Exhibit B –PART (1)

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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/s/ William H. Pease

William H. Pease (Bar Roll No. 102338)
Assistant United States Attorney

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUNIOR DOE, et al	:	CIVIL ACTION
v.	:	NO. 06-cv-1926
ALLENTOWN SCHOOL DISTRICT, et al	:	

ORDER

AND NOW, this 8th day of July, 2009, upon consideration of the United States' Motion for Leave to Intervene and Defendant Allentown School District's Opposition thereto (Doc. No. 134), the United States' Motion (Doc. No. 131) is hereby GRANTED. The United States shall file the Complaint in Intervention against Defendant Allentown School District attached to its Motion for Leave to Intervene—subject to Paragraph 2 of the Court's June 30, 2009 Order addressing the redaction and amendment of Paragraph 10 of the United States' Complaint in Intervention (Doc. No. 135)—within five (5) days of the date of this Order. Defendant Allentown School District shall file a responsive pleading to the United States' Complaint in Intervention within twenty (20) days of the date of this Order.

BY THE COURT:

Thomas M. Golden

THOMAS M. GOLDEN, J.

169-62-44

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUNIOR DOE, et al	:	CIVIL ACTION
v.	:	NO. 06-cv-1926
ALLENTOWN SCHOOL DISTRICT, et al	:	

MEMORANDUM OPINION

GOLDEN, J. JULY 8, 2009

Before the Court is the United States' Motion for Leave to Intervene in this action, which was filed on June 18, 2009. In its Motion, the United States contends that it is entitled to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Alternatively, the United States argues that the Court should permit intervention on the basis that the United States has satisfied the requirements of permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

The United States seeks to intervene in this case to support the sexual harassment claims asserted by Plaintiffs against Defendant Allentown School District ("ASD" or "School District") pursuant to Title IX of the Education Amendments of 1972. (See U.S. Proposed Compl. in Intervention ¶ 1); see also 20 U.S.C. § 1681, *et seq.* The United States' Proposed Complaint in Intervention is solely against ASD pursuant to Title IX. (See U.S. Proposed Compl. in Intervention ¶ 2). ASD is the only Defendant opposing the United States' request to intervene. For the foregoing reasons, the United States' Motion for Leave to Intervene (Doc. No. 131) is granted.

FACTUAL BACKGROUND

The claims in this action arise out of a series of alleged sexual assaults perpetrated by Defendant F.H.—a twelve-year old boy who transferred to Central Elementary School ("CES") in Allentown at the beginning of the 2003 school year—against four first-grade boys in bathroom stalls at CES. (Second

169-62-44

Am. Compl. ¶¶ 38, 39, 49; Doc. No. 124). The alleged assaults took place between December 2003 and March 2004. (Id. at ¶ 39).[1] Plaintiffs, the four minor victims of these alleged assaults, brought this action against ASD and several other defendants asserting various federal and state law claims. Plaintiffs are asserting two federal claims in this case: (1) one count against various defendants alleging violations of Plaintiffs' constitutional right to bodily integrity pursuant to 42 U.S.C. § 1983 and (2) one count against ASD alleging violations of Title IX. (Id. ¶¶ 69-93).

This case was brought in May 2006. (Doc. No. 1). Plaintiffs subsequently filed a Motion for Leave to File a Second Amended Complaint in an effort to include, among other new claims, a count alleging violations of Title IX. (Doc. No. 93). After extensive briefing and oral argument, the Court granted Plaintiffs' request to include this Title IX count against ASD on February 26, 2009. See Doe v. Allentown Sch. Dist., No. 06-1926, 72 Fed. R. Serv. 3d 1021, 2009 WL 536671, at *3-5 (E.D. Pa. Mar. 2, 2009); (Doc. No. 117). On March 9, 2009, Plaintiffs filed their Second Amended Complaint, which included their Title IX claim against ASD. (Doc. No. 118). Plaintiffs subsequently filed a corrected Second Amended Complaint on April 21, 2009. (Doc. No. 124).

STANDARD

Pursuant to Rule 24(a)(2), "[o]n timely motion, the court must permit anyone to intervene who...claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Third Circuit Court of Appeals has interpreted Rule 24(a)(2) to require an intervening applicant to prove the following four elements: (1) a timely application for leave to intervene; (2) a sufficient interest

[1] For a more detailed description of the facts alleged in this case, see Doe v. Allentown Sch. Dist., No. 06-1926, 2007 WL 2814587, at *1-2 (E.D. Pa. Sept. 21, 2007) (Doc. No. 79).

in the litigation; (3) a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and (4) inadequate representation of the prospective intervenor's interest by existing parties to the litigation. Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998); Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987), cert. denied, 484 U.S. 947 (1987). "Although these requirements are intertwined, each must be met to intervene as of right." Harris, 820 F.2d at 596.

ANALYSIS

The United States has satisfied the four elements necessary to intervene as of right pursuant to Rule 26(a)(2).

A. Timeliness of Application

The timeliness of a motion to intervene is determined from all the circumstances by the trial court in the exercise of its sound discretion. Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 369 (3d Cir. 1995). The Third Circuit Court of Appeals has articulated three factors for district courts to consider in determining whether a motion to intervene is timely: (1) how far the proceedings have gone when the movant seeks to intervene; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay. Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3d Cir. 1976), cert. denied, 426 U.S. 921 (1976); see also Mountain Top, 72 F.3d at 369.

An analysis of these factors demonstrates that the United States' Motion for Leave to Intervene is timely. Though this case is over three years old, Plaintiffs' Title IX claim against ASD was only added in March 2009 (Doc. No. 118)—just over three months before the United States filed its request to intervene in support of this claim. Discovery in this matter has only just begun. Paper discovery began in May 2009, and depositions are scheduled to commence in July and August 2009. (ASD Br. at 2). A Rule 16 Scheduling Conference was conducted on June 18, 2009, and the United States was permitted to participate in this Conference. (Doc. No. 132). Additionally, a Scheduling Order was issued on June 30,

2009. (Doc. No. 136).

As this case is in the early stages of protracted discovery and is not slated for trial until April 2011, any prejudice to ASD is minimal and not, as ASD contends, "severe." (ASD's Br. at 8). The United States' intervention poses little threat of interfering with the current discovery schedule set by the parties, especially since the United States' Proposed Complaint in Intervention does not add a new cause of action. Indeed, the United States asserted during the Court's June 18, 2009 Rule 16 Scheduling Conference that it "was prepared to adhere to any schedule that is set forth by the Court . . . and the parties." The United States also agreed to meet any deposition dates that have already been set by the parties. The Court has no reason to disbelieve such statements and will take the United States at its word that its involvement will not delay this case. In short, ASD's contention that the United States' intervention will further "complicate the discovery [of] an already complicated litigation process" is simply not sufficient to render the United States' intervention either untimely or prejudicial. (ASD's Br. at 8); see Lopez v. Metro. Gov't of Nashville and Davidson County, No. 07-799, 2008 WL 4831318, at *3-4 (M.D. Tenn. Nov. 4, 2009) (permitting intervention of United States to redress Title IX violations and holding that the United States' intervention request was timely where a comprehensive factual record had already been developed, discovery was almost complete, and the United States asserted that its involvement would not cause any modification of the scheduling deadlines).

B. Sufficient Interest in the Litigation

An applicant for intervention must demonstrate that its interest in the litigation is "a legal interest as distinguished from interests of a general and indefinite character." Harris, 820 F.2d at 601 (internal quotations omitted). The Third Circuit has further explained the "sufficient interest" requirement of Rule 26(a)(2): "[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct of the litigation requires that

intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated." See Kleissler, 157 F.3d at 972.

The United States asserts that it has "a direct and substantial interest in ensuring that recipients of federal funds, such as the Allentown School District, do not discriminate on the basis of sex in violation of Title IX." (U.S. Br. at 3). The United States further notes that it "plays a central role in the enforcement of Title IX" and "has an interest in ensuring that its enforcement of Title IX in subsequent matters is not undermined by adverse precedent generated in this case." (Id. at 3-4). However, ASD asserts that the United States does not have a sufficient interest in this lawsuit, contending that "[t]he allegations in this lawsuit do not involve systemic failure or lack of policy infrastructure"; rather, the United States' Complaint in Intervention only addresses four isolated incidents—incidents which have not been repeated. (ASD Br. at 4-5). ASD further cites the fact that the individual ASD Defendants allegedly involved in this matter have ceased working for the School District. (Id. at 5).

The United States has a sufficient interest in this litigation. Several courts have held that the proper enforcement of Title IX, by ensuring that the recipients of federal funds do not discriminate on the basis of sex, is a sufficient interest. Courts have also recognized an interest on the part of the United States to ensure that federal funds are not given to entities that fail to comply with federal anti-discrimination laws. See, e.g., A.B. v. Rhinebeck Central Sch. Dist., 224 F.R.D. 144, 156-57 (S.D.N.Y. 2004) ("The Government certainly has a legally protectable interest in assuring that all students . . . are protected by Title IX."). ASD's claim that Plaintiffs' allegations are merely the product of isolated incidents does not undercut the sufficiency of the United States' stated interests. The United States certainly has an interest in determining whether ASD has policies, either explicitly or implicitly, that foster discriminatory conduct in violation of Title IX. Notwithstanding ASD's contention that most,

Exhibit B –PART (2)

if not all, of the individual ASD Defendants in this case have ceased working for the School District, the existence of alleged discriminatory policies on the part of ASD goes beyond the individual ASD Defendants in this case and broadly implicates the School District's culture of Title IX compliance. The United States' interest in this case is further supported by the fact that Congress has delegated to federal departments and agencies both the authority to promulgate regulations to implement Title IX and the responsibility to ensure that recipients of federal funds comply with the statute and its regulations. See 20 U.S.C. § 1682.

