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201 APR 18 P 2:57
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MEJ

CV 11 1860
Case No.

11 LILAH R., by and through her guardian ad
12 litem, ELENA A.;

13 Plaintiff,

14 vs.

15 ANTHONY SMITH, WILLIAM HUYETT,
16 BERKELEY UNIFIED SCHOOL DISTRICT
17 and DOES 1 through 20;

18 Defendants.

COMPLAINT FOR DAMAGES AND
EQUITABLE RELIEF

- 1. Title IX, 20 U.S.C. § 1681
- 2. Civil Rights, 42 U.S.C. § 1983
- 3. Cal. Civil Code §§ 51 et seq. and 52
- 4. Cal. Gov. Code § 11135
- 5. Sexual Battery
- 6. Negligence

DEMAND FOR JURY TRIAL

INTRODUCTION

LILAH R, a high school student, was subjected to severe and pervasive sexual harassment by a counselor, but has been unable to secure adequate preventative or remedial measures to protect her and other students. Thus, she petitions this Court for redress.

- 1 9. Defendant BERKELEY UNIFIED SCHOOL DISTRICT (“BUSD” or the
2 “DISTRICT”) is the local educational agency, established under the laws of the State
3 of California, responsible for Plaintiff’s education at all times relevant to this action.
- 4 10. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as
5 DOES 1 through 20, and therefore sues these Defendants by such fictitious names.
6 Plaintiff will amend the complaint and allege the true names and capacities of said
7 Defendants when ascertained. Plaintiff is informed and believes that each of the
8 fictitiously named Defendants is responsible in some manner for the occurrences
9 herein alleged, and that Plaintiff’s damages were proximately caused by their
10 actions.
- 11 11. Plaintiff is informed and believes that all times mentioned, each of the named and
12 DOE Defendants was the agent of some or all of the other Defendants, and in doing
13 the acts and making the omissions alleged herein, was acting within the course and
14 scope of such agency and with the permission, authority, and/or ratification of each
15 such co-defendant. Each Defendant is jointly and severally liable for all of the
16 wrongs alleged herein.

17 **STATEMENT OF FACTS**

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- 19 12. The allegations include a number of incidents during the school year in which
20 SMITH came by LILAH’s classroom at different periods of the day, or had a student
21 proctor send for her to visit his office. The constant monitoring of her throughout the
22 day, almost always accompanied by suggestive comments of a sexual nature and/ or
23 physical touching, was offensive and unwelcome. This conduct had the effect of
24 creating an intimidating, hostile and offensive educational environment and caused
25 LILAH increasing mental anguish, as it would for any teen or young adult
- 26 13. In a written statement made by LILAH on April 29, 2010, under penalty of perjury
27 and a series of emails sent from LILAH to the Berkeley High School vice-principal
28 in the days following the written statement, she reported that:

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- a. On April 23, 2010, SMITH “spanked” her buttocks. Two weeks prior to that he told her: “Maybe we can be in contact outside of school [during the summer] so I can share some feelings with you.”
 - b. In approximately January 2010, SMITH asked her what she wore to bed. “Oh, you don’t sleep naked?” he responded.
 - c. “He always hugged me good-bye and ...would put his face in my chest and/or rub my back.” He constantly talked about her hair and told her she was “so beautiful.”...He “[a]lways sized me up, rarely looked at my face.”
 - d. He opened the door to her advanced placement English class one day in early 2010 and said “I haven’t seen you in a while.” When she was sitting in his office, with the door closed and blinds drawn, talking about the YMCA, he asked if she might “work out” with him.
 - e. SMITH was often caressing her thigh (November-December 2009), brushing her hair off her face and leaning in and smelling her neck (February-March 2010). He told her she “smelled really good” (February-March 2010), that she should wear her hair differently or color it or not cut it (December 2009; January-March 2010) and that he could tell she liked warm weather by the clothes she was wearing (April 2010). He came by her various classrooms frequently to take her out of class and speak to her. The talk ranged from small talk (“to chop it up”) to plans she had for holidays or school breaks— not academic counseling matters.
14. SMITH intentionally engaged in a series of acts over the course of the school year, from approximately November 2009 through April 2010, that included following LILAH throughout the school day, standing outside her classroom or summoning her out of classes and making unwelcome and sexual comments and physical contact.

