No. 22-1830

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

M.L., a minor, by and through her father and next friend, D.L.,

Plaintiff–Appellant,

v.

CONCORD SCHOOL DISTRICT; SCHOOL ADMINISTRATIVE UNIT 8,

Defendants–Appellees.

On Appeal from a Final Order of the
United States District Court for the District of New Hampshire (Concord)
Case No. 1:18-cv-327, Hon. Paul J. Barbadoro

BRIEF FOR APPELLANT AND VOLUME I OF THE APPENDIX

Jim Davy
CA1 Bar Id. 1205361
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Counsel for Appellant

Feb. 27, 2023

CORPORATE DISCLOSURE STATEMENT

M.L. is an individual. She has no parent corporation, and no publicly held corporation owns any portion of her.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

Other Authorities

Rules

INTRODUCTION

When a classmate sexually assaulted M.L. on their bus to school, employees of the School District Appellees mishandled it in virtually every way possible. Initially, they took her report without even opening an investigation. They brushed aside her assailant privately approaching the School Resource Officer to speak "man to man" and share that he "knew what he did was wrong." JA 275. And they declined to impose any responsive measures at all, including keeping her and the assailant from riding on the same bus. In post-assault claims like M.L.'s, courts have repeatedly held that a funding recipient school acts with deliberate indifference when its actions make the student liable to further harassment after an assault. Here, however, the School District did not merely expose M.L. to *possible* further encounters with her harasser—its actions ensured that she repeatedly *actually* faced repeated post-assault harassment and bullying by text message and in person, as even the School District later acknowledged. When the School District finally did open an investigation, it imposed a no contact order that her assailant quickly and repeatedly violated. Appellees took no action in the face of that failure except to remind him of the order—which ensured that M.L. even faced subsequent retaliation at the school from her assailant's father. Instead, Appellees' imposed burdens on M.L. to limit her own access to educational benefits to protect herself from future harassment. The District Court erred by crediting the ineffective steps the School District took, including by construing facts in the School District's favor, and by failing to consider

or apply precedent about funding recipient schools' responsibilities to act effectively to stop harassment.

While the School District's limited and ineffective attempts to protect M.L. from further post-assault harassment would suffice for a jury to find deliberate indifference, a reasonable jury could also find deliberate indifference in the School District's unreasonable, poorly executed investigations. Appellees' investigations reveal adults seemingly determined to ignore strong evidence of a sexual assault: discounting or dismissing statements and facts demonstrating likely culpability of M.L.'s assailant; accepting or inventing implausible explanations for damning admissions spoken aloud and written in text messages by M.L.'s assailant; and assuming consent based upon purported body language and upon long-rejected stereotypes. The District Court ultimately treated the School District's dithering and errors during the investigatory process as evidence that the School District engaged in substantial process that could not amount to indifference. But that treatment made two key and interlinked errors. First, it presumes that the School District ultimately reached the right outcome, and second, it requires construing numerous facts in favor of the School District. If the District Court had construed the numerous facts suggesting that an assault had occurred in favor of M.L., as required, and considered the School District's investigation in that context, it would have concluded that a reasonable jury could find deliberate indifference from the School District Appellees' post-assault actions and omissions. This Court should do this same, and reverse the District Court's grant of summary judgment.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, as Plaintiff-Appellant M.L. appeals from a final judgment of the United States District Court for the District of New Hampshire. The trial court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the complaint alleged claims pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. A final order was entered on Sept. 30, 2022 that disposed of all claims. JA 2-3. The Notice of Appeal was timely filed on Oct. 27, 2022. JA 1.

QUESTION PRESENTED

Whether the District Court erred by improperly discounting more than sufficient evidence from which a reasonable jury could find that the School District acted with deliberate indifference to an ongoing, substantial risk of severe sex-based harassment, of which it had knowledge and an ability to stop.

Proposed answer: Yes.