C. Threat that Interest Will Be Impaired By Disposition of the Action

"In order to prove an interest is impeded, the third part of the intervention test, the applicant must demonstrate a tangible threat to its legal interest." United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 n.15 (3d Cir. 1994) (internal quotations omitted). In other words, a proposed intervenor must demonstrate that his or her interest "*might* become affected or impaired, as a practical matter, by the disposition of the action in [his or her] absence." See Mountain Top, 72 F.3d at 368 (citing Alcan Aluminum, Inc., 25 F.3d at 1185 n.15).

The United States has demonstrated that its interest might be impaired by the disposition of this action if the United States is not permitted to intervene. ASD argues that the United States need not be involved in this case because the "United States can do an investigation and receive the materials it seeks without the need to intervene." (ASD Br. at 5). However, whether the United States has an alternative avenue is not the standard for intervention; rather the Court must focus on the impairment of the United States' interests absent intervention. See Lopez, 2008 WL 4831318, at *5 ("[W]hether or not there is any alternative avenue for the movant is not the standard, but rather whether the movant's interest may be impaired absent intervention."). Here, among the other interests discussed above, the United States' interest in *stare decisis* may be undermined in the absence of the United States' involvement in this case.

As one court has concluded, "an adverse judgment could interfere with the Government's ability to enforce Title IX . . . particularly in cases where a school district's response to allegations of sexual harassment proves inadequate to stop the harassment from continuing." See A.B., 224 F.R.D. at 157; see also Brody v. Spang, 957 F.2d 1108, 1123 (3d Cir. 1992) ("[T]his factor may be satisfied if, for example, a determination of the action in the applicants' absence will have a significant *stare decisis* effect on their claims . . . ."); Harris, 820 F.2d at 601 ("Courts thus have found that an applicant has a sufficient interest to intervene when the action will have a significant *stare decisis* effect on the applicant's rights . . . .").

D. Adequacy of Representation of United States' Interest by Existing Parties

As to whether Plaintiffs will adequately represent the United States' interests in the absence of intervention by the United States, this element "is satisfied if the applicant shows that representation of his interest 'may be' inadequate." Mountain Top, 72 F.3d at 368 (quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972)). "[T]he burden of making that showing should be treated as minimal." Id. (quoting Trbovich, 404 U.S. at 538 n.10). A prospective intervenor's rights "are not adequately represented where: (1) the interest of the applicant so diverges from those of the representative party that the representative party cannot devote proper attention to the applicant's interest; (2) there is collusion between the existing parties; or (3) the representative party is not diligently prosecuting the suit." Alcan Aluminum, Inc., 25 F.3d at 1185 n.15; see also In re Comty. Bank of N. Va., 418 F.3d 277, 315 (3d Cir. 2005) (noting that there is a presumption of adequate representation).

The United States does not argue that there is collusion between the existing parties or that Plaintiffs are not diligently prosecuting their case. Thus, the question before the Court is whether the interests of Plaintiffs and the United States diverge sufficiently such that Plaintiffs cannot devote proper attention to the United States' interests. Though the United States and Plaintiffs present similar, if not

identical, Title IX claims, "[t]he 'tactical similarity' of the 'legal contentions' of a current party with that of a proposed intervenor . . . does not assure adequate representation." See Sierra Club v. Robertson, 960 F.2d 83, 86 (8th Cir. 1992).

The United States has demonstrated that the existing parties to the litigation will inadequately represent the United States' interests in this suit. Governmental entities have litigation interests that are inherently different from the interests of private litigants, as governmental entities intervene to protect the interests of a broad constituency of citizens. See id. (discussing State's interests versus interests of private parties). Plaintiffs only represent their individual interests and do not necessarily have an interest to compel ASD to engage in comprehensive corrective measures. See A.B., 224 F.R.D. at 157 ("The Plaintiffs, despite alleging a pattern of on-going sexual harassment, only represent their individual interests."). Conversely, the United States represents the public in its totality and has a broad interest in ensuring that school districts that receive federal funds comply with Title IX prospectively. See Sierra Club v. Espy, 18 F.3d 1202, 1208 (5th Cir. 1994) ("The government must represent the broad public interest, not just the economic concerns of the timber industry.").

Plaintiffs are not seeking equitable relief under Title IX. As a result, in the event Plaintiffs are successful in the absence of intervention by the United States, this lawsuit will not result in ASD being compelled to implement corrective action that would ensure that students are protected from discriminatory practices. The United States' Complaint in Intervention, however, seeks equitable relief, thereby requiring ASD—if it acted unlawfully—to implement systemic changes that will protect ASD's students from unlawful discrimination and harassment. ASD notes that "Plaintiffs are not barred from seeking injunctive relief." (ASD Br. at 6). While this may be the case, Plaintiffs are seeking no such relief, which itself is indicative of the differing interests held by Plaintiffs and the United States. Accordingly, the United States has met its minimal burden under this element of Rule 24(a)(2). See

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
The Madison Building, Room 401
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Thomas M. Golden
Judge

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FACSIMILE COVER SHEET

DATE: July 9, 2009

FAX NUMBER: 202-514-8337

PLEASE DELIVER TO: Allison Brown, Esq., United States Department of Justice

PAGES: 11, including cover sheet

FROM: Gilles R. Bissonnette, Law Clerk to the Honorable Thomas M. Golden

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Please find attached a Memorandum Opinion and Order signed yesterday by Judge Thomas Golden granting the United States' Motion to Intervene in Junior Doe v. Allentown Sch. Dist., No. 06-1926. These documents should be docketed by approximately Friday, July 10, 2009.

cc: James L. Pfeiffer, Esq. For Plaintiffs (fax: 610-258-1943)
John E. Freund, Esq. For Allentown School District (fax: 610-332-0314)
Howard Stevens, Esq. For Lehigh Valley Hospital (fax: 610-820-6006)

Exhibit B

Westlaw.
Slip Copy
Slip Copy, 2008 WL 4831318 (M.D.Tenn.), 71 Fed.R.Serv.3d 1535
(Cite as: 2008 WL 4831318 (M.D.Tenn.))

H

United States District Court,
M.D. Tennessee,
Nashville Division.
Kimberly **LOPEZ**, as guardian, next friend and parent of Gilberto **Lopez**, a minor
v.
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; and Genesis Learning Centers
United States of America, Movant for **Intervention**.
No. 3-07-0799.

Nov. 4, 2008.

West KeySummary
Federal Civil Procedure 170A 338

170A Federal Civil Procedure
170AII Parties
170AII(H) **Intervention**
170AII(H)2 Particular **Intervenors**
170Ak338 k. Governmental Bodies and Officers Thereof. Most Cited Cases
The **United States** was allowed to **intervene** in a suit against a public school board of education resulting from the alleged sexual assault of a student by another student on a special education school bus. The **United States** met its minimal burden of showing that the mother of the alleged victim might not adequately represent its interest. If the mother were barred from seeking injunctive relief because the alleged victim was no longer transported by special education buses and the **United States** could seek injunctive relief broader than what the mother could assert, the mother's representation would be clearly inadequate.

John R. Clemmons, Malcolm L. McCune, William Gary Blackburn, Blackburn & McCune, PLLC, Nashville, TN, for Kimberly Lopez.

Mark H. Wildasin, Office of the **United States** Attorney, Nashville, TN, for **United States** of America, Movant for **Intervention**.

Benjamin M. Rose, James K. Simms, IV, Jay N. Chamness, Richard L. Tennent, Bell, Tennent & Frogge, PLLC, Nashville, TN, for Metropolitan Government of Nashville and Davidson County; and Genesis Learning Centers.

ORDER

JULIET GRIFFIN, **United States** Magistrate Judge.

*1 As provided herein, the motion to **intervene** filed by the **United States** (Docket Entry No. 109) is GRANTED.

The **United States** seeks to **intervene**, pursuant to **Rule 24**(a) and (b) of the Federal Rules of Civil Procedure, to "redress violations of Title IX of the Education Amendments of 1972 ("Title IX"),"20 U.S.C. §§ 1681 et seq. Docket Entry No. 109, at 1. Neither the plaintiff nor defendant Genesis Learning Centers filed a response to the motion to **intervene**, indicating that they have no opposition to the motion. *See* Local Rule 7.01(b). However, defendant Metropolitan Government of Nashville and Davidson County ("Metro") filed a response in opposition (Docket Entry No. 115), to which the **United States** filed a reply (Docket Entry No. 130).

I. PROCEDURAL BACKGROUND

The plaintiff initially filed this action on July 30, 2007, in the Davidson County, Tennessee Circuit Court, naming as the defendant the Board of Education for the Metropolitan Nashville Public Schools, and asserting claims for damages under the Tennessee Governmental Tort Liability Act, Tenn.Code Ann. §§ 29-20-101 et seq ., and 42 U.S.C. § 1983, as a result of an alleged sexual assault on Gilberto Lopez by another student on a Metro special education school bus. The plaintiff also asserted claims for injunctive relief and sought to certify the case as a class action.

Defendant Metro removed the case to this Court on August 2, 2007. The defendant's motion to correct misjoinder (Docket Entry No. 8) and the plaintiff's motion to amend the complaint (Docket Entry No. 12) were granted by order entered September 10,

2007 (Docket Entry No. 14), and the plaintiff filed her first amended complaint on September 14, 2007 (Docket Entry No. 15), naming the Metropolitan Government of Nashville and Davidson County as the sole defendant.

On November 13, 2007, the plaintiff filed a motion for class determination (Docket Entry No. 24), which the plaintiff agreed to withdraw, without prejudice on November 28, 2007. By order entered December 3, 2007 (Docket Entry No. 29), the plaintiff was given until December 7, 2007, to file a renewed motion for class certification with an accompanying memorandum. The plaintiff filed a renewed motion for class determination on December 7, 2008 (Docket Entry No. 31), to which the defendant responded (Docket Entry No. 34).