1 This conduct was for no good reason and was a violation of the school district's
2 written sexual harassment policy (BP 4119.11) and illegal under state and federal
3 sexual harassment law.

4 15. By his conduct SMITH harassed LILAH and engaged in the type of conduct that
5 would cause substantial emotional distress to any reasonable person and did in fact
6 cause substantial emotional distress to LILAH. For example, she felt very
7 uncomfortable when he asked to spend time together "shar[ing] some feelings..."
8 On one occasion, her teacher came over to LILAH and asked her if she was okay
9 after SMITH appeared outside her classroom and told her he hadn't seen her for a
10 while. After SMITH asked LILAH if she slept in the nude, it was at that point that
11 she knew she no longer felt comfortable. She "dreaded" it when he always hugged
12 her good-bye after a meeting. She "burst into tears" after leaving SMITH's office on
13 one occasion and at another time when she was called out of chemistry class to meet
14 him, she was "trembling" because she thought she was in trouble.

15 16. Plaintiff is informed and believes that SMTH was put on administrative leave in
16 April or May 2010, while BUSD carried out its investigation, which was initiated on
17 or about April 29, 2010. The investigation included interviews with LILAH's
18 teachers and a three-hour interview of LILAH by the District's law firm. Under
19 Board of Education Policy, the investigation must be completed within 30 calendar
20 days. BP 4119.11

21 17. BUSD's interim personnel director wrote LILAH on July 12, 2010, summarizing
22 LILAH's allegations of harassment by SMITH between November 2009 and April
23 23, 2010 and concluding that the investigation had determined LILAH to be "the
24 more credible witness" and that SMITH had "engaged in inappropriate and
25 unprofessional behavior contrary to District policy." Yet, the letter does not state
26 anything about SMITH's further contact with LILAH in terms of personal conduct
27 or staying away from her. It simply states, without specification, that "the District
28 will be taking appropriate personnel action" against him.

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2 18. Plaintiff is informed and believes that there had been an incident report from a prior
3 investigation of SMITH.

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5 19. Before the start of the current school year, LILAH expressed continued
6 apprehension about returning to school and possibly running into SMITH,
7 despite a verbal assurance from a high school vice-principal and the District
8 Assistant Superintendent for Human Resources that she would be assigned to
9 a new academic counselor on a floor above SMITH's office. When she went
10 to register for classes and pick up her schedule and books on August 30,
11 2010, she asked her older brother to accompany her, as she was fearful of
12 encountering SMITH.

13 20. On September 2, 2010, LILAH's parents obtained a temporary restraining order
14 from the Alameda County Superior Court, requiring SMITH to stay 100 yards away
15 from LILAH and to have no communication with her. Plaintiff's parents also
16 appealed the investigative finding and outcome to the Assistant Superintendent, to
17 Defendant HUYETT and eventually to the Berkeley Board of Education. Despite
18 repeated requests, BUSD continued to refuse to transfer or remove SMITH from his
19 counseling position thereby further subjecting LILAH and other students to possibly
20 continued sexual harassment and creation of a hostile educational environment.

