

# New Jersey Law Journal

VOL. CXCIV - NO.6 - INDEX 355

FEBRUARY 9, 2009

ESTABLISHED 1878

## COMMENTARY

### A Two-Pronged Attack Against Harassment in Public Schools

By Amelia Carolla and Catherine Merino Reisman

On Jan. 21, the U.S. Supreme Court held in *Fitzgerald v. Barnstable School Committee* that parents may sue for violations of Title IX of the Education Amendment of 1962 and simultaneously for violation of 42 U.S.C. § 1983 for peer-on-peer sexual harassment and gender discrimination.

Two years ago, in *L.W. v. Toms River Regional Schools Board of Education*, our state Supreme Court recognized that bullying and teasing at school could violate New Jersey's Law Against Discrimination. Now, with the U.S. Supreme Court's holding in *Fitzgerald*, two federal statutes may also concurrently give rise to a cause of action.

No parent wants to hear that a student is bullying her child in school. Isn't school supposed to be a place where our children are safe? Isn't school supposed to be a place for learning good lessons, not tough ones? Unfortunately, as we are steadfastly finding, this is not always so.

The *Fitzgerald* case involved a kindergartener who reported to her mother that a third-grade boy was bullying her into lifting her skirt on the school bus on the way to school. Her mother reported

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the bullying, and school district administrators interviewed the boy, who denied the allegations. District personnel also interviewed the bus driver and other children on the bus, but they would not corroborate the allegations, so nothing more was done.

Later, the girl told her parents that the boy had also coerced her into pulling down her underpants and spreading her legs. District personnel questioned the boy and other students again, and the local police department conducted an investigation. However, neither the school district nor the police department found sufficient evidence to warrant school discipline or charges.

The district suggested transferring the girl to a different bus or leaving rows of empty seats between the kindergarteners and the older students on the bus. The girl's parents felt this punished their daughter, not the perpetrator. The parents asked that the district move the boy to a different bus or place a monitor on the original bus. The district refused, and the parents began driving her to school instead. The girl continued to report unsettling incidents at school, which the parents reported to the district.

The parents brought suit against the school district's governing body and superintendent, directly under Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681(a), as well as pursuant to 42 U.S.C. § 1983. The section 1983 claim sought to enforce the student's

statutory rights under Title IX as well as her constitutional rights under the Equal Protection Clause.

The Court of Appeals dismissed the parents' § 1983 claims, explaining that Title IX's private remedy was "sufficiently comprehensive" to preclude use of § 1983 to advance statutory claims based on Title IX or constitutional claims alleging gender discrimination. This decision deepened a conflict among the circuits regarding whether Title IX precludes use of § 1983 to redress unconstitutional gender discrimination in schools.

The Supreme Court reversed, settling the conflict in the circuits in favor of allowing causes of action under both laws.

In analyzing whether a statute's remedial provisions preclude resort to § 1983, the Court placed "primary emphasis on the nature and extent of that statute's remedial scheme." Title IX has only a single express enforcement mechanism, 20 U.S.C. § 1682, an administrative procedure that can result in the withdrawal of federal funding for noncompliance.

This is in stark contrast to the statutes where the Court found preclusion of § 1983 claims, which usually include unusually elaborate, carefully tailored, or restrictive enforcement schemes, administrative exhaustion requirements and notice provisions. Thus, parallel and concurrent § 1983 claims under Title IX would not circumvent required procedures, nor allow access to new remedies.

Further, after comparing the substantive rights and protections under Title IX to those guaranteed by the Equal Protection Clause, the Court concluded that Title IX did not preclude §

1983 constitutional suits alleging gender discrimination. Title IX's protections are, said the Court, "narrower in some respects and broader in others" than the remedies available under § 1983 for constitutional violations.

In light of the differences in cover-

age of Title IX and the Equal Protection Clause, as well as the absence of a comprehensive remedial scheme comparable to other statutes, the Court held that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or as a substitute

for § 1983 for enforcing constitutional rights.

Will resort to federal laws stop all harassment and discrimination? Probably not. But clearly every tool is necessary to bring attention to this important issue and protect children in our schools. ■