The plaintiff's motions to amend the complaint (Docket Entry No. 38 and 61) were granted by order entered March 7, 2008 (Docket Entry No. 70), and the plaintiff filed a third amended complaint on March 7, 2008 (Docket Entry No. 71), naming Genesis Learning Centers, a private school that contracted with Metro and that Gilberto attended, as an additional defendant.[FN1]

> FN1. The second amended complaint was never officially filed since the Court granted the plaintiff's leave to file the second and third amended complaints at the same time.

By order entered April 1, 2008 (Docket Entry No. 87), the plaintiff's motion for class determination was denied to allow Genesis an opportunity to address the plaintiff's motion. At the case management conference held on April 4, 2008, the plaintiff was given until June 16, 2008, to file a renewed motion for class certification. *See* order entered June 27, 2008 (Docket Entry No. 96). The plaintiff did not file a renewed motion for class certification, and, at the case management conference held on June 30, 2008, plaintiff's counsel confirmed that the plaintiff would not seek class certification in this case. *See* order entered July 2, 2008 (Docket Entry No. 99).

*2 The plaintiff's motion to file a fourth amended complaint (Docket Entry No. 93) was granted by order entered June 30, 2008 (Docket Entry No. 97), and the fourth amended complaint was filed on June 30, 2008, adding claims under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, § 504 of the Rehabilitation Act, 29 U.S.C. §. 794, and 20 U.S.C. §§ 1681 et seq. ("Title IX"). That amended complaint is now the operative complaint in this case.

*II. **RULE 24(a)***

The **United States** seeks to **intervene** as of right under **Rule 24**(a) (2) of the Federal Rules of Civil Procedure, which provides as follows:

On timely motion, the court must permit anyone to **intervene** who:

* * *

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.[FN2]

> FN2. **Rule 24**(a)(1) provides that, upon timely motion, a court must permit anyone to **intervene** who is given an unconditional right to **intervene** by a federal statute. The movant does not suggest that **intervention** is appropriate under section (a)(1).

A movant seeking to **intervene** as of right pursuant to **Rule 24**(a) (2) must show the following: (1) that the motion to **intervene** was timely; (2) that the movant has a substantial interest in the subject matter of the case; (3) that the movant's ability to protect that substantial legal interest may be impaired in the absence of **intervention**; and (4) that the parties already before the Court may not adequately represent the proposed **intervenor's** interest. *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir.2007), *petition for cert. denied*, --- U.S. ----, 129 S.Ct. 35, 172 L.Ed.2d 239, 2008 WL 728200 (Oct. 6, 2008); *Northeast Ohio Coalition for the Homeless and Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir.2006); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir.2005); ***United States** v. Michigan*, 424 F.3d 438, 443 (6th Cir.2005); ***United States** v. Tennessee*, 260 F.3d 587, 591-92 (6th Cir.2001); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th

Cir.2000); *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir.1999); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir.1997); ***United States** v. Detroit Internat'l Bridge Co.*, 7 F.3d 497, 499 (6th Cir.1993); *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir.1993); *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir.1990); *Grubbs v. Norris*, 970 F.2d 343, 345 (6th Cir.1989); *Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir.1987). A movant for **intervention** must satisfy all four prongs and failure to satisfy one of the prongs will result in denial of the motion. ***United States** v. Michigan, supra; Grubbs, supra.*

Although most frequently addressed in the context of determination of whether a putative **intervenor** has a substantial interest in the litigation, the Court of Appeals for the Sixth Circuit has also held that, in general, requests for **intervention** should be construed liberally in favor of granting **intervention**. *See Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 Fed.Appx. 782, 784 (6th Cir.2004); *Stupak-Thrall*, 226 F.3d at 472;*Purnell*, 925 F.2d at 950.

A. Timeliness

***3** An evaluation of the timeliness of a motion to **intervene** should be made in the context of the relevant circumstances. *Jansen, supra; Bradley v. Milliken, supra.*Factors to be considered are (1) the point to which the lawsuit has progressed; (2) the purpose for which the **intervention** is sought; (3) the length of time that the movant knew or should have known of its interest in the case before it actually sought to **intervene**; (4) the prejudice to the original parties due to the movant's failure to promptly **intervene** after it knew or should have known of its interest in the case; and (5) the existence of unusual circumstances militating against or in favor or **intervention**. *Tennessee*, 260 F.3d at 592; *Stupak-Thrall*, 226 F.3d at 473; *Cuyahoga Valley*, 6 F.3d at 395-96;*Jansen, supra; Grubbs, supra.*

Defendant Metro argues that, because of the current procedural posture of the case, the movant should not be allowed to **intervene**. Specifically, defendant Metro suggests that the movant raises "the possibility of re-visiting discovery that is already complete and interfering with the current discovery schedule set by the existing parties."Docket Entry No. 115, at 3. However, the movant has represented that it "does not intend to ask the Court to deviate from the deadlines set forth in the current scheduling orders," Docket Entry No. 110, at 7, and does not seek to add parties or claims to this case. The movant did not, however, unequivocally represent that it would not conduct any additional discovery, but instead maintained that it does not "intend to issue substantial discovery requests in light of the comprehensive factual record already developed in this case."Docket Entry No. 130, at 4. It would have been helpful to the Court to know what additional discovery, if any, the movant would seek. However, without that information, it appears that whatever additional discovery would be minimal particularly in light of the December 5, 2008, deadline for completion of fact discovery as established in the order entered October 10, 2008 (Docket Entry No. 126).

(1) Point to Which Lawsuit Has Progressed

This case was filed over a year ago, discovery is almost complete, and the trial is scheduled on May 26, 2009. Although the movant is seeking to **intervene** at the later stage of this litigation, almost seven (7) months remain before the trial date.

*(2) Purpose for **Intervention***

The movant contends that it has a strong interest in ensuring that recipients of federal funds, such as defendant Metro, do not discriminate on the basis of sex in violation of Title IX; and an interest in ensuring that federal funds are not disbursed to entities that do not comply with the federal law. Docket Entry No. 110, at 4; Docket Entry No. 130, at 2. The movant also argues that it has a "powerful interest" in pursuing "the most expeditious and efficient means available" to eliminate allegedly discriminatory conditions. Docket Entry No. 130, at 3. In other words, although the movant can institute an investigation on its own, it is more efficient to seek relief in the context of this lawsuit in which discovery has already been conducted, rather than addressing the same issues in another, duplicative administrative proceeding.

***4** Defendant Metro has not disputed that the movant has a substantial interest in the subject matter of this litigation.

(3)Length of Time Movant Knew or Should Have

Known of Its Interest

At the initial case management conference on November 28, 2007, plaintiff's counsel represented that the **United States** was aware of the lawsuit at that time.[FN3] According to the movant, it was the plaintiff's decision in June of 2008, not to seek class certification that was the pivotal event in its decision to seek **intervention** in this case. It is not entirely clear why the movant's decision was contingent upon the plaintiff's determination not to seek class certification, and is not clear whether the movant believes that, by no longer seeking class certification, the plaintiff has also abandoned her request for injunctive relief or whether the plaintiff simply will be less motivated to seek injunctive relief.

> FN3. Interestingly, although the plaintiff had asserted a Title IX claim in the companion case of *Staehling v. Metro,* 3-07-0797, in the initial complaint filed in state court on July 16, 2007, it was not until April 30, 2008, that the plaintiff sought to add a Title IX claim in this case by a fourth amended complaint. *See* Docket Entry No. 93. Just as interesting, the movant did not seek to **intervene** in the *Staehling* case even though a Title IX claim had been asserted throughout that litigation. The movant did, however, seek to file and was granted leave to file an amicus brief in the *Staehling* case.

Although the movant was clearly aware of the pendency of this case and its own interest well before June of 2008, the movant's level of concern for the potential impairment of its interest and the potential that the plaintiff might not adequately represent the movant's interest was clearly elevated once the plaintiff decided not to seek class certification.

(4) Prejudice to Other Parties

The only party that has asserted potential prejudice is defendant Metro, which raises the specter of the movant's revisiting the extensive discovery already taken in this case. However, the movant represents that its **intervention** will not cause any modification of scheduling deadlines and that it will not engage in "substantial" additional discovery. Without more information from the movant about what discovery it might seek, it is difficult to determine if the concerns of defendant Metro have any validity. However, the Court will take the movant at its word and assume that discovery, if any, it may seek will be minimal, and thus defendant Metro will not suffer prejudice as a result of any delay by the movant in seeking to **intervene.**

(5) Other Factors

The parties have not addressed other factors that would militate in favor of granting or denying **intervention.**

When coupled with the movant's representations that its **intervention** in this case will not serve to delay the deadline for completion of discovery or the other deadlines in this case, the Court cannot find that the case has progressed to the point that the movant should not be permitted to **intervene.** Based on the representations of the movant's counsel, the concerns raised by defendant Metro of revisiting discovery and interfering with the current discovery schedule appear unsubstantiated.

B. Substantial Interest in the Subject Matter

There is no dispute that the movant has a substantial interest in the subject matter of the case and specifically in enforcement of Title IX, and defendant Metro has not suggested otherwise.

C. Impairment of Movant's Interest

*5 The burden of showing that the interest of the movant may be impaired in the absence of **intervention** is minimal. *See* Miller, 103 F.3d at 1247. *See also Purnell,* 925 F.2d at 948; Grutter, 188 F.3d at 399. The movant argues that, since the plaintiff is no longer seeking class certification, there is a greater likelihood that this case could be resolved "through a settlement agreement or other monetary disposition that does not compel Metro to implement the institutional changes necessary to ensure that students are protected from [ ] dangerous and discriminatory conditions in the future."Docket Entry No. 110, at 5. In addition, the movant contends that a ruling in favor of defendant Metro could "complicate the **United States'** efforts to prosecute future instances of unlawful discrimination" in this district by establishing adverse precedent. Docket Entry No. 110, at 6.