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22 21. In her letter to Plaintiff's parents of September 1, 2010 Assistant Superintendent
23 Ruiz reduced the issue to one of LILAH's "feelings." She also questioned the need
24 for a stay-away court order and intimated that the collective bargaining agreement
25 was an obstacle to any transfer or removal of SMITH. Following an appeal to the
26 Superintendent, Defendant HUYETT informed LILAH's parents in a letter of
27 September 8, 2010 that the conduct was not in fact sexual harassment, as it was
28 neither "severe" nor "pervasive." He also labeled the transfer request as "not

1 reasonable” despite that, as a school counselor, SMITH required regular contact with
2 students. On September 19, 2010, Plaintiff’s parents appealed HUYETT’s
3 determination to the full Board of Education, challenging the lack of remedial action.
4 On November 3, 2010, Defendant HUYETT, in his capacity as Board Secretary,
5 wrote Plaintiff’s parents a four-sentence letter, which reads in pertinent part:

6 “This letter serves to inform you that the Board has considered your
7 appeal and has decided to uphold my decision.”

8
9 **FIRST CLAIM FOR RELIEF**
10 **DAMAGES FOR VIOLATION OF TITLE IX, 20 U.S.C. §1681**
11 **(Against All Defendants)**

12 Plaintiff re-alleges and incorporates by reference each allegation set forth in paragraphs 1
13 through 21.

14 22. BUSD operates an education program or activity receiving federal financial
15 assistance. Under Title IX of the Education Act Amendments of 1972 (20 USC §
16 1681), the school district may not exclude any person, on the basis of sex, from
17 participation in any education program or activity receiving federal financial
18 assistance, or deny benefits on the basis of sex or subject that person to sex-based
19 discrimination.

20 23. SMITH’s conduct constituted “unwelcome sexual advances...and other verbal,
21 visual or physical conduct of a sexual nature” which “interfer[ed] with [LILAH’s]
22 education...creating an intimidating, hostile, or offensive educational
23 environment....”

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25 24. The harassment perpetrated by SMITH was so severe, pervasive and persistent and
26 so objectively offensive that it effectively barred LILAH’s access to educational
27 opportunities or benefits, and/or limited her ability to participate in, or benefit from,
28 the education program, and/or created a hostile or abusive educational environment.

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25. HUYETT and BUSD officials acting under his direction failed to respond adequately, which failure amounted to deliberate indifference to LILAH's rights and in so doing discriminated against LILAH in its programs and activities, in violation of 20 USC § 1681.
26. Under federal Department of Education regulations, a school district "shall adopt and publish grievance procedures providing for *prompt* and equitable resolution of student and employee complaints" about sexual harassment. 34 CFR § 106.8(b) [emphasis added]. Office for Civil Rights (OCR) guidelines add that a "critical issue" is whether the District "recognized that sexual harassment has occurred" and took "*prompt and effective* action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects." Preamble, 2001 *Guidance* [emphasis added].
27. In evaluating the promptness and equitably of a district's grievance procedures, OCR determines whether the parties have been given notice of the outcome of the complaint. 2001 *Guidance* ("Prompt and Equitable Grievance Procedures") and note 102 (where alleged harasser is a non-student, FERPA does not limit district's ability to inform complainant of disciplinary action taken). Berkeley's interim personnel director merely wrote in his July 12, 2010 letter to LILAH: "Please be advised that the District will be taking appropriate personnel action against Mr. Smith." BUSD also violated its own deadline for "promptly and thoroughly investigat[ing]" the complaint concerning LILAH. Its investigation was not completed until July 12, 2010 - approximately 42 days beyond the deadline stated in its own policy, BP 4119.11.
28. In terms of appropriate action, it was incumbent on the DISTRICT to take into account the potential for SMITH, in his position as a counselor in the current academic year, to create a hostile or abusive educational environment for LILAH and other students. Even without any prior incidents, the severity, pervasiveness

1 and/or persistence of SMITH's conduct should have been enough to question his
2 continued presence as a counselor at Berkeley High School. Defendant HUYETT
3 made a reference to a "prior investigation" of SMITH, but "assured [LILAH's
4 parents] that... the District [considered] any past complaints that may have been
5 raised, and whether such complaints were substantiated and/or admissible."
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7 29. The BUSD sexual harassment grievance procedures do not contain reasonably prompt
8 timeframes for major stages of the complaint process, i.e. the various hierarchical levels
9 of review, up to and including the Board of Education. The policy is silent as to the
10 process and timeframe for appeals at each level, stating only: "All decisions made under
11 this procedure may be appealed by the aggrieved person to the [Assistant
12 Superintendent, and to the] Superintendent and, thereafter, to the Board." BP 4119.11
13 ("Appeal and Disciplinary Procedures") Following HUYETT's denial of the appeal,
14 the full board did not communicate any action on this complaint for more than six
15 weeks, from September 19 to November 3, 2010, despite the fact it had regularly
16 convened four times in that period.