STATEMENT OF THE CASE

I. Statement of Facts

A. L.M. sexually assaults M.L. on the bus to school.

On November 29, 2017, M.L. was sexually assaulted on the school bus that she was riding to Deerfield High School. L.M., a fellow student, began by kissing her, but quickly escalated to groping her over her clothes, and then, unbuckling her belt, shoving his hand underneath her clothes, and penetrating her with his finger. *E.g.* JA 180; JA 225. He also began touching himself for the purpose of his own sexual gratification. *Id*. During the course of the assault, M.L. froze in shock and as a result of the trauma. JA 231. The bus driver, Marie Bolster, shouted at L.M., which ended the assault—and led L.M. to threaten the bus driver on his way off the bus. JA 158; JA 226.

Substantial evidence supports this. For one thing: M.L.'s own testimony. For another thing, the bus driver's observations, including about M.L.'s frozen, shocked demeanor in the immediate aftermath. JA 277-78; JA 155 (describing M.L. having "walked stiffly"). Most notably, however, L.M.'s own actions in the immediate aftermath of the assault demonstrate his culpability. L.M. texted his girlfriend, S.D., that "I feel sick to my stomach," because "I did something horrible," JA 261, which he characterized as "something wrong." JA 262. He described himself as "so fucked up in so many ways," and lamented that "I lose everyone because I . . . do something wrong to them." JA 262. He also, on his way off the bus, threatened the bus driver when she attempted to admonish him. Finally, he texted M.L. herself, in which he admitted that he knew had made a mistake.

B. The school inexplicably fails to act in the immediate aftermath, exposing M.L. to further harassment.

After the assault, the school initially failed to take meaningful action. The bus driver, Marie Bolster, notified M.L.'s father about L.M. having done something to M.L. on the bus—she didn't know exactly what. JA 277. When her father raised it with her, M.L. confirmed to her father that something had happened, although began crying uncontrollably. JA 227. She could not initially bring herself to share more than that L.M. had kissed and touched her without her consent. JA 121. Upon learning this, her father called the school, explaining to Assistant Principal ("AP") Corkum what had happened. JA 121. AP Corkum and School Resource Officer ("SRO") Mark Hassapes interviewed M.L. JA 121. Although M.L. felt uncomfortable giving the full details to two older male adults, she nevertheless explained to them that L.M. had kissed and touched her without her consent. JA 122.

AP Corkum, AP Thomas Crumrine, and SRO Hassapes also interviewed L.M. on Nov. 30. JA 122. He initially denied that he had even kissed M.L., JA 269, JA 122, but gave conflicting oral and written statements. JA 122; JA 151 (allowing that "from another point of view it might have looked like more"). After his interview, he privately approached SRO Hassapes, asked to speak with him "man to man," and explained that it had been "more than a kiss," and that he "knew what he did was wrong." JA 275, JA 123, JA 130. Nobody—not AP Corkum, SRO Hassapes, AP Crumire, or anyone else—asked L.M. at any point what had happened that was "more than a kiss" or why it had been "too far." JA 267 (Corkum deposition). AP Crumrine asked one follow up question, and accepted at face value L.M.'s claim that he and

M.L. were "now on good terms," despite L.M. asserting that on the day that she had made a statement about him assaulting her. JA 130-31. The School District also received a statement from Ms. Bolster, the bus driver, in which she emphasized that she could tell something wrong had happened. *E.g.* JA 6. Instead of accounting for or addressing any of the numerous pieces of information suggesting L.M. had assaulted M.L., the School District initially declined to officially open an investigation, JA 124; JA 130, declined to take any disciplinary action, JA 124; JA 130, and declined to impose any measure that might have protected M.L. from a substantial risk of further harassment. JA 124; JA 130.