Defendant Metro is correct that the movant has another avenue of seeking relief available since the **United States** can pursue a Title IX administrative enforcement action against Metro. Thus, defendant Metro argues that the movant does not "need" to **intervene** in this case. Docket Entry No. 115, at 2. However, whether or not there is any alternative avenue for the movant is not the standard, but rather whether the movant's interest may be impaired absent **intervention**. Defendant Metro did not respond to the movant's contention that a potential adverse precedent in this case could impair the movant's ability to enforce Title IX violations in this District, and the Court finds that the movant has met its minimal burden of showing that its interest could be impaired without **intervention**.

D. Adequacy of Representation

As the movant implicitly suggests, this factor blends into the consideration of impairment of the movant's interest. Again, the movant has only a minimal burden of showing that the existing parties may not adequately represent the movant's interest. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972); *Blackwell*, 467 F.3d at 1008; ***United States** v. Michigan, supra; Grutter*, 188 F.3d at 400; *Litton by Arnold v. Commissioner of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir.1992); *Doe v. Briley*, 2007 WL 1345386, * 5 (May 7, 2007) (Trauger, J.).

A determination of adequacy of representation can involve consideration of whether there is collusion between the existing parties or whether the parties have adverse interests to the putative **intervenor**. *See Purnell*, 925 F.2d at 949-950. The plaintiff and the putative **intervenor** are not adverse and there is no hint of collusion between the plaintiff and the existing defendants. In addition, if all the movant sought was to **intervene** to seek damages on behalf of the plaintiff, there would be absolutely no grounds for the **United States** to **intervene**. The plaintiff and her counsel are clearly capable of pursuing and motivated to pursue claims for damages. However, the movant argues that, because the plaintiff is no longer seeking class certification, there is a greater likelihood of settlement or other resolution of this case that might not include a requirement that defendant Metro implement institutional changes.

*6 Defendant Metro suggests that the plaintiff jettisoned her class claims because she would not have been successful in pursuing class certification. In so doing, defendant Metro appears to have merged the merits of class certification with the issue of whether either the plaintiff or the movant can pursue a Title IX claim seeking "institutional changes" without the case having been certified as a class action. The movant does not seek to revive a request for class certification; nor would such a request to seek class certification be granted at this stage in the case. In addition, the plaintiff has not withdrawn her Title IX claim.

The defendant has not contended that "institutional changes" cannot be sought by either the plaintiff or the movant in this case without class certification. Neither the movant nor the plaintiff has addressed the scope of the injunctive relief to which either would be entitled or whether injunctive relief in the form of "institutional changes" remains available if Gilberto is no longer transported by Metro special education buses. It is also not clear whether any remedy sought by the movant would be coterminous with the remedy the plaintiff could seek. If the plaintiff is barred from seeking injunctive relief because Gilberto is no longer transported by Metro special education buses and the **United States** can seek injunctive relief broader than what the plaintiff can assert, the plaintiff's representation is clearly inadequate. Even if the relief that the plaintiff seeks can still properly include injunctive relief, if the plaintiff is no longer transported by Metro special education buses, the plaintiff may understandably concentrate on seeking compensatory damages-either through litigation or settlement-to the potential detriment of claims for injunctive relief. Thus, the movant has met its minimal burden of showing that the plaintiff may not adequately represent the interest of the movant. [FN4]

FN4. The movant's contentions on the issues of substantial interest, impairment and adequacy of representation are exactly the same arguments made in and accepted by the Southern District of New York in *AB v. Rhinebeck Central Sch. Dist.*, 224 F.R.D. 144, 156-157 (S.D.N.Y.2004).

In addressing this factor, defendant Metro again echoes its concern that **intervention** will delay the

progression of the case and further complicate the case with additional discovery. Those concerns, while valid, are more appropriately addressed, and were addressed, in the context of consideration of the timeliness of the motion to **intervene**.

Taking into account that the Sixth Circuit has directed that requests for **intervention** be treated liberally, along with the minimal standards for determining impairment of interest and inadequate representation, the Court finds that the motion to **intervene** should be granted.

Despite having granted the motion to **intervene**, the Court will not extend any scheduling deadlines already established in this case because of such **intervention**, and, as addressed above, takes the **United States** at its word that its **intervention** in this case will not cause any disruption to the schedule already established. *See* Advisory Committee Notes to the 1996 amendments to **Rule 24** (**intervention** may be subject to "appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings").

*7 Having determined that **intervention** is appropriate under **Rule 24**(a)(2), it is not necessary to address whether the movant should be granted permissive **intervention** under **Rule 24**(b)(2).

The Clerk is directed to file and docket the complaint in **intervention** attached to the motion to **intervene** (Docket Entry No. 109-1).

Defendant Metro shall have until November 24, 2008, to file a response to the complaint in **intervention**.

Any party desiring to appeal this order of the Magistrate Judge may do so by filing a motion for review no later than ten (10) days from the date of service of this order. The motion for review must be accompanied by a brief or other pertinent documents to apprise the District Judge of the basis for the appeal. *See* Rule 9(a) (1) of the Local Rules for Magistrate Judge Proceedings.

It is so ORDERED.[FN5]

FN5. The Court has considered the motion to **intervene** as a nondispositive motion under 28 U.S.C. § 636(b)(1)(A). However, should the motion be considered to be the functional equivalent of the motions specifically enumerated in 28 U.S.C. § 636(b)(1)(A), *see Vogel v. U.S. Office Prods. Co.*, 258 F.3d 509 (6th Cir.2001); *Massey v. City of Ferndale*, 7 F.3d 506 (6th Cir.1993); *Bennett v. General Caster Serv. of N. Gordon Co.*, 976 F.2d 995 (6th Cir.1992), this order may be deemed to be a report and recommendation for which the standard of review is de novo.

M.D.Tenn.,2008.
Lopez v. Metropolitan Gov. of Nashville and Davidson County
Slip Copy, 2008 WL 4831318 (M.D.Tenn.), 71 Fed.R.Serv.3d 1535

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Exhibit C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JEREMY LOVINS,

Plaintiff,

and

UNITED STATES OF AMERICA,

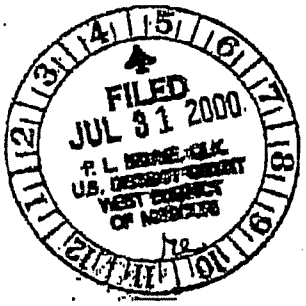
Plaintiff-Intervenor

v.

PLEASANT HILL PUBLIC SCHOOL DISTRICT, R-III,

Defendant.

Case No. 99-0550-CV-W-2



CONSENT ORDER

On June 4, 1999, Plaintiff Jeremy Lovins ("plaintiff," "Jeremy," or "Mr. Lovins") filed this action, alleging that, for four years, Defendant Pleasant Hill Public School District, R-III ("defendant" or "the District"), and Hugh Graham,[1] caused him to be harassed on the basis of sex and sexual orientation. In his Complaint, Mr. Lovins alleged, inter alia, violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, et seq. In its Answer, the defendant expressly denied the plaintiff's claims. The United States, after conducting a preliminary evaluation of the plaintiff's allegations and the defendant's responses, informed the parties on May 19, 2000, that

[1]On February 11, 2000, the Court ordered Defendant Hugh Graham dismissed with prejudice from this action.

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169-43-28

the Attorney General had certified this case as one of general public importance for purposes of seeking intervention under Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2. Contemporaneously with the filing of this Consent Order, the United States is filing its Complaint-in-Intervention and accompanying Certificate of the Attorney General. The defendant does not contest this Court's jurisdiction over, or the United States' right to intervene in, this case.

The parties desire to avoid costly and protracted litigation and have voluntarily agreed, as indicated by the signatures below, to resolve the plaintiff's and United States' claims against the defendant without the necessity of an evidentiary hearing. After reviewing the terms of this Consent Order, the Court concludes that the entry of this Consent Order comports with federal law and is appropriate under all the circumstances.

Therefore, it is ORDERED, ADJUDGED and DECREED as follows:

I. Factual Background

A. Defendant Pleasant Hill Public School District, R-III is organized under, and exists pursuant to, the laws of the State of Missouri, and is a recipient of Federal financial assistance. During the 1994-95 school year, Plaintiff Jeremy Lovins attended the eighth grade at Pleasant Hill Middle School, which is operated by the defendant; during the 1995-96, 1996-97, and the first semester of the 1997-98 school years, the plaintiff attended the ninth, tenth and eleventh grades, respectively, at Pleasant Hill High School, which is also operated by the defendant.

B. During the period from 1995 through 1998, the plaintiff was subjected to harassment on the basis of sex and perceived sexual orientation by his classmates. The United States and the plaintiff contend that, as a result of this harassment, the plaintiff completed the eleventh and twelfth grades on a homebound program provided by the District. The plaintiff and the United

States contend that the harassment on the basis of sex and perceived sexual orientation was severe, pervasive and objectively offensive; that District officials with authority to rectify the situation were given notice of the harassment but failed to take immediate and appropriate corrective actions; that these District officials were deliberately indifferent to this harassment; and that this deliberate indifference prevented Jeremy Lovins from enjoying educational benefits and opportunities. The plaintiff and the United States further contend that the District's response to Jeremy Lovins's complaints of harassment constituted a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Title IX of the Education Amendments of 1972. The defendant denies these allegations. Neither the defendant's agreement to the terms of this Consent Order nor any other action taken by the defendant in connection with this settlement constitutes an admission of wrongdoing or a violation of any state or federal law by the defendant.

II. Scope and Duration of Consent Order

A. This Consent Order is effective immediately upon its entry by the Court and shall remain in effect for two (2) years from the date of entry or ninety (90) calendar days after the last report under Section VII is received, whichever date is later, absent an extension as set forth in Section II.C.

