UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AB, an infant, by her aunt and legal guardian, CD; EF; GH, an infant, by her father and natural guardian IJ; KL; and CATHY CONLEY, Plaintiffs, - against - RHINEBECK CENTRAL SCHOOL DISTRICT, and THOMAS MAWHINNEY, Defendants.	03 Civ. 3241 (SCR) (GAY)
UNITED STATES OF AMERICA, Plaintiff-Intervenor, - against - RHINEBECK CENTRAL SCHOOL DISTRICT, Defendant.	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE UNITED STATES OF AMERICA'S MOTION TO INTERVENE

PRELIMINARY STATEMENT

The United States of America (the "Government") respectfully submits this reply memorandum of law in further support of its motion pursuant to Rule 24(c) of the Federal Rules of Civil Procedure for leave to intervene in the action entitled AB, et al. v. Rhinebeck Central School District, et al., 03 Civ. 3241 (SCR) (GAY).

In its opposition to the Government's motion to intervene, the Rhinebeck Central School District (the "District") acknowledges that "a hospitable attitude is deemed to be appropriate where the government seeks to intervene in cases involving [a] statute it is required

to enforce" (see Memorandum of Law of Defendant Rhinebeck Central School District ("District's Br.") at 2)), such as Title IX of the Education Amendments of 1972, but claims that this Court should nevertheless deny the Government's motion under the circumstances present here. For the reasons set forth below, each of the District's arguments against intervention should be rejected and the Government's motion should be granted.

ARGUMENT

I. The Government's Motion is Timely

The District's claim that the Government's motion is not timely (see District's Br. at 2; Affirmation in Opposition to Motion to Intervene ("District's Aff.") at 4-6) does not withstand scrutiny. The Government has acted diligently in pursuing its interests in this case. Plaintiff's original complaint was filed on May 9, 2003, only eleven months ago. After learning of the lawsuit, the Government investigated plaintiffs' claims by requesting and reviewing documents from plaintiffs and the District and interviewing numerous witnesses. See District Aff. at ¶ 8; Letter dated January 12, 2004 to District requesting documents and other information and informing the District that the Government was considering intervention (attached to this reply memorandum of law as Exhibit A). When the investigation was complete, the Government moved promptly to intervene.

Moreover, the District has not identified any prejudice that would result from any alleged delay by the Government in moving to intervene in this action. Although the District speculates that "the government's intervention may delay completion of the proceedings" (see District's Br. at 2), the District offers no factual basis for that assertion. To the contrary, there is no reason to believe that intervention by the Government would delay discovery or the trial of

this action. As stated in the Government's initial brief in support of its motion (see Memorandum of Law in Support of the United States of America's Motion to Intervene ("Government's Br.") at 4), the Government has already obtained relevant documents from the parties and does not plan to re-take any of the depositions that have already been taken, assuming that the deposition transcripts are made available to the Government. Nor will the Government's intervention delay any schedule currently in place for the depositions that have not yet taken place, which include the key District witnesses former Principal Mawhinney and the former District Superintendents.

Likewise, the District's speculation that the Government's intervention could "complicate settlement" (see District's Br. at 2) does not constitute a basis on which to find that the Government's motion should be denied, much less that it should be denied on timeliness grounds. While intervention by the United States necessarily means that the District may not avoid liability by settling with the existing plaintiffs alone, that "complication" exists in every case in which an additional plaintiff seeks to join an ongoing lawsuit. Moreover, the District's concern that intervention by the United States may "complicate" settlement only confirms that the Government's interests in the action are not identical to those of the private plaintiffs. Rather, as the Government explained in its initial brief in support of its motion (see Government's Br. at 5), the Government's interest extends beyond seeking redress for the individual student plaintiffs and includes ensuring that the District implements institutional change that protects all High School students from unlawful discrimination both currently and in the future. Any "complications" that might arise in settlement of this action as a result of these important Government interests do not constitute a legally cognizable "prejudice" to the District.