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18 30. As a direct and proximate result of this conduct, LILAH has suffered damages for
19 which she is entitled to compensatory damages and injunctive relief, and because she
20 has been compelled to employ attorneys, is entitled to attorneys' fees pursuant to 42
21 USC § 1988.

22 **SECOND CLAIM FOR RELIEF.**
23 **DAMAGES FOR DEPRIVATION OF FEDERAL RIGHTS**
24 **42 U.S.C. § 1983**
25 **(Against All Defendants)**

26 Plaintiff re-alleges and incorporates by reference each allegation set forth in paragraphs 1
27 through 30.
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- 1 31. By engaging in the above-described misconduct and by acting pursuant to its
2 custom, practice and policy, Defendants acting under color of state law, violated
3 LILAH's federally-protected civil rights under 42 U.S.C. § 1983, including LILAH's
4 right to be free from discrimination on the basis of sex.
- 5 32. In doing all of the acts complained of herein, Defendants acted intentionally,
6 recklessly and/or with deliberate indifference to LILAH's well-being, all under color
7 of state law to deprive LILAH of her constitutionally-protected rights to be free from
8 sex-based discrimination.
- 9 33. As a direct and proximate result of the aforementioned acts, LILAH has suffered and
10 continues to suffer humiliation, anxiety, indignity, and mental and emotional
11 anguish.
- 12 34. Pursuant to 42 U.S.C. § 1988(b), Plaintiff is entitled to recover reasonable attorneys'
13 fees and costs incurred in bringing this action.

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15 **THIRD CLAIM FOR RELIEF**
16 **DAMAGES FOR VIOLATION OF UNRUH CIVIL RIGHTS ACT**
17 **Cal. Civ. Code §§ 51 *et seq.* and 52 *et seq.***
(Against BUSD and SMITH)

18 Plaintiff re-alleges and incorporates by reference each allegation set forth in paragraphs 1
19 through 34.

- 20 35. BUSD, a public school district, is a business establishment within the meaning of the
21 Unruh Civil Rights Act. As such, it is liable for any damages if it denies or aids a
22 denial of a right, or denies full and equal accommodations, advantages, facilities,
23 privileges or services, based on sex, or makes a determination or distinction contrary
24 to the Unruh Act.
- 25 36. The acts perpetrated by SMITH and BUSD wrongfully, arbitrarily and intentionally
26 discriminated against LILAH, contrary to Civil Code sec. 51, and denied or aided in
27 the denial, on the basis of sex, of her right to full and equal accommodations,
28 advantages, facilities, privileges or services in public school.

1 37. As a direct and proximate result of this conduct, LILAH has suffered, and will
2 continue to suffer, damages for which she is entitled to compensatory and punitive
3 and statutory damages and to treble actual damages, but in no case less than \$4000
4 per violation, and because she has been compelled to employ attorneys, she is
5 entitled to attorneys' fees pursuant to Cal. Civil Code § 52.

6 **FOURTH CLAIM FOR RELIEF**
7 **EQUITABLE RELIEF FOR VIOLATION OF CAL. GOV'T CODE § 11135**
8 **(Against Defendant BUSD)**

9 Plaintiff re-alleges and incorporates by reference each allegation set forth in paragraphs 1
10 through 37.

11 38. Section 11135(a) of the California Government Code provides in pertinent part: "No
12 person in the State of California shall, on the basis of . . . sex... be unlawfully denied
13 full and equal access to the benefits of, or be unlawfully subjected to discrimination
14 under, any program or activity that is conducted, operated, or administered by the
15 state or by any state agency, is funded directly by the state, or receives any financial
16 assistance from the state."