B. The Court shall retain jurisdiction over this action during the two-year period specified above, absent an extension as set forth in Section II.C, to insure compliance with all provisions of this Consent Order.

C. The United States may move the Court to extend the period in which this Consent Order is in effect if it determines that the defendant likely has violated one or more terms of the

Order, or if the interests of justice otherwise require an extension of the terms of the Order.

D. The parties to this Consent Order shall endeavor in good faith to resolve informally any differences regarding interpretation of, and compliance with, this Order prior to bringing such matters to the Court for resolution. However, in the event that the defendant either fails to perform in a timely manner any act required by this Order or acts in violation of any provision of this Order, the United States may move the Court to impose any remedy authorized by law or equity, including, but not limited to, an order requiring performance or non-performance of certain acts and an award of any damages, costs, and attorneys' fees that may have been occasioned by the defendant's actions or non-actions.

E. The parties agree that the time limits set forth throughout this Consent Order may be expanded upon mutual consent of the parties.

III. Injunctive Relief

The defendant, its agents, employees, successors, and all persons in active concert or participation with it, are enjoined from:

A. Engaging in any act or practice that has the purpose or effect of discriminating against any student on the basis of that student's sex or sexual orientation in the administration or provision of educational services, programs, opportunities or benefits;

B. Failing to respond promptly and appropriately to allegations of harassment or discrimination on the basis of sex or sexual orientation;

C. Retaliating against, or taking any actions that may have the purpose or impact of adversely affecting, any student or employee because that student or employee has alleged, opposed, or filed or participated in a complaint with the District or any federal, state, local or

non-governmental entity concerning, harassment or discrimination on the basis of sex or sexual orientation.

IV. **Retention of Expert/Development of Comprehensive Plan and Training Program**

A. Within thirty (30) calendar days from the date of entry of this Consent Order, the District shall retain, and submit to the United States[2] the name(s) and resumes of, individual(s) and/or organization(s) with appropriate expertise in the area of sexual harassment prevention and training in the context of elementary/secondary education, to:

1. Evaluate the District's policies, practices and procedures for preventing, identifying and remediating harassment and discrimination on the basis of sex or sexual orientation;

2. Conduct a school climate assessment, in consultation with and with the approval of the superintendent, and prepare a written analysis of each school in the District regarding student to student and teacher to student interactions, to determine whether circumstances warrant school-specific actions;

3. Develop a comprehensive plan to prevent, identify and remediate harassment and discrimination on the basis of sex or sexual orientation ("the Comprehensive Plan"), as described in Section V, below;[3] and

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[2]All documents or reports required to be submitted to the United States pursuant to this Consent Order shall be addressed to: Chief, Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 65958, Washington, DC, 20035-5958.

[3]Although this Consent Order obligates the District to develop and implement a comprehensive plan to prevent, identify and remediate harassment and discrimination on the basis of sex or sexual orientation, the District is encouraged to develop and implement similar plans to prevent, identify and remediate harassment and discrimination on the basis of race, ethnicity, national origin and disability. See, e.g., Office for Civil Rights, U.S. Department of Education,

4. Develop a mandatory education and training program ("the Training Program"), as described in Section VI, below, for all District school board members and employees.[4]

B. Within ninety (90) calendar days from the date of entry of this Consent Order, the defendant shall deliver to counsel for the United States, at the address set forth previously, copies of the written school climate assessments and analyses, the proposed Comprehensive Plan, the proposed Training Program, and all supporting materials.

C. Within one hundred twenty (120) calendar days from the date of entry of this Consent Order, the United States shall provide written comments or objections, if any, to the defendant that pertain to the items set forth in Section IV.B, above. The defendant shall make a good faith effort to address any concerns of the United States, and, where appropriate, incorporate any suggestions or modifications proposed by the United States.

V. Comprehensive Plan for Preventing, Identifying and Remediating Harassment and Discrimination on the Basis of Sex or Sexual Orientation

The Comprehensive Plan shall be implemented by the District within one hundred eighty (180) calendar days from the date of entry of this Consent Order, and shall, at a minimum, include the following provisions:

A. The District's general statement of policy. The District shall revise its written policy prohibiting harassment and discrimination on the basis of sex or sexual orientation, to insure that

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and National Association of Attorneys General, Protecting Students from Harassment and Hate Crime: A Guide for Schools at ii (1999).

[4]For purposes of this Consent Order, "employees" shall be defined to include all central office and school administrators, counselors, teachers, teacher aides, coaches, secretaries, playground supervisors, bus drivers, cafeteria workers, custodians, and all other staff members who have contact with students.

the written policy (1) sets forth the District's commitment to protect students from harassment and discrimination and to maintain a nondiscriminatory environment; (2) states that all students, regardless of sex or sexual orientation, are entitled to an educational environment free from harassment and discrimination; (3) reaffirms that the District shall respond to male and female students' complaints of harassment promptly, appropriately and with the same degree of seriousness; (4) requires all District employees to promptly report, to the principal or a compliance coordinator (as described in Section V.J, below), harassment that they observe, are informed of, or reasonably suspect; and (5) prohibits retaliation against students or District employees who report allegations of harassment or discrimination, or who participate in the reporting or investigation of such allegations.

B. Definitions and examples of prohibited conduct. The District shall define harassment and discrimination on the basis of sex or sexual orientation, and provide concrete examples of each.

C. Policies and procedures for reporting prohibited conduct. The District shall explain how to report allegations of harassment and discrimination, and, with annual revisions (as appropriate), identify to whom at each school in the District and at the District's central office such allegations should be reported. The District shall set forth formal complaint procedures within the District and shall also inform students and their parents of their rights to file complaints with the U.S. Department of Education, the U.S. Department of Justice, and other state or local entities, including the right to bring an action in state or federal court.

D. Policies and procedures for investigating complaints. The District shall describe the steps it will take to respond to reported incidents of harassment or discrimination, including but

not limited to taking disciplinary measures against those found to have engaged in such acts, and, where appropriate, reporting violent or criminal conduct to law enforcement authorities.

E. Policies and procedures for remediating violations. The District shall explain the disciplinary measures available against persons who are found to have engaged in harassment or discrimination on the basis of sex or sexual orientation. Corrective action shall be, among other things, appropriate to the severity of the harassment; calculated to end the harassment and prevent retaliation; and designed to insure that the offending conduct does not limit and/or interrupt the ability of the complainant (and the victim, if different) to participate in, or benefit from, the educational services, programs and/or opportunities provided by the District.

F. Policies regarding confidentiality. The District shall explain what efforts it will make, consistent with its legal obligations to investigate, to take appropriate action, and to conform with any discovery or disclosure obligations, to respect the privacy of the complainant, the victim, individuals against whom a complaint is filed, and witnesses.

G. Dissemination of policies and procedures, and training of personnel. The District shall inform all employees of the requirements of this Consent Order and shall post, in prominent places throughout each school and District administrative building, its revised policies concerning harassment and discrimination on the basis of sex or sexual orientation.

H. Dissemination of policies and procedures to students and parents. The District shall inform students and their parents, through, at a minimum, annual meetings with all students, an annual distribution of notices to students and mailings to parents or guardians, and inclusion in student and parent handbooks, of the District's policies prohibiting harassment and discrimination on the basis of sex or sexual orientation, including how and to whom to report harassment or

discrimination, how to file a formal complaint, and what steps the District will take to investigate complaints and punish those found to have engaged in prohibited conduct.

I. Student curriculum. As part of each school's regular curriculum, at least annually the District shall train students (using age-appropriate training materials) about preventing, identifying and responding to harassment and discrimination on the basis of sex or sexual orientation;

J. Designation of compliance coordinators (one male and one female teacher or administrator) at each school in the District. The compliance coordinators shall be appointed by the District Superintendent and shall be empowered to receive and investigate complaints of harassment or discrimination, and to take such other actions as may be delineated. The District shall insure that appropriate time is afforded the compliance coordinators to fulfill their duties as described herein. The District shall inform its employees, students and parents or guardians of the identities and roles of the compliance coordinators. The District shall, on at least an annual basis, provide the compliance coordinators with appropriate training. Such training shall, at a minimum, include (1) how to investigate allegations of harassment or discrimination on the basis of sex or sexual orientation; (2) how to document and maintain records of such investigations; (3) how to balance the complainant's privacy and confidentiality concerns with the notification of complainant's teachers to prevent additional incidents of harassment or discrimination; and (4) how to remediate such harassment or discrimination. Any new compliance coordinators who may be designated in the future shall receive appropriate training within thirty (30) calendar days.

K. Record-keeping. The District shall maintain a written record ("Incident Report") of each and every allegation, whether verbal or in writing, of harassment or discrimination on the basis of sex or sexual orientation. The Incident Report shall, at a minimum, include (1) the name

of the person making the allegation, and, if different, the name of the alleged victim; (2) the nature of the allegation and the date of the alleged incident; (3) the names of all persons alleged to have committed violations; (4) the names of all persons who may have relevant information about the incident; (5) the written statements of the complainant, the victim (if different from the complainant), the alleged perpetrator, and any witnesses; (6) the outcome of the investigation; (7) any action taken by the District; and (8) attached copies of any documents supplied to the District or created during the investigation or complaint process. The Incident Report shall be completed no later than fifteen (15) calendar days after the date upon which the complaint is first made. The compliance coordinators, the school building principal, and the Superintendent shall be supplied with a copy of each such Incident Report, and, in a space specifically designated, each shall initial the Incident Report to indicate that s/he has reviewed the Report and approves of the actions taken by the investigating official.

VI. Mandatory Education and Training Program

A. The District shall begin implementation of the Training Program within one hundred eighty (180) calendar days from the date of entry of this Consent Order. Within two hundred ten (210) calendar days from the date of entry of this Consent Order, the District shall insure that all District school board members and employees have participated in the Training Program.