Based on well-established case law, the Government's motion should not be denied on timeliness grounds because the District cannot show any prejudice to the parties from intervention and the Government has a compelling interest to protect in this action. Even extensive periods of delay do not warrant denial of intervention on timeliness grounds if no undue prejudice would result to the parties and the movant's interests could be jeopardized by denial. In Kirby v. Coastal Sales Assocs., Inc., 199 F.R.D. 111, 117 (S.D.N.Y. 2001), for example, the court found that even though the movant had delayed for years and the action was in an advanced stage of discovery, a "finding of timeliness [wa]s nevertheless warranted" on the ground that it "w[ould] not unduly prejudice the defendants" and that the movant's interests could be impaired by denial of intervention. Likewise, in ruling on the timeliness issue in Wilder v. Bernstein, No. 78 Civ. 957 (RJW), 1994 WL 30480, at * 3 (S.D.N.Y. Jan. 28, 1994), and Abondolo v. GGR Holbrook Medford Inc., 922 F.2d 92, 96 (2d Cir. 1990), the courts focused on whether intervention would cause any cognizable prejudice to the parties to the action and whether the movant had legally protectable interests in the action.

Duttle v. Bandler & Kass, 147 F.R.D. 69 (S.D.N.Y. 1993), aff'd, 999 F.2d 536 (2d Cir. 1993), which the District cites in support of its position on timeliness (see District's Br. at 2-3), is entirely distinguishable. In Duttle, the court denied intervention by the Internal Revenue Service ("IRS") on timeliness grounds where the IRS's delay would have caused severe prejudice to the parties. See 147 F.R.D. at 75-76. The court found that if the IRS had moved for intervention when it became aware of the threat to its interests, instead of delaying for fifteen months, plaintiffs "could have potentially saved more than one and one-half years of effort and tens of thousands of dollars in legal fees they have accrued in trying to recover on assets the IRS

now claims they have no right to possess." Id. at 75. In addition, the parties, who had just concluded a settlement, would have been "forced to expend more time and resources, and to relitigate issues . . . they had long since left behind." Id. at 76. The District suggests no prejudice remotely comparable, and the Duttle court itself acknowledged that "[t]he prejudice to the current parties" is "the most important consideration in deciding whether a motion for intervention is untimely." Id. (citation omitted).

Finally, this Court should also reject the District's claim of untimeliness based on a 1996 complaint to the United States Department of Education's Office for Civil Rights ("OCR") concerning an incident of sexual harassment involving Mawhinney and a female student at Rhinebeck High School (the "High School") that had occurred during the 1995-96 school year. See District's Br. at 2; District's Aff. at 4-6. The Government's claim for relief under Title IX in its proposed complaint in intervention is based on the District's pattern and practice of deliberate indifference to the known sexual harassment of numerous female students at the High School, including the student plaintiffs, over a ten-year time period. See Complaint in Intervention (attached to Notice of Motion as Exhibit A). Contrary to the District's claim (see District's Br. at 2; District's Aff. at 4-6), the Government was not put on notice of its Title IX cause of action by the OCR complaint involving a single student filed seven years before this lawsuit was commenced. The Resolution Agreement between the District and OCR resolved only the 1996 complaint, not any other claims of sexual harassment by Mawhinney, including the plaintiffs' claims. See District's Aff., Exhibit D (Resolution Agreement states that District will take eleven actions "[i]n order to resolve the allegations in Case No. 02-96-1196 [the 1996 complaint]"). The November 26, 1996 letter forwarding the Agreement also makes clear that it

does not "cover any issues regarding the District's compliance with Title IX that are not discussed herein." See District's Aff., Exhibit D. Likewise, although the Resolution Agreement required the District to revise its grievance procedures with respect to sexual harassment complaints, the 1996 Agreement did not resolve the Government's current claim that the District's pattern of deliberate indifference to complaints received pursuant to those procedures violates Title IX. Id.

Accordingly, this Court should find that the Government's motion is timely.

II. The Government Has a Legally Protectable Interest in this Action

The District's argument that the Government lacks a legally protectable interest in this action (see District's Br. at 2; District's Aff. at 4-6) should also be rejected. As discussed in the Government's initial memorandum of law in support of its motion (see Government's Br. at 5), the Government has a strong interest in the proper enforcement of Title IX, including ensuring that recipients of federal funds such as the District do not discriminate on the basis of sex and ensuring that federal funds are not provided to entities that are in violation of federal laws against discrimination.

Contrary to the District's assertion, (see District's Br. at 2; District's Aff. at 4-6), OCR's April 17, 2003 letter did not conclude that the District was in compliance with Title IX and thereby vitiate the Government's interest in this case. OCR's April 17, 2003 letter closing its file regarding the 1996 complaint expressly related only to the 1996 complaint and the requirements of the Resolution Agreement. See District's Aff., Exhibit D. The letter stated that OCR was closing its file because the District had satisfied the terms of the 1996 Resolution Agreement. Id. The terms included twelve reporting requirements, all of which had deadlines in

1997, further demonstrating the limited scope of the Agreement. The District's failure to satisfy some of those requirements until 2003 does not change the fact that the April 17, 2003 letter spoke only to the District's compliance with the 1996 Agreement. In short, this letter in no way absolved the District of liability under Title IX for the conduct alleged in the Government's proposed complaint in intervention.

