

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

KIMBERLY LOPEZ, as guardian, next
friend and parent of G.L., a minor,

Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor
Applicant,

v.

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY,

Defendant.

NO. 3:07-CV-799

JURY DEMAND

Judge Echols

Magistrate Judge Griffin

COMPLAINT IN INTERVENTION

The United States of America, Plaintiff-Intervenor, alleges for its complaint in intervention as follows:

PRELIMINARY STATEMENT

1. The United States files this complaint in intervention to redress discrimination on the basis of sex in violation of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681-88.

2. The United States brings this complaint solely against the Metropolitan Government of Nashville and Davidson County ("Metro" or "District").

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1345.

4. Venue is proper pursuant to 28 U.S.C. § 1391(b) because Defendant Metro is located within the Middle District of Tennessee, and the claims alleged in this complaint arose from events that occurred within this judicial district.

PARTIES

5. Plaintiff Kimberly Lopez is the natural mother of G.L., a special needs child who suffers from autism, mild mental retardation, emotional disturbance, speech impairment and language impairment. G.L. formerly attended elementary school in the Metropolitan Nashville Public Schools System ("MNPS").

6. Defendant Metro is the political entity responsible for oversight and management of MNPS.

7. Defendant Metro is a recipient of federal financial assistance.

PROCEDURAL BACKGROUND

8. On July 30, 2007, Plaintiff filed a complaint against Metro in state court on behalf of G.L. "individually, and as a member of a class of similarly-situated individuals." The complaint sought relief under common law tort principles, the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq., and 42 U.S.C. § 1983. On August 2, 2007, Defendant removed the case to federal court.

9. On April 30, 2008, Plaintiff filed a Fourth Amended Complaint that added new claims for relief under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

10. On July 2, 2008, Magistrate Judge Griffin issued a case management order which states that Plaintiff will not seek class certification.

FACTUAL ALLEGATIONS

11. G.L. suffers from several disabilities, including autism, mild mental retardation, emotional disturbance, speech impairment and language impairment.

12. G.L. began attending school in the District in August 2006.

13. Shortly after the 2006-07 school year commenced, the District assigned G.L. to Genesis Academy ("Genesis").

14. Genesis is a private school that contracts with Metro to provide free and appropriate education to certain special needs students who the District deems unable to attend other public schools within Metro because they require increased supervision, including students with emotional disorders, behavioral disorders and learning disabilities.

15. According to Terry Adams, the Founder and Executive Director of Genesis, the “mere fact” that a student attends Genesis should put Metro on notice that the student is “at risk of creating an environment that could be construed as dangerous or at risk.”

16. G.L. was initially transported to Genesis in a regular-sized school bus operated by Metro.

17. G.L. was harassed by other male students assigned to this bus, who instructed G.L. to “throw” gang signs and placed stolen objects into his pockets.

18. On or about April 2007, Plaintiff requested that Metro assign a monitor to G.L.’s bus.

19. Metro denied Plaintiff’s request for a bus monitor.

20. Plaintiff alternatively requested that G.L. be transferred to a smaller school bus, and Metro agreed to assign G.L. to a small special needs school bus.

21. Unbeknownst to Plaintiff, K.H. – a nineteen-year old boy with a history of sexual misconduct – was assigned to the same bus.

22. K.H. suffers from mental retardation, bi-polar disorder, emotional disturbance and attention deficit hyperactivity disorder.

23. Before assigning K.H. to Genesis, Metro knew that K.H. had committed acts of sexual misconduct at Madison School, a K-12 special education school operated by Metro.

24. On September 27, 2004, the faculty at Madison School established a “Safety Plan” for K.H. that required him to be escorted by an adult to the restroom and the lunchroom, and either escorted or supervised by an adult while moving between classes.

25. Even after the Safety Plan was implemented, Metro received complaints from

students and parents that K.H. was continuing to engage in sexual misconduct on his assigned school bus.

a. A January 18, 2005 memorandum copied to Metro's Executive Director of Special Education and Special Education Coordinator recounts a complaint that K.H. – then seventeen years old – exposed his penis to a first-grade boy while riding the school bus, after previously threatening to “do it to the new little kid.” K.H. received a ten-day suspension from school as a consequence of this incident.

b. In November 2004, K.H. was involved in “a series of repeated bus incidents of [a] sexual nature including verbal threats to intimidate,” according to a Functional Behavior Assessment (“FBA”) conducted by Metro officials on February 4, 2005.

c. The FBA further states that “if [K.H.] is closely supervised at all times these behaviors do not occur. Must escort [K.H.] everywhere. Having a bus driver driving his bus is NOT adequate supervision” (emphasis in original).

d. School officials at Madison developed a “Bus Safety Plan” for K.H. Under this plan, K.H. was permanently assigned to the front right hand seat of the bus, and the remaining right hand seat as well as both front left side seats were to be left vacant. Large X's were taped to the front four seats of K.H.'s bus to remind other students not to sit in those seats.

26. In April 2006, Metro removed K.H. from the Madison School and assigned him to Genesis. According to Terry Adams, the Executive Director of Genesis, Metro transferred K.H. from Madison to Genesis because he required close monitoring and supervision due to his prior history of sexual misconduct.

27. According to Sandra Burton, the Metro official responsible for assigning students with disabilities to special needs school buses, she was never informed about K.H.'s prior sexual misconduct or told that K.H. was a potential threat to other students.