17 39. At all times relevant to this action, Defendant BUSD received financial assistance
18 from the State of California.

19 40. Through its acts and omissions described herein, Defendant BUSD has violated and
20 continues to violate Government Code § 11135 by unlawfully denying LILAH the
21 benefits of, and unlawfully subjecting her to discrimination under, the programs and
22 activities of Defendant.

23 41. Plaintiff is informed, believes, and thereon alleges that Defendant BUSD
24 discriminated and continues to discriminate against LILAH insofar as its policies
25 and practices do not adequately address complaints of sexual harassment.

26 42. Because the discriminatory conduct is ongoing, declaratory and injunctive relief are
27 appropriate remedies, as well as reasonable attorneys' fees incurred in bringing this
28 action.

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FIFTH CLAIM FOR RELIEF
SEXUAL BATTERY
(Against Defendant SMITH)

Plaintiff re-alleges and incorporates by reference each allegation set forth in paragraphs 1 through 21.

43. Defendant SMITH acted with the intent to cause a harmful or offensive contact with an intimate part of LILAH (her buttocks), resulting in a sexually offensive contact with her. Further, Defendant SMITH acted to cause an imminent apprehension of a harmful and offensive contact with an intimate part of LILAH, resulting in a sexually offensive contact with her.

44. SMITH is therefore liable for general and special damages.

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SIXTH CLAIM FOR RELIEF
NEGLIGENCE
(Against all Defendants)

Plaintiff realleges and incorporates by reference each allegation set forth in paragraphs 1 through 21.

45. DEFENDANTS owe a duty to LILAH to use due care to prevent sexual harassment, sexual battery (Calif. Civil Code § 1708.5), and other tortious behavior from occurring, and, upon learning of such acts, to take prompt and appropriate action to remedy the situation.

46. DEFENDANTS failed to use the due care of a reasonably prudent person, and that required by statutory, regulatory, administrative and common law standards, including in supervising, instructing, training and disciplining SMITH.

47. As a direct and proximate result of this conduct, LILAH has suffered physical and emotional injury for which she is entitled to compensatory damages.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for relief as follows:

- 3 1. General damages according to proof;
- 4 2. Special damages according to proof;
- 5 3. For treble damages, but in no case less than \$4,000 per violation under the first and
- 6 third causes of action;
- 7 4. For declaratory and injunctive relief ordering Defendant BUSD to enact policies,
- 8 procedures and training in conformity with all California and federal law prohibiting
- 9 sexual harassment and discrimination in public schools and which provide for
- 10 prompt, equitable and effective resolution of student complaints about sexual
- 11 harassment;;
- 12 5. Costs of suit incurred, including reasonable attorneys' fees incurred; Punitive
- 13 damages against Defendant SMITH;
- 14 6. Such other relief as the Court deems necessary and proper.

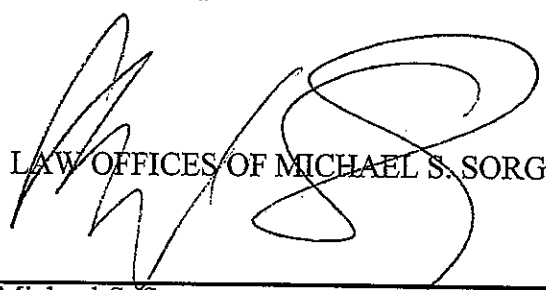
15 **DEMAND FOR JURY TRIAL**

16 Plaintiff hereby demands trial by jury on all her legal claims pursuant to Federal Rules of

17 Civil Procedure 38(b).

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19 DATED: April 18, 2011

By:  LAW OFFICES OF MICHAEL S. SORGEN

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Michael S. Sorgen
22 Attorneys for Plaintiff

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