Finally, the District's claim that Mawhinney's departure nullifies the Government's interest in this case (see District's Br. at 2; District's Aff. at 3) is also unavailing. The Government's claim relates to the District's failure to properly handle sexual harassment complaints and to respond to those complaints in a manner that would ensure female students would be protected from continuing harassment. That claim is not premised on the identity of the harasser. Indeed, the Government's proposed complaint in intervention does not seek relief against Mawhinney, but rather against the District for its action and inaction with respect to Mawhinney's conduct. The Government is seeking broad relief in this action to uproot the District's embedded practice of deliberate indifference to sexual harassment complaints and require the District to implement in good faith appropriate procedures for handling, investigating, evaluating, and responding to such complaints in order to ensure a discrimination-free environment for its students currently and in the future. See Complaint in Intervention.

Accordingly, the Government has a "legally protectable" interest in the subject matter of this case.

III. The Government's Ability to Protect its Interests in this Action Will be Impaired If Intervention is Denied; the Government's Interests Are Not Adequately Represented by Plaintiffs

Contrary to the District's claim (see District's Br. at 2-3; District's Aff. at 3-4, 7),

the Government's ability to protect its interests in this action will be impaired if intervention is denied. As discussed in further detail in the Government's initial memorandum of law in support of its motion (see Government's Br. at 5), an adverse judgment in this case, particularly one applying the "deliberate indifference" standard or determining whether conduct constitutes sexual harassment, could impair the Government's ability to enforce Title IX in cases involving teacher-on-student sexual harassment. In addition, the Government's interest in preventing further discrimination by the District could be impaired because the private plaintiffs could agree to settle this action for money damages without addressing the District's practices to ensure that students are protected from harassment in the future. Accordingly, the Government's interests in this action are not adequately protected by plaintiffs. For these same reasons, the similarity between the claims asserted by the Government and plaintiffs does not, as the District argues (see District's Br. at 2; District's Aff. at 7), make the Government's participation in this action unnecessary.

IV. The Government Has Not Threatened the Confidentiality of the Identity of Any Student or Engaged in Actions Indicating That its Primary Interest is in Publicity

Contrary to the District's claim (see District's Br. at 2-3; District's Aff. at 6-7), the Government has not threatened the confidentiality of information concerning current and former students or engaged in conduct indicating that its real interest in this action is in generating publicity rather than enforcing Title IX. Both the Government's motion to intervene and its proposed complaint in intervention fully respect the confidentiality order entered by the Court in this action and the students' interests in protecting their identities. Like the plaintiffs' complaint and amended complaint, the Government's motion and proposed complaint in

intervention refer to the student plaintiffs solely as "AB, "CD," "EF," and "GH." Nor do the Government's motion or proposed complaint in intervention reveal the identity of any other student who was sexually harassed at the High School.

Finally, the District has no grounds to complain about the issuance of press releases by the United States Attorney or the United States Department of Justice. Where, as here, the United States brings civil litigation to enforce federal law, it is not only permissible but appropriate for the United States to release accurate information to the public concerning the filing of that action. See 28 C.F.R. § 50.2(a)(2) ("[T]here are valid reasons for making available to the public information about the administration of the law."); see also ABA Informal Op. 1345 (lawyer for federal government may inform news media that a civil lawsuit has been filed). The release to the public of information about the public filing of a civil lawsuit to enforce the federal civil rights laws recognizes and respects the right of the people in a constitutional democracy to be informed about the conduct of law enforcement officers and the enforcement of public laws, and serves important educational and deterrent functions. See United States Attorney's Manual Section 1-7.110 & 112. The Government's release to the public of information about its motion and its proposed complaint does not provide any ground to deny intervention in this case.

CONCLUSION

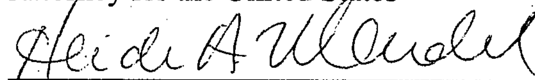
For the foregoing reasons and the reasons set forth in the Government's initial memorandum of law, the Government's motion for intervention under Rule 24 of the Federal

Rules of Civil Procedure should be granted.