28. Metro did not implement the bus safety plan it developed for K.H. at the Madison School on the bus that it used to transport K.H. to Genesis.

29. On May 7, 2007, K.H. sexually assaulted G.L. and compelled him to perform oral sex while riding a special needs school bus operated by Metro (the "May 7 incident").

30. At the time of the May 7 incident, G.L. was nine years old and K.H. was nineteen years old.

31. Terrilyn Harris, K.H.'s mother, had a meeting with Metro officials prior to the May 7 incident to discuss K.H.'s inappropriate sexual behavior. The officials at this meeting led Harris to believe that K.H. would be permanently assigned a bus monitor while he attended Genesis.

32. Prior to the May 7 incident, K.H. was assigned a bus monitor for approximately one and a half months, but the monitor was removed without Harris' knowledge or consent.

33. Prior to the May 7 incident, the District had no policy or protocol for informing officials in Metro's Transportation Department when a student with severe behavioral problems or a history of injuring other children was referred for assignment to a bus.

34. Christopher Gaines, the regular driver of the bus that transported G.L. and K.H. to Genesis, had no knowledge of K.H.'s history of sexual misconduct.

35. On the day of the incident, G.L.'s bus was driven by Gloria Smith, a substitute bus driver.

36. No one at Metro informed Gaines that Smith would be the substitute driver for his bus, or provided Gaines with an opportunity to convey instructions to Smith.

37. According to officials at Genesis, no one from Metro informed Genesis that a substitute bus driver would be driving Gaines' bus on May 7.

38. According to Sandra Burton, Metro's special education bus route coordinator, a video recording of the May 7 incident reveals that G.L.'s head went down below the back of the seat two or three times, for approximately three seconds each time.

39. K.H. admitted to officials at Genesis that he told G.L. to perform oral sex, and that G.L. complied.

40. Between May 7 and May 14, 2007, no one at Metro informed G.L.'s parents that G.L. had been sexually assaulted.

41. Between May 7 and May 14, 2007, no one from Metro informed Gaines that a sexual assault had occurred, or instructed Gaines to take additional precautions to keep K.H. separated from G.L.

42. After the May 7 incident, G.L. and K.H. continued to be transported on the same bus together for one week until Metro notified Genesis on May 14, 2007 that G.L. had been sexually assaulted.

43. Since the May 7 incident, G.L. has engaged in disturbing behavior that includes, but is not limited to, squeezing his genitals to the point of bruising, asking his mother to cut off his genitals, urinating in his home in inappropriate places, and defecating in his bedroom.

44. In October 2007, G.L. was committed to a residential treatment facility in Memphis, Tennessee. G.L. is currently institutionalized at the Middle Tennessee Mental Health Institute.

45. In the opinion of Sandra Burton, the May 7 incident would not have occurred if a bus monitor had been riding the bus.

46. A Genesis official has asserted that prior to the May 7 incident Genesis asked Metro to place bus monitors on the buses transporting students to Genesis.

47. A Genesis official has asserted that Genesis informed Metro prior to the May 7 incident that monitors were necessary because the students with disabilities who attended Genesis created difficulties that could not be adequately managed or supervised by a bus driver alone.

48. A Genesis official has asserted that prior to the May 7 incident Metro agreed on the need for bus monitors on the buses transporting students to Genesis, but informed Genesis that the District did not have sufficient funds to hire such monitors.

49. According to an official at Genesis, Metro informed Genesis that the school was prohibited from including bus monitors as an accommodation in a student's Individual Education

Plan (“IEP”). A Genesis official has testified that including a bus monitor on a child’s IEP would require Metro to furnish the monitor.

50. The May 7 incident is not the only sexual assault that Metro is aware of involving two students with disabilities on a school bus operated by Metro. See, e.g., Staehling v. Metropolitan Government of Nashville and Davidson County, No. 3:07-CV-797 (M.D.Tenn.); Functional Behavior Assessment of K.H., conducted February 4, 2005 (produced to United States at Bates Number PO-000642).

51. Prior to October 2006, officials in the District’s Transportation Department and Special Education Department agreed that the District needed to assign additional bus monitors to special needs school buses.

52. Despite the acknowledged need for additional bus monitors on special needs school buses, the District failed to hire these monitors because the Transportation Department and Special Education Department could not agree on which department was responsible for funding the monitors.

CLAIM FOR RELIEF

53. The United States incorporates by reference the allegations set forth in paragraphs 1 through 52 above.

54. Defendant Metro’s deliberate indifference to known instances of severe, pervasive and objectively offensive sexual harassment of students with disabilities transported on Metro school buses effectively bars the students’ equal access to educational opportunities or benefits in violation of Title IX of the Education Amendments of 1972.

55. Unless enjoined by this court, Metro will continue to violate Title IX.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court:

a. Declare that Metro has discriminated against G.L. on the basis of sex by failing to address, prevent and remedy the harassment to which he was subjected, thereby denying G.L.

equal access to its educational activities and services in violation of Title IX of the Education Amendments of 1972.

b. Permanently enjoin Metro, its officers, agents, employees, successors, assigns and all persons in active concert or participation with Metro from unlawfully discriminating against students with disabilities on the basis of sex.

c. Order Metro to develop, adopt and expediently implement a comprehensive plan that will ensure a safe, secure and harassment-free environment for all students with disabilities who are transported on Metro school buses.

d. Provide any and all relief necessary to compensate Plaintiff for Metro's acts of discrimination against G.L.

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