And indeed, the School District's[1] failure to take any action did in fact expose M.L. to further sex-based harassment. Although M.L. had texted L.M. after the assault to say that she wanted nothing more to do with him, JA 228, the School District's decision not to act left them on the same bus, and on December 4th, he sat near her again, forcing her to move away from him—although this did not "substantively change [the School District's] understanding of the situation." JA 124; JA 130. On December 5th, L.M. sat closer to her again, forcing her to move closer to the driver. JA 164. Ms. Bolster, the driver, not only observed L.M. follow M.L. up the bus as she changed seats to get away from him, but walked up and down the aisle to check on their proximity, and eventually requested other students stagger their departure from the bus to make sure there was space between them. JA 164. That day, L.M. also contacted both M.L. and M.L.'s brother, asking for M.L.'s father's

[1] When used throughout this brief, "the School District" refers to the Appellees.

contact information, *e.g.* JA 164, which he used to attempt to get in touch with M.L.'s father. JA 124. He also followed M.L. in the halls at school, JA 164, including in places where M.L. had never seen him before and places she intentionally went to try to avoid him. JA 181. All of this was extremely traumatic in the wake of the assault, and undermined M.L.'s equal access to educational benefits at the school.

C. The school finally opens an investigation, and imposes ineffective restrictions on L.M.

The incidents on December 5th forced M.L. to seek help from the School District again. She made another statement that detailed L.M.'s post-assault actions, including that he had contacted her father; that he had been following her at school; and that he had repeatedly moved closer to her on the bus. JA 124, JA 164. The School District, finally, opened an official investigation on December 6th.

AP Corkum began the investigation. But after M.L. and M.L.'s mother explained that M.L. had difficulty discussing the facts of the assault with men, AP Corkum and AP Crumrine had AP Chali Davis, a woman, interview M.L. JA 125. In talking to AP Davis, M.L. felt more comfortable detailing the full scope of the assault than she had to AP Corkum and SRO Hassapes, both men. So, she told AP Davis that the assault had been more than unwanted kissing, and had included L.M. groping her and digitally penetrating her without her consent. JA 136. In the course of the interview, AP Davis referred M.L. for counseling, and asked her what supports she thought might help her in the wake of the assault. JA 137. M.L. made two simple requests: she did not want to remain on the same bus as L.M., and she did not want to see him at school. JA 231.

AP Davis also interviewed L.M. and his father. L.M. told a new story that differed from his already inconsistent prior oral and written statements to AP Crumire and SRO Hassapes. AP Davis told L.M., in the presence of his father, not to contact M.L. The School District also finally obtained the surveillance video of the bus from November 29th. JA 9. The video was apparently of low quality. *Id*. Also, because of the angle, it did not show anything that happened below the top of the seat—as virtually all of the most serious conduct that M.L. described, including him groping her and digitally penetrating her, had. JA 10. The viewers deemed the video inconclusive. But it did confirm several aspects of M.L.'s story, regardless—it showed L.M. following her to a second seat, and confirmed Ms. Bolster's account that he had threatened her when she confronted him at the end of the ride. Nobody interviewed Ms. Bolster. JA 230.

Despite AP Crumrine calling it "the most complicated and convoluted case I have worked on" as an administrator, JA 143, the School District wrapped the investigation up within just three business days of opening it. On December 11th, the School District concluded that L.M. had made unwanted physical contact with M.L. on the bus, and had been insubordinate to the bus driver. JA 125; JA 149. The School District suspended him for 10 days, and issued him a no contact order regarding M.L.—he was not to contact her, was supposed to stay away from her at school, and avoid antagonizing her via social media. JA 125; JA 133. Despite this, however, the School District allowed him to remain on the same bus as M.L., and merely assigned him a specific seat. JA 125; JA 143.

The no contact order failed virtually immediately. This owed partly to the School District setting it up to fail. First, as already noted, the School District affirmatively refused to change bus assignments, leaving L.M. and M.L. on the same school bus. M.L. felt extremely uncomfortable with this, and ended up having to stop taking the bus. JA 11. Second, the School District did not even notify faculty and staff of the contents or existence of the no contact order, including most notably Ms. Jared, who taught L.M. and M.L. math in back-to-back periods in the same classroom. JA 296. Ms. Jared therefore did not have any idea that L.M. and M.L., who encountered each other every week during the passing of those class periods, were not supposed to have any contact with each other. JA 296-99; JA 238. Third, regarding one specific schedule overlap, the school reassigned M.L., not L.M., and made no effort to address M.L. having had to eat in the library instead of the cafeteria to avoid L.M. JA 231-32. This gave the impression that M.L. had done something wrong, rather than L.M.