B. The Training Program shall, at a minimum, include the following:

1. Informing each individual of the District's policies prohibiting any act or practice that has the purpose or effect of discriminating against any student on the basis of that student's sex or sexual orientation in the administration or provision of educational services, programs, opportunities or benefits;

2. Informing each individual of her or his duties and responsibilities under the Distict's Comprehensive Plan for preventing, identifying and remediating harassment and discrimination on the basis of sex or sexual orientation, and of the consequences to each individual for failure to comply with these duties and responsibilities;

3. Informing each individual of the District's procedures for the prompt reporting of incidents of harassment or discrimination;

4. Discussing how to structure a classroom and school environment in which harassment and discrimination are not tolerated;

5. Holding a question and answer session to review each of the foregoing areas; and

6. Certification of attendance by the person conducting the Training Program for each person attending the program.

C. The District shall conduct a comparable Training Program within thirty (30) calendar days of the start of each school year.

D. New District school board members and employees shall participate in a comparable Training Program within thirty (30) calendar days from the start of their affiliation with, or employment in, the District.

VII. Reports to the United States

A. On or before January 31, 2001, June 30, 2001, and June 30, 2002, the defendant shall deliver to counsel for the United States, at the address set forth previously, a detailed report covering the preceding reporting period containing information about the defendant's compliance efforts with this Consent Order, including but not limited to:

1. Copies of the District's policies and procedures for preventing, identifying, reporting and responding to harassment and discrimination on the basis of sex or sexual orientation, including any revisions since the previous report;

2. Copies of notices and other materials provided to employees, students and parents of the District's policies and procedures for preventing, identifying, reporting and responding to harassment and discrimination on the basis of sex or sexual orientation, and a description of how and when these notices and materials were distributed;

3. Copies of the agenda (including date of training) and all materials used in the Training Program for District school board members and employees;

4. Copies of all certifications of attendance of District school board members and employees in the Training Program;

5. A list of compliance coordinators, by sex, job title and school;

6. Copies of the agenda (including date of training) and all materials used in the training of compliance coordinators;

7. The names of all trainers and copies of their resumes, vitae and/or brochures;

8. Copies of all posters or notices regarding harassment and discrimination on the basis of sex or sexual orientation, and a description of when they were posted and where;

9. Copies of all Incident Reports, as described in Section V.K., above. (The District may redact the names of minor students or request that the United States maintain the confidentiality of these records to the extent permitted by law.); and

10. Narrative descriptions of upcoming training and other activities related to the prevention of harassment and discrimination.

B. Within sixty (60) calendar days of receipt of any of the above reports, the United States may request, in writing, clarifications of, or supplementation to, the report. In that event, the District shall provide such clarifications and/or permit the inspection and copying of supplemental materials as the United States may reasonably request.

VIII. Compensation of Plaintiff and Release of Claims

In consideration of the mutual covenants, promises and consideration contained herein, the parties agree as follows:

A. This Consent Order (including this release) does not constitute, nor shall it be construed as, an admission of any liability or wrongdoing by any party.

B. The District shall pay to Jeremy Lovins within ten (10) business days from date of entry of this Consent Order, the total sum of seventy-two thousand five hundred and 00/100 U.S. dollars ($72,500.00), by check made payable to Mr. Jeremy Lovins and Mr. Douglas Patterson, his attorney, for settlement of any and all claims that Mr. Lovins may have against the District, and its affiliates and subsidiaries, together with their respective members, directors, officers, agents, and employees, including but not limited to, claims for compensatory damages, personal injury, emotional distress, loss of reputation, humiliation, embarrassment, costs, expenses and attorneys' fees.

C. Jeremy Lovins hereby releases, remises, and forever discharges the District, and its affiliates and subsidiaries, together with their respective members, directors, officers, agents, and employees, including their attorneys, from any and all claims or other causes of action he may have against them, including but not limited to — any alleged rights or claims arising under Title IX of the Education Amendments of 1972; 20 U.S.C. 1681, et seq.; 42 U.S.C. 1983; 42 U.S.C.

1985; the Americans With Disabilities Act, 42 U.S.C. 12101, et seq.; 42 U.S.C. 1981; the Rehabilitation Act of 1973, 29 U.S.C. 791, et seq.; the Missouri Human Rights Act, Mo. Rev. Stat. ch. 213; and any other alleged discrimination; personal injury; wrongful act; or any other violation of federal, state, or local statutory or common law — relating to or arising out of Mr. Lovins's enrollment in, attendance at, and status as a student of the District, including but not limited to claims for the physical and emotional injuries, up to and including the date on which this release becomes effective.

D. Mr. Lovins agrees that simultaneously with the submission of this Consent Order to the Court, his attorney, Mr. Douglas Patterson, shall also file in the United States District Court for the Western District of Missouri, Western Division, the Motion to Dismiss attached hereto as Exhibit A, which Motion requests that, contingent on the Court's signing and entering this Consent Order, all claims asserted in Case No. 99-0550-CV-W-2 be dismissed with prejudice, each party to bear its own costs.

E. Mr. Lovins agrees not to enter into any suit, action, or other proceeding at law or in equity, or to prosecute further any suit or action that might presently exist, or to make any claim or demand of any kind against the District or any of its affiliates and subsidiaries, together with their respective members, directors, officers, agents, and employees, asserting any claim released by Mr. Lovins in Section VIII.C, above, other than an action to enforce his rights herein. If Mr. Lovins enters into any action in violation of this Section, Mr. Lovins shall forfeit all sums paid pursuant to Section VIII.A, above, and shall pay all legal costs, including attorneys' fees, incurred by the District, its affiliates and subsidiaries, and their respective officers, directors, agents, and employees in defending against such action.

F. Mr. Lovins acknowledges that this Consent Order (including his release of all claims) has been reviewed in detail with him and that its language and intended effect have been explained, and that he has had the opportunity to review the Consent Order (including his release of all claims) with an attorney of his choice. Mr. Lovins also acknowledges that he has voluntarily entered into this Consent Order (including the release of all claims) of his own free will based only upon the terms and conditions included in the Consent Order and release.

G. The provisions of this release will be governed by the laws of the State of Missouri.

H. If a court of competent jurisdiction determines that any provision contained in this release, or any part thereof, cannot be enforced, the parties agree that such determination shall not affect or invalidate the remainder of the release.

I. This Consent Order (including the release of all claims) constitutes the entire agreement between Mr. Lovins and the District, and supercedes all prior understandings, whether oral or written, between the parties. Any amendments or modifications to this Consent Order (including the release of all claims) must be in writing and signed by the parties.

J. This agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors, and assigns.

ORDERED, this 31st day of July, 20

FERNANDO J. GAITAN, JR.
United States District Judge

By their signatures on this and the following pages, the undersigned parties and counsel agree to, and request the entry of, this Consent Order:

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LIL BOUCHARD, Secretary
Pleasant Hill Board of Education

Exhibit C

Not Reported in F.Supp., 1997 WL 473566 (S.D.N.Y.), Fed. Sec. L. Rep. P 99,533
(Cite as: 1997 WL 473566 (S.D.N.Y.))

H

United States District Court, S.D. New York.
Robert STROUGO, on behalf of The Brazil Fund, Inc., Plaintiff,
v.
SCUDDER, STEVENS & CLARK, INC., Defendant.
and
THE BRAZIL FUND, INC., Nominal Defendant.
Robert STROUGO, on behalf of himself and all others similarly situated, Plaintiff,
v.
Juris PADEGS, Nicholas BRATT, Edgar R. FIEDLER, Roberto TEIXEIRA DA COSTS, Ronaldo A. DA FROTA NOGUEIRA, Wilson NOLEN, Edmond D. VILLANI, and SCUDDER, STEVENS & CLARK, INC., Defendants.
No. 96 CIV. 2136(RWS).

Aug. 18, 1997.

WECHSLER HARWOOD HALEBIAN & FEFFER, Attorney for Plaintiff, New York, NY, By: JOEL C. FEFFER, ESQ. JEFFREY M. HABER, ESQ. RICHARD B. BRUALDI, ESQ. Of Counsel.

DEBEVOISE & PLIMPTON, Attorney for Defendants, New York, N.Y. By: JOHN S. KIERNAN, ESQ. JEREMY FEIGELSON, ESQ. EDWARD V. DI LELLO, ESQ. Of Counsel.

DECHERT, PRICE & RHOADS, Attorney for Nominal Defendant The Brazil Fund, Boston, MA, By: BERNARD J. BONN, III, ESQ. Of Counsel.

ROPES & GRAY, Attorney for Independent Directors of The Brazil Fund, Boston, MA, By: JOHN D. DONOVAN, JR., ESQ. TIMOTHY J. HINKLE, ESQ. SILVESTRE A. FONTES, ESQ. Of Counsel.

KIRKPATRICK & LOCKHART, Attorney for Investment Company Institute, amicus curiae, New York, NY, By: DAVID SIMON, ESQ. EUGENE R. LICKER, ESQ..

OPINION

SWEET, District Judge.

***1** In this action alleging violations of the Investment Company Act of 1940, as amended (the "ICA"), 15 U.S.C. §§ 80a-1 *et seq.*, and breach of fiduciary duty under the common law, defendants Scudder, Stevens & Clark, Inc. ("Scudder"), Juris Padegs ("Padegs"), Nicholas Bratt ("Bratt"), Edmond Villani ("Villani"), Edgar Fiedler ("Fiedler"), Wilson Nolen ("Nolen"), Ronaldo A. Da Frota Nogueira ("Nogueira"), and nominal defendant the Brazil Fund ("the Fund"), have moved, pursuant to Local Civil Rule 6.3 of the Southern District Rules, for reargument of this Court's May 8, 1997 opinion and order (the "Order") denying their motion to dismiss, or, in the alternative, for certification of the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Investment Company Institute (the "ICI") has moved for leave to participate amicus curiae.

