omitted) . The court held that "Andree, a female student, targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual, has established a genuine issue of fact as to whether this harassment amounts to gender-based discrimination, actionable under Title IX." Id.

The Defendants argue that Pratt cannot prove a sex stereotyping claim because the alleged harassment (i.e., epithets such as "faggot," "sissy," "queer," "fudge packer," "gay," "fairy," "girl," "sissy," "Charlotte," and "Charlise" (feminized versions of Pratt's name)) suggests sexual orientation discrimination. (See Defs.' Mem. at 13-15.) This argument implies

that Pratt is somehow trying to "bootstrap protection for sexual orientation" into Title IX. Dawson, 398 F.3d at 218 (internal quotation marks omitted). However, the Court in Oncale cautioned against drawing such superficial, perfunctory conclusions about sex-based harassment:

> In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

523 U.S. at 81-82; accord Davis, 526 U.S. at 651-52.

An example of the careful review contemplated by Oncale can be found in Montgomery. The plaintiff alleged that the school district failed to address persistent harassment that included slurs (e.g., "fag," "Jessica" (feminized version of the plaintiff's name), "girl," "gay," "princess," "homo," "freak," "lesbian") and physical aggression (e.g., punching, kicking, pushing, throwing plaintiff to the ground and pretending to rape him). Montgomery, 109 F. Supp. 2d at 1083-84. The school district argued that the plaintiff's "Title IX claims must be dismissed because Title IX does not protect individuals from discrimination based on sexual orientation or perceived sexual orientation." Id. at 1089. In denying the defendant's motion to dismiss, the court explained that a trier of fact could find that the harassment was based on sex:

> Plaintiff contends that the students engaged in the offensive conduct at issue not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity. The facts alleged in plaintiff's complaint support this characterization of the students' misconduct. He specifically alleges that some of the students called him "Jessica," a girl's name, indicating a belief that he exhibited feminine characteristics. Moreover, the Court finds important the fact that plaintiff's peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be "homosexual" or "heterosexual." The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting

> him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy. Plaintiff thus appears to plead facts that would support a claim of harassment based on the perception that he did not fit his peers' stereotypes of masculinity.

Id. at 1090; see also, Schmedding v. Tenmec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999) (harassment that included rumors that labeled plaintiff as homosexual did not transform the complaint from one alleging harassment based on sex to one alleging harassment based on sexual orientation). The court's reliance on the allegation that the harassment began in elementary school demonstrates how the "social context in which particular behavior occurs" and how such contexts help to distinguish harassment based on sex from that based on sexual orientation.[9] Oncale, 523 U.S. at 81.

Additionally, OCR policy recognizes that Title IX prohibits harassment based on sex even when some of the harassment appears to be related to sexual orientation. The 2001 OCR Guidance states that "sufficiently serious harassment of a sexual nature remains covered by Title IX . . . even though the hostile environment may also include taunts based on sexual orientation." 2001 OCR Guidance at v.

Because the case law establishes that a plaintiff can concurrently assert claims for sex-based harassment and sexual-orientation-based harassment (even if the latter claims are not cognizable under the same laws), Pratt should be given an opportunity to prove that the alleged harassment is based on sex under Title IX and the Equal Protection Clause.

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[9] Moreover, being gay does not deny a student his right to be free from sex-based discrimination pursuant to Title IX and the Equal Protection Clause. See, e.g., 2001 OCR Guidance at 3 ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance."); Romer v. Evans, 517 U.S. 620, 633 (1996).

III. A Hostile Environment Claim May Span Transitions Between Classrooms, Grades, and Schools.

The Defendants assert that breaks inherent in the transitions between classes, grades, and schools defeat Pratt's hostile environment claim under Title IX and the Equal Protection Clause:

> Even assuming, *arguendo*, that the Plaintiffs state harassment based on sex: lengthy vacation periods, break up periods of attendance in public school, students moving from teacher to teacher, grade to grade, classroom to classroom, and school building to school building as they continue to attend school, prevent Plaintiffs from alleging pervasive and continuous harassment. In short, the educational experience is not continuous, broken up as it is by lengthy periods of vacation. Also, the educational environment changes so dramatically from kindergarten to high school that it cannot reasonably be deemed to constitute one educational environment.

