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School District Is Not Liable for 'Sex Harassment' by Classmates

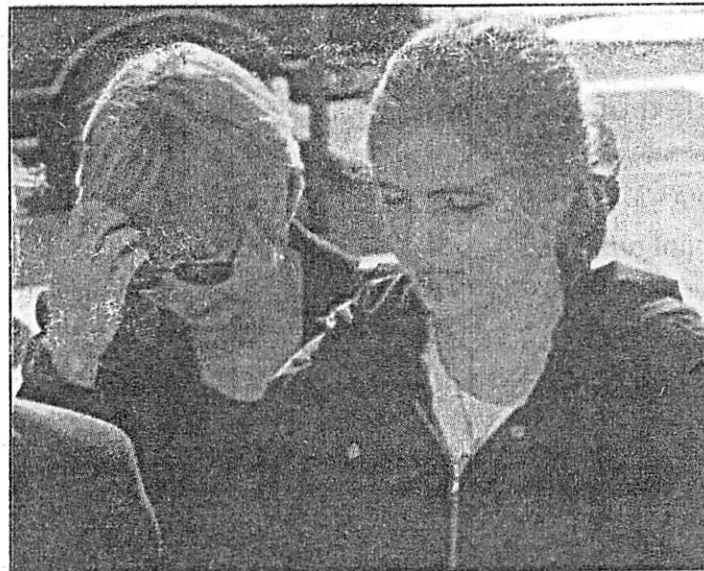
By Susan A. Bocamazo

A girl who claimed she was taunted with sexual comments by boys in her sixth-grade class has lost a closely-watched federal trial against her school district in rural upstate New York.

The jury of six women and two men deliberated for nearly six hours before returning a finding of no liability.

The plaintiff claimed the boys in her class called her and the other girls "prostitute," "dog-faced bitch," "whore" and "lesbian." She claimed the boys grabbed the girls' breasts in the hall, tried to stuff things down their blouses and kicked and

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AP/WIDE WORLD PHOTOS

Plaintiff Eve Bruneau, 15, and her mother leave federal court in Binghamton, New York. A jury found that her mistreatment by boys at school wasn't 'sex harassment.'

School Not Liable for 'Sex Harassment' by Classmates

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punched them.

The school denied that some of the incidents occurred, but it argued that even if they did, this was mere adolescent misbehavior and not "sexual harassment."

The jury agreed. It found that:

◆ The boys' conduct wasn't "sexual harassment" under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* (The vote on this issue was 6-2.)

◆ Even if it *were* harassment, the school wasn't liable because it responded appropriately to the boys' actions. (The vote on this issue was unanimous.)

The plaintiff claimed that when her parents complained to her teacher, he told them that their daughter was "a beautiful child" and they had nothing to worry about because, "Boys will be all over her in a few years," according to her attorney, Merrick Rossein, a law professor at City University of New York.

The plaintiff claimed that an assistant superintendent stated that she would look into the problem, but did nothing about it. When the school denied the plaintiff's request to transfer to another class, she transferred to another school district and sued.

But the school's attorney, Frank Miller of Binghamton, New York, says that once the school learned of the problem, it undertook a series of disciplinary measures including loss of classroom privileges, letters home to parents, after-school detention and suspension.

The school also brought in guidance counselors to talk to the students, according to Miller.

The plaintiff is planning to appeal, says Rossein's co-counsel, New York attorney Brooks Burdette.

Hard to Win

Plaintiffs' lawyers say the verdict suggests that student-on-student harassment cases may be difficult to win unless the facts are truly egregious.

"These cases aren't going to fly if what you have is the normal sort of teasing that all of us underwent when we were children," says Atlanta plaintiffs' attorney Matt Billips. "We've all seen kids be cruel to each other, but that doesn't make a federal case."

What plaintiffs' lawyers should look for, says Billips, "are cases where there is a sexual assault or some criminal misconduct or incredibly pervasive demeaning and degrading conduct. Those are the cases that really have jury appeal."

The verdict also suggests that plaintiffs should think about suing for negligence in state court, rather than bringing a federal claim under Title IX, says Oakland, California attorney Sandra Springs, who used this strategy to win a \$500,000 verdict in a student-on-student sexual harassment case earlier this year. Springs notes that in a state-court suit, the jurors are more likely to live in the school district and may be more appalled by what happens in a school supported by their own tax dollars.

"Sometimes in federal court you end up getting people on a jury who are not part of the community," she says. "We had people with more of a vested interest."

None of the jurors in the New York case lived in the school district, notes Burdette.

Defense lawyers say the verdict suggests that jurors may have sympathy for school districts that are trying to cope with student misbehavior.

"It's a very tough job for school offi-



Eve Bruneau and her parents leave federal court where a jury found that she wasn't 'sexually harassed' by her classmates. Lawyers say the closely-watched verdict suggests that Title IX cases against schools will be hard to win.

cial to police student misconduct at an age where they're learning about sexual matters and trying to find out for themselves what's appropriate and inappropriate behavior, and it's encouraging to know that some jurors recognize that it's a difficult job," says Houston defense attorney Rick Morris.

Is It Harassment?

Lawyers say the verdict may focus attention in Title IX cases on the issue of whether the conduct constituted "harassment" at all, as opposed to under what circumstances the school is liable for it.

In a recent Harris survey, over 80% of high school students claimed that they had experienced some form of sexual harassment.

However, the New York verdict suggests that jurors may be more demanding when they decide whether name calling, sexual touching, etc. constitute "harassment" for purposes of Title IX.

Jurors may be reluctant to impose the same standards of conduct used for adults in a workplace on junior high school students, lawyers say.

So far, the case law under Title IX has focused on when a school is liable rather than whether the conduct constitutes "sexual harassment" in the first place.

The Fifth Circuit has held that a school is liable only if the officials actually knew of the harassment and the officials "discriminated" on the basis of sex, such as by treating harassment of one sex differently from harassment of the other sex.

However, the Eleventh Circuit has held that school officials don't actually have to discriminate themselves; it's enough if they merely tolerate a "hostile environment" in which students are harassed by other students. (The Eleventh Circuit's decision has been vacated and is being reheard *en banc*.)

The Eleventh Circuit didn't say whether a plaintiff has to prove actual knowl-

edge of the hostile environment or whether constructive knowledge is enough.

One U.S. District Court in California recently held that actual knowledge isn't necessary. But on a previous motion for summary judgment, the judge in the New York case ruled that a school must have actual notice.

For a thorough discussion of this issue, see 96 LWUSA 761; Search words for LWUSA On-Line: Verna, Stuff.

Title IX prohibits sex discrimination by educational programs that receive federal funds. A plaintiff who sues under Title IX can recover compensatory damages (including emotional distress) and attorney fees, as well as punitive damages if the school district has waived its immunity. And unlike Title VII suits, there is no cap on liability.

Jury verdict in the U.S. District Court for the Northern District of New York. Bruneau v. South Kortright Central School District, No. 94-DV-864. November 21, 1996. No written opinion.

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