For the reasons set forth below, the ICI's motion to participate amicus curiae will be granted, and the motions for reargument or certification will be denied.

Parties

Robert Strougo, suing on behalf of the Brazil Fund, purchased 1,000 shares of the Fund on January 11, 1993, and has held shares continuously thereafter.

The Fund, a nominal defendant in this action, is a Maryland corporation whose principal executive office is located in New York, New York. The Fund is a non-diversified, closed-end investment company that invests in the securities of Brazilian companies. Shares in the Fund trade on the New York Stock Exchange.

Scudder is a Delaware corporation whose principal offices are located in New York, New York. Scudder serves as investment advisor to and manager of the Fund. It is a registered investment advisor under the Investment Advisers Act of 1940, as amended, 15 U.S.C. 80b-1 *et seq.*

Padegs is chairman of the board and a director of the

Fund. He is also a managing director of Scudder and serves on both Scudder's board and the boards of other funds managed by Scudder.

Bratt is president and a director of the Fund. Bratt is also a managing director of Scudder and serves on the boards of other funds managed by Scudder.

Villani is a director of the Fund. He is also president and managing director of Scudder and serves on both Scudder's board and the boards of other funds managed by Scudder.

Scudder, Padegs, Bratt and Villani will be referred to as the "Scudder Defendants."

Fiedler is a director of the Fund and serves on the boards of seven other funds managed by Scudder. Nolen is a director of the Fund. He also serves on the boards of fourteen other funds managed by Scudder. Nogueira is a director and resident Brazilian director of the Fund. He serves on the boards of three other funds managed by Scudder. Da Costa, against whom all claims have been dismissed, is a director and resident Brazilian director of the Fund.

Prior Proceedings

Strougo filed his initial complaint on March 22, 1996. He filed the first amended class action and verified shareholder derivative complaint (the "Complaint") on June 17, 1996. Defendants' motions to dismiss were granted in part and denied in part by the Order, dated May 8, 1997. *See* Strougo v. Padegs, 964 F.Supp. 783 (S.D.N.Y.1997). Specifically, the Order dismissed all direct class action claims and the excessive compensation claim under ICA Section 36(b). The motion was denied with respect to the remaining derivative claims under Sections 36(a) and 48 of the ICA and under the common law.

*2 Defendants filed the instant motion on May 22, 1997. The ICI filed its motion the same day. Oral argument was heard on June 18, 1997, at which time the motions were fully submitted.

The Facts

The factual allegations of the complaint are more fully set forth in the Order. *See* Strougo, 964 F.Supp. at 788-89. Those facts relevant to decision of these motions are set forth below.

This action arises from the 1995 decision by the board of directors of the Brazil Fund, a closed-end investment company incorporated under Maryland law and traded on the New York Stock Exchange, to increase the Fund's capital by offering the Fund's existing shareholders rights to purchase additional shares of newly issued stock (the "Rights Offering"). Strougo asserts that Scudder and each of the directors of the Fund breached their respective fiduciary duties of loyalty and due care as a result of the development and implementation of the Rights Offering.

Scudder created the Brazil Fund in 1988. The Fund is a non-diversified, closed-end investment company registered under the Investment Company Act of 1940 (the "ICA") that invests almost exclusively in securities of Brazilian companies. Certain of the Fund's directors serve as executive officers of Scudder and receive substantial compensation from Scudder. A majority of the remaining directors of the Fund serve as directors of other closed-end funds affiliated with Scudder. Defendant Fiedler serves on the boards of eight funds managed by Scudder and received or accrued approximately $81,753 as a result of such directorships during 1994. Defendant Nolen serves on the boards of fifteen funds managed by Scudder and received $132,023 in 1994 as a result thereof. Defendant Nogueira serves on the boards of four funds managed by Scudder and received $54,997 in 1994 as a result thereof.

Because closed-end funds, unlike traditional mutual funds, operate with a fixed number of shares, they have limited options for obtaining capital to make new investments. Once a fund's initial capital has been fully invested, new investments generally can be made only if the fund sells existing portfolio holdings. Other options for raising capital include secondary public offerings at net asset value, or rights offerings to current investors at or below NAV.

Scudder is paid a fee equal to a percentage of the Fund's net assets. From December 1994 through November 1995, the Fund's net assets declined significantly, dropping to $271 million on November 16, 1995, from $377 million on December 31, 1994. As the Fund's net assets materially declined, so did Scudder's fee.

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As a result of the decline in net assets, as well as in Scudder's fees, Strougo alleges that defendants decided to raise additional capital to increase the Fund's net assets, and thereby restore Scudder's annual compensation. On October 13, 1995, defendants announced that the Fund would conduct the Rights Offering, whereby the Fund would issue transferable rights to its shareholders. Each Fund shareholder received one right for each share held; three rights entitled the holder to purchase an additional share at the "Subscription Price" of $15.75. The rights were transferrable; that is, if the shareholders did not wish to exercise their rights to purchase additional shares, they were entitled to sell the rights to any purchaser. The rights expired on December 15, 1995.

***3** The ICI represents the Investment Company Industry, including over 6,000 open end mutual funds and over 400 closed end investment companies. The ICI contends that the Order will have a significant impact on the board structure of investment company complexes among its members.

Discussion

I. *The ICI Will Be Permitted to Participate as Amicus Curiae*

Federal courts have discretion to permit participation of amici where such participation will not prejudice any party and may be of assistance to the court. *See* Vulcan Society of New York City Fire Dep't, Inc. v. Civil Service Comm'n, 490 F.2d 387, 391 (2d Cir.1973); Zell/Merrill Lynch Real Estate Opportunity L.P. v. Rockefeller Center Properties, No. 96 Civ. 1144, 1996 WL 120672, *3 (S.D.N.Y. March 19, 1996). The parties have identified no prejudice arising from the ICI's participation, and the policy arguments advanced by the ICI may illuminate the legal issues presented by this motion. Accordingly, the ICI is granted leave to participate amicus curiae for purposes of this motion only.

II. *Reargument Will Be Denied*

To be entitled to reargument under Local Civil Rule 6.3, a party must demonstrate that the Court overlooked controlling decisions or factual matters put before it on the underlying motion. *See* Domenech v. City of New York, 927 F.Supp. 106, 108 (S.D.N.Y.1996) (construing Local Rule 3(j), the predecessor to Local Rule 6.3); Ameritrust Co. Nat'l Ass'n v. Dew, 151 F.R.D. 237 (S.D.N.Y.1993); Fulani v. Brady, 149 F.R.D. 501, 503 (S.D.N.Y.1993). Accordingly, a party in its motion for reargument "may not advance new facts, issues or arguments not previously presented to the court." Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., No. 86 Civ. 6447, 1989 WL 162315, at * 3 (S.D.N.Y.1989).

Moreover, Local Rule 6.3 is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court. *See* Caleb & Co. v. E.I. Du Pont De Nemours & Co., 624 F.Supp. 747, 748 (S.D.N.Y.1985). In deciding a motion to reargue, the court must not allow a party to use the motion to reargue as a substitute for appeal. *See* Morser v. AT & T Information Sys., 715 F.Supp. 516, 517 (S.D.N.Y.1989); Korwek v. Hunt, 649 F.Supp. 1547, 1548 (S.D.N.Y.1986).

Because the Court overlooked neither controlling decisions nor dispositive factual matters put before it on the underlying motions to dismiss, the present motions will be denied.

Defendants and the ICI contend that the court overlooked: (1) the actual amount of compensation received by Edgar Fiedler; (2) the "tension" between the statutory and regulatory definitions of an "interested person" (which do not "necessarily" consider holding multiple directorships a disqualifying interest) and the court's conclusion, under Maryland law, that when all but one board member has multiple directorships in a single fund complex and earns significant compensation from that complex, demand on the board is excused in a case that presents inherent conflicts between the interests of the complex's management and the fund's shareholders; and (3) the fact that federal courts in other circuits have refused to excuse demand in the face of similar allegations.

***4** It does appear that the actual compensation received by Fiedler in 1994 was only $81,753, not the $400,000 assumed in the prior Order. However, this difference in compensation does not change the outcome, since Nogueira was alleged to have received even less aggregate compensation than Fiedler actually received, but the allegations as against Nogueira were nonetheless considered sufficient to raise a

doubt as to his independence such that demand would be excused.

The court expressly addressed the asserted "tension" between the rule adopted in the Order and the ICA's definition of an interested person in the prior opinion. Strougo, 964 F.Supp. at 795. The movants contend that the court overlooked the "combined effect" of the statutory and regulatory provisions, which establish a regime in which directors must disclose their service on multiple boards before being elected, and are considered competent to evaluate matters affecting the fund advisor upon being elected. However, this "tension" is a result of the Supreme Court's determination that state law, not federal law, would govern demand futility in ICA cases. *See* Kamen v. Kemper, 500 U.S. 90, 108-09, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). The Supreme Court rejected the notion that the application of state demand futility rules, which vary from state to state, would impede ICA regulatory objectives or be inconsistent with the policies underlying the ICA. *Id.* at 107. The Court reasoned that "the ICA embodies a congressional expectation that the independent directors would 'loo[k] after the interests of the [investment company]' by 'exercising the authority granted to them *by state law*.' ... We thus discern no policy in the Act that would require us to give the independent directors, or the boards of investment companies as a whole *greater* power to block shareholder litigation than these actors possess under the law of the state of incorporation." *Id.* at 107-08 (emphasis in original) (quoting Burkes v. Lasker, 441 U.S. 471, 485, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979)). State corporation law, including the state law governing pre-suit demand, does not change because that law is in "tension" with provisions of the ICA.