Dated: New York, New York
April 9, 2004

Respectfully submitted,

DAVID N. KELLEY
United States Attorney for the
Southern District of New York
Attorney for the United States

By: 

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CERTIFICATE OF SERVICE

I, HEIDI A. WENDEL, Assistant United States Attorney for the Southern District of New York, hereby certify that on April 9, 2004, I caused a copy of the attached Reply Memorandum of Law in Further support of the United States of America's Motion to Intervene to be served by overnight mail upon the following:

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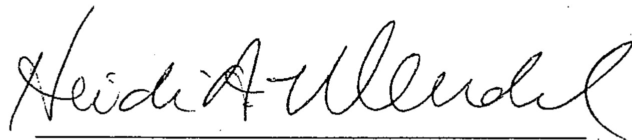
Dated: New York, New York
April 9, 2004



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January 12, 2004

VIA OVERNIGHT DELIVERY

Mark C. Rushfield, Esq.
Shaw & Perelson, LLP
40 South Roberts Road
Highland, New York 12528

Re: A.B. v. Rhinebeck Central School District
03 Civ. 3241 (SCR)

Dear Mr. Rushfield:

The United States Department of Justice is conducting an investigation to determine whether the United States should exercise its right to intervene in the above-captioned action. As you are aware, A.B. v. Rhinebeck Central School District, 03 Civ. 3241 (SCR) ("the Rhinebeck action") was brought by four current and former students and one staff member at Rhinebeck High School ("the "High School") in Rhinebeck, New York, against the Rhinebeck Central School District (the "District") and former principal Thomas Mawhinney ("Mawhinney"). Among other things, the Amended Complaint alleges violations of Title IX of the Civil Rights Act, 20 U.S.C. §§ 1681 et seq., and of the Fourteenth Amendment of the United States Constitution. Section 902 of Title IX authorizes the United States to intervene in an action seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment on account of sex when the Attorney General certifies that a case is of "general public importance." 42 U.S.C. § 2000h-2. As part of our investigation to determine whether the United States should intervene under that provision, we are seeking information and documents concerning plaintiffs' allegations in the Rhinebeck action and the District's response to those allegations.

Specifically, we request that you provide us with the following documents and information:

1. All documents embodying and concerning any sexual harassment policy or any grievance procedures in effect at the High School since 1993, including all documents concerning or reflecting any changes in any such sexual harassment policy or any grievance procedures. These documents should include, but not be limited to, any complaint forms that have been in use at the High School since 1993, and any changes in such complaint

forms since 1993.

2. All documents regarding any allegation by a student, parent, or District employee or official, or any other individual, that Mawhinney engaged in any allegedly inappropriate or otherwise improper behavior toward a female student at the High School, including, but not limited to, the events alleged by plaintiffs in the Rhinebeck action.

3. All documents regarding any investigation conducted by or on behalf of the District into any allegation by a student, parent, teacher, or District employee or official, or any other individual, that Mawhinney engaged in any allegedly inappropriate or otherwise improper behavior toward a female student at the High School, including, but not limited to, the events alleged by plaintiffs in the Rhinebeck action. These documents should include, but not be limited to: the report and counseling letter and refresher course referred to in paragraph 35 of the Amended Complaint; any documents relating to the District's decision not to take disciplinary or other action against Mawhinney with respect to the events alleged in paragraphs 18, 38, 46, 56, 65, 66, 68, 69, 70, 72, 74 and 77 of the Amended Complaint; the reports referred to in paragraphs 14, 15, 34, 38, 45, 55, 65, 66, 68, 69, 70, 72, 74, 76, 77, 80 and 93 of the Amended Complaint; the complaints referred to in paragraphs 17 and 19 of the Amended Complaint; the results of the investigation referred to in paragraphs 18 and 46 of the Amended Complaint; notes or other documents concerning the investigation referred to in paragraph 34 of the Amended Complaint, including, but not limited to, the interview of AB; and the memoranda referred to in paragraphs 93 and 94 of the Amended Complaint. You should also include all documents concerning the determination referred to in paragraph 56 of the Amended Complaint and all documents reflecting investigation of the events referred to in paragraphs 58 through 64 of the Amended Complaint.

4. All documents regarding the outcome, resolution or conclusion of any investigation conducted by the District into any allegation by a student, parent, District employee or official, or any other individual, that Mawhinney engaged in any allegedly inappropriate or otherwise improper behavior toward a female student at the High School, including, but not limited to, the events alleged by plaintiffs in the Rhinebeck action. These documents should include, but not be limited to, the decision to take or not to take disciplinary or other action against Mawhinney.