(Defs.' Mem. at 18; see also id. at 16-20, 22.)[10] The Defendants use breaks in the transition between classes, grades, and schools to divide Pratt's alleged harassment by grade and school. By then tallying merely the harassment alleged within each, the Defendants attempt to defeat Plaintiffs' claim that the conduct created a hostile environment for him. The Defendants are essentially challenging whether the alleged harassment meets the "pervasive" element under Title IX and the Equal Protection Clause. See Davis, 526 U.S. at 650 (to be actionable under

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[10] Defendants fail to cite even one case that stands for the proposition that the "educational experience is not continuous." (Defs. Mem. at 18.) The Defendants cite two Title VII cases that do not discuss hostile environments in an educational setting, but even Hughes recognizes the prematurity of determining whether a continuous claim is established at the motion to dismiss stage before discovery has commenced. Hughes v. United Parcel Serv., Inc., No. 117224/01, 2004 WL 2059768, at *7 (N.Y. Sup. Ct. June 28, 2004) (the court held that "given that various acts of discrimination may be considered as part of a hostile work environment claim depending on their relationship with other acts comprising such claim, and, as discovery has not yet been completed, it is premature to determine which acts of alleged discrimination are isolated events that are unrelated to the hostile work environment claim."); see Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62-63 (2d Cir. 1992) (held that the alleged workplace harassment was sufficiently continuous). Moreover, Defendants' improperly try to import the workplace environment from Title VII cases to the school environment in a Title IX claim. The Supreme Court has explicitly stated that "schools are unlike the adult workplace." Davis, 526 U.S. at 651.

Title IX, the harassment must be severe and pervasive); Hayut, 252 F.3d at 745 (citations omitted) (requiring that sex-based harassment be sufficiently severe or pervasive under the Equal Protection Clause and explaining that "'pervasive' means that the challenged incidents are 'more than episodic; they must be sufficiently continuous and concerted.'")

Defendants' argument is precisely the type of "rigid 'calculate and compare' methodology" discouraged by the Second Circuit. See Hayut, 252 F.3d at 746 (citations omitted). Courts should instead be cognizant of the "fact-specific and circumstance-driven nature of hostile environment claims" when reviewing the pervasiveness of alleged harassment. Id. For instance, Defendants argue that gaps in Pratt's high school attendance defeat the hostile environment claim as it applies to his high school years. (Defs.' Mem. at 18.) Under Defendants' logic, a victim who misses school due to the psychological impact of harassment could never establish a hostile environment claim. Moreover, because all students transition between grades and schools with intervening breaks for holidays and summer, Defendants' argument would preclude any student from establishing a hostile environment claim beyond a very short time frame. Not surprisingly, this nonsensical result lacks any legal support and undermines the Supreme Court's fundamental recognition that Title IX bars schools from maintaining a hostile environment over time. See, e.g., Davis, 526 U.S. at 633-35, 653-54 (holding that a Title IX claim based student-on-student harassment spanning the winter holidays and spring break was sufficient to survive a Rule 12(b)(6) motion).

Contrary to the Defendants' argument, courts in the Title IX context often find that the harassment is pervasive precisely because it spans grades and schools.[11] In Riccio, the court

[11] However, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. See 2001 OCR Guidance at 6, n. 45 (citing Vance v. Spencer County

noted that the "term 'pervasive' implies that something is widespread." 467 F. Supp. 2d at 227. The court found two grounds on which the plaintiff could satisfy the pervasive element. Id. First, the fact that the harassment followed the plaintiff from school to school (i.e., her eighth grade year at Nathan Hale School to her ninth grade year at Community Magnet High School) could signify "a systemic problem within the district and amounts to a widespread issue of discrimination." Id. Second, the harassment could be "deemed pervasive because it continued throughout the school year." Id. ("This was not a single act of teasing, or even a few incidents spanning only a short time period.")

Similarly, in Theno, the court held that a rational trier of fact could find the harassment was pervasive because it transcended from one school to another and continued unabated throughout the school year. 377 F. Supp. 2d at 968. The harassment followed the plaintiff from his seventh, eighth, and ninth grade years at a junior high school to his tenth and eleventh grade years at Tonganoxie High School. Id. at 954-61. For instance, he was "teased for years based on the rumor that started in seventh grade to the effect that he had been caught masturbating in the boys' restroom." Id. at 968. Moreover, the harassment continued throughout the school year. Id. The plaintiff was "referred to as being gay or queer" and was routinely called names such as "fag," "faggot," "jack-off boy," "banana boy," "queer," "flamer," or "masturbator." Id.

In sum, the relevant case law establishes that a hostile educational environment can span breaks, classes, grades, and schools. The Defendants' unsupported arguments to the contrary defy common sense. Accordingly, Pratt should be given the opportunity to prove the

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Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000); Doe v. School Admin. Dist. No. 19, 66 F. Supp. 2d 57, 62 (D. Me. 1999).

pervasiveness of the alleged harassment under Title IX and the Equal Protection Clause without such artificial constraints.

CONCLUSION

Based on the arguments above, the United States respectfully submits that: harassment based on nonconformity with sex stereotypes is a legally cognizable sex-based claim under Title IX and the Equal Protection Clause, that sexual orientation harassment does not preclude a harassment claim based on non-conformity to sex stereotype, and that a hostile environment claim in primary and secondary schools can span classes, grades, and schools. Defendants' arguments to the contrary should be rejected and as to these points their motion denied.

Dated: August 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2010, I served copies of the foregoing pleading to counsel of record via the United States District Court for the Northern District of New York's electronic filing system:

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