Finally, the defendants and the ICI suggest that the court overlooked the fact that the Seventh Circuit, in Kamen v. Kemper Fin. Servs., Inc., 939 F.2d 458 (7th Cir.1991), dismissed a complaint with similar allegations under Maryland's demand excuse law. The defendant's point to the lower court opinion in *Kamen*, where the court noted the allegation that the "so-called 'non-interested' directors receive aggregate remuneration of approximately $300,000 a year for serving as directors of the Fund and of all of the other funds in the Kemper group." Kamen v. Kemper Fin. Servs., Inc., 659 F.Supp. 1153, 1161 (N.D.Ill.1987). *See also Batra v. Investors Research Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 96,983, 1992 U.S. Dist. Lexis 16148 (W.D.Mo.1992).

***5** However, the *Kamen* decisions do not provide grounds for reargument. First, as the defendants concede, *Kamen* and the district court cases cited in the briefs, are not "controlling authority," because they were not decided by a Maryland court or the Second Circuit. In addition, the lower court decision in *Kamen* and the *Batra* decision were not before the court on the underlying motion, and are thus an improper basis for reargument.

More significantly, the *Kamen* decision and its factual similarity to this case were not overlooked. The Court of Appeals decision was cited liberally in the opinion. This court was fully aware that the *Kamen* plaintiffs had alleged that the independent directors sat on multiple Kemper boards, as the Seventh Circuit noted in its opinion. Kamen, 939 F.2d at 460. However, the Seventh Circuit did not expressly consider the contention that holding multiple directorships in a single advisor's complex could compromise a director's independent judgment and provided no reasons for rejecting such a claim. *Compare Strougo,* 964 F.Supp. at 974 n. 2 (declining to follow dictum in Olesh v. Dreyfus Corp., No. CV 94-1664, 1995 WL 500491 (E.D.N.Y. Aug.8, 1995), noting that court engaged in no discussion of effect of multiple directorships on director's independence). It simply viewed the plaintiff's allegations as a variant on the discredited notion that receipt of director's fees renders a director incapable of evaluating a demand. *Id.* Even with respect to those arguments it addressed directly, *Kamen* relied more on Delaware law and general trends in corporate law than on Maryland law, *id.* at 460-61, even though Maryland law is considered "liberal in excusing demand upon directors." *See* Grill v. Hoblitzell, 771 F.Supp. 709, 712 n. 4 (D.Md.1991). Thus, *Kamen* provides no authoritative or reasoned basis for reconsidering the conclusion that allegations of multiple directorships may contribute to a finding that demand should be excused under Maryland law. In the absence of such authority, the Order concluded that well-compensated service on multiple boards of funds managed by a single fund advisor can, in some circumstances, be indistinguishable in all relevant respects from employment by the fund manager, which admittedly renders a director interested.

Furthermore, *Kamen* is distinguishable on its facts. In *Kamen,* seven of ten purportedly independent directors served on multiple boards. *Id.* Thus, there remained three indisputably independent directors, who could form a litigation committee to impartially consider a shareholder demand to institute a suit. Hanks, *Maryland Corporation Law,* § 7.21[c] at 269, n. 173 (1994-1 Suppl.) (minimum of two directors required to form committee). Here, in contrast, only one of the directors does not serve on multiple Scudder boards, so the Board could not appoint a committee of directors without such attachments to consider a demand, and thus such a demand would be futile. *See* Strougo, 964 F.Supp. at 795.

***6** For these reasons, the motion to reargue will be denied.[FN1]

> FN1. Defendants and the ICI also suggest that this court certify the demand excuse question to the Maryland Court of Appeals pursuant to Md. Courts & Judicial Proceedings § 12-603. However, this proposal was not put before the court on the underlying motion. It is thus inappropriate to consider this question on reargument.

II. *The Order Will Not Be Certified*

Section 1292(b) provides that a district court may certify an interlocutory order for appeal if it is of the opinion that: (1) the order "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion," and (3) an immediate appeal "may materially advance the ultimate termination of the litigation." In considering a request for certification, the district court must carefully assess whether each of the three conditions for certification is met. *German v. Federal Home Loan Mortgage Corp.*, 896 F.Supp. 1385, 1398 (S.D.N.Y.1995); *see also Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir.1959) (certification is to be "strictly limited to the precise conditions stated in the law"). The determination of whether § 1292(b) certification is appropriate under the above standards is in the discretion of the district court. *See Ferraro v. Secretary of U.S. Dept. of Health & Human Services,* 780 F.Supp. 978, 979 (E.D.N.Y.1992); 16 Charles A. Wright, et al., *Federal Practice and Procedure* § 3929 at 140 & n. 23 (1977 & Supp.1996).

Interlocutory appeals under § 1292(b) are an exception to the general policy against piecemeal appellate review embodied in the final judgment rule. Since the statute was enacted in 1958, the Second Circuit has repeatedly emphasized that a district court is to "exercise great care in making a § 1292(b) certification." *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Dist. Corp.*, 964 F.2d 85, 89 (2d Cir.1992); *see also Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 25 (2d Cir.1990). Certification is only warranted in "exceptional cases," where early appellate review "might avoid protracted and expensive litigation." *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 690 F.Supp. 170, 172 (S.D.N.Y.1987); *see also German,* 896 F.Supp. at 1398. Section 1292(b) was not intended "to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation" *Telectronics,* 690 F.Supp. at 172, or to be a "vehicle to provide early review of difficult rulings in hard cases." *German,* 896 F.Supp. at 1398; *see also Abortion Rights Mobilization, Inc. v. Regan,* 552 F.Supp. 364, 366 (S.D.N.Y.1982); *McCann v. Communications Design Corp.*, 775 F.Supp. 1506, 1534 (D.Conn.1991).

The institutional efficiency of the federal court system is among the chief concerns motivating § 1292(b). *See Forsyth v. Kleindienst,* 599 F.2d 1203 (3d Cir.), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1979). The efficiency of both the district court and the appellate court are to be considered, and the benefit to the district court of avoiding potentially unnecessary proceedings must be weighed against the inefficiency of having the Court of Appeals hear multiple appeals in the same case. *See Harriscom Svenska AB v.. Harris Corp.*, 947 F.2d 627, 631 (2d Cir.1991) (where controlling question is whether genuine issues of material fact remain, "the federal scheme does not provide for an immediate appeal solely on the ground that such an appeal may advance the proceedings in the district court"); 16 Wright, Miller & Cooper, *Federal Practice and Procedure,* Jurisdiction 2d § 3930 at 435-36 (1996).

***7** Although there may be substantial grounds for difference of opinion with respect to this court's resolution of the demand excuse issue (*see* Part I of this opinion, above),the question framed by defendants and the ICI is not a "controlling question of law" and is thus not appropriate for interlocutory review.

A controlling question of law may exist if: (1) reversal of the district court's opinion would result in dismissal of the action, (2) reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action, or (3) the certified issue has precedential value for a large number of cases. *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir.1990); *Pereira v. Aetna Casualty & Sur. Co.*, 921 F.Supp. 1121, 1126 (S.D.N.Y.1996); *Chan v. City of New York*, 803 F.Supp. 710, 733 (S.D.N.Y.1992), *aff'd*, 1 F.3d 96 (2d Cir.1993); *Shipping Corp. of India v. American Bureau of Shipping*, 752 F.Supp. 173, 175 (S.D.N.Y.1990).

The issue raised by defendants and the ICI does not fit into any of these three categories of "controlling questions." Reversal on appeal would not necessarily result in immediate dismissal of the action, since plaintiff advanced other grounds for excusing demand that were not expressly considered in the Order. In the event the Court of Appeals reversed the Order, it would likely remand for consideration of these other grounds, rather than dismissing.

Immediate appellate resolution of the question is also unlikely to change the conduct of this litigation. If an appeal does not result in dismissal, there is no reason to believe it will have any significant impact on the conduct of the case.

Defendants and the ICI strenuously contend that the court' s "unprecedented" ruling should be certified, because it may affect a large number of cases and because it could cause a dramatic and expensive restructuring of industry governance practices. As noted in the Order, however, the rule adopted by the court would not eliminate multiple directorships in fund complexes. It would require only that a sufficient number of directors without such multiple directorships-in Maryland, that number is two-serve on each board so that a litigation committee could be convened to consider proposed litigation. Moreover, to the extent that a district court decision such as this carries any persuasive authority, the Order's holding applies only to funds incorporated in Maryland. Under Delaware law, interlocking directorships are not a ground for demand excuse. *See Langner v. Brown*, 913 F.Supp. 260 (S.D.N.Y.1996).

Moreover, as a general matter, rulings on the sufficiency of pleadings are not appropriate for interlocutory review. *See Gottesman*, 268 F.2d at 196. However, decisions on the pleadings may be appropriate for interlocutory review when they present difficult questions of substantive law, rather than the technical sufficiency of the pleadings. 16 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction 2d § 3931 at 458-59 (1996).

*8 In *Gottesman*, the Second Circuit held that interlocutory review of an order denying defendants motion to dismiss for failure to make a pre-suit demand was inappropriate. *Gottesman*, 268 F.2d at 196-197. While *Gottesman* does not support a sweeping proposition that orders denying such motions should not be certified under any circumstances, it reflects the reluctance to burden the Court of Appeals with piecemeal litigation of fact-specific issues such as this.

Defendants also contend that certification is appropriate, because the normal route of appeal after a final judgment is inadequate where, as here, there is a high likelihood of settlement prior before an appealable final order is entered. However, if a likelihood of settlement were a basis for certifying interlocutory orders for appeal, the "floodgates" to piece-meal appeals would truly be opened, for the vast majority of all civil cases settle before a final judgment and often after resolution of dispositive motions.

Accordingly, because the Order does not present a controlling question of law, it will not be certified for immediate appeal.

Conclusion

For the reasons set forth above, ICI's motion to participate amicus curiae is granted, and the motions to reargue or certify for interlocutory appeal are hereby denied.

It is so ordered.

S.D.N.Y.,1997.
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