The failure also owed partly to the School District taking no action when L.M. virtually immediately flaunted the restrictions. Superintendent Forsten's notes from late January noted that "L.M. has shown inability" to abide by the no contact order. JA 291. Indeed, L.M. harassed M.L. directly and via third parties as if no order existed. L.M.'s girlfriend, S.D., began texting people (inaccurately) that M.L. was suing L.M. and was going to ruin his life. Notably, however, S.D. also allowed to at least one other student, J.W., that L.M. had "gone too far." JA 181. A.B., who had been a close friend of M.L., told her that based upon what he'd heard, she could not have been raped. JA 181. L.M. himself kept passing M.L. in the halls, even when she varied her route to try to avoid places where she knew he would be. JA 181. And most

flagrantly, L.M. directly texted one of M.L.'s friends saying that he intended to "ruin her life" and that it was "burying time." JA 283-84.

M.L. and her family repeatedly followed up with the school about all of these issues. The School District, instead of taking meaningful action, simply reminded L.M. of the existence of the no contact order. *E.g.* JA 134. To the extent that it took any substantive action, it again imposed the responsibility of avoiding harassment on M.L., moving her to an all-female Commons with different students, JA 137-38, and "provided her with options on how to prevent" L.M. from running into her. JA 138. The School District did this rather than impose any consequences on L.M. for violating the no contact order. Indeed, when it did finally reopen its investigation in light of the substantial retaliation, it admonished *M.L.* that "she is to have no contact with the alleged perpetrator either directly or indirectly," JA 172, despite no evidence that she had ever initiated contact with L.M. after he assaulted her.

D. The school reopens its investigation, and bungles it badly, forcing M.L. out of school.

When M.L.'s family kept complaining about L.M. harassing M.L., the School District reopened its initial investigation. JA 138; JA 172. Hardly stopping the harassment of M.L., the very reopening of the investigation only prompted additional retaliation against M.L. Shortly after the school reopened the investigation, L.M.'s *father* came to campus, where he sought out and "stared down" M.L. in the school cafeteria. JA 259. The School District knew about this, and took no action. JA 260.

AP Davis led the reinvestigation. JA 138. This time, AP Davis knew much more than previously. During the reinvestigation, AP Davis knew of L.M. threatening M.L.

directly and through intermediaries—including that he would "ruin her life" and that it was "burying time"—repeatedly encountering her around their back-to-back math classes, M.L. avoiding her own bus so as not to have to share it with L.M. JA 13-14. Similarly, AP Davis knew that L.M.'s girlfriend was texting inaccurate information about the situation to other students in an attempt to undermine M.L. JA 212. This time, AP Davis had L.M.'s text messages in which he said that he felt "sick to my stomach" because he had done "something horrible." AP Davis also had information from other students that L.M. had been "manipulative, mean, and possessive" toward S.D., and "threatened to kill himself" when she broke up with him—similar to a different girl he dated before who "had the same issues with him." JA 292; JA 185. A prior romantic partner described him as "a compulsive liar." JA 202. Other students also reported that L.M. "has the idea that girls aren't as smart as guys." JA 292. And the School District learned that L.M. "will be more forceful" if he "doesn't get what he wants," including having previously "got physical when she didn't want to" with another girl by trying to "put his hand up her dress." JA 198. Although she actively sought it out, AP Davis included none of this contextual information about L.M. in her final report.

AP Davis also failed to even seek out or consider other relevant information. She still declined to interview the bus driver, Ms. Bolster, or consider anything that Ms. Bolster had shared in her initial report—including details about how M.L. had seemed "frozen" and traumatized in the immediate aftermath of the assault. JA 15. She declined to speak to M.L.'s school counselor, who would have (and later did) explain that M.L. presented like a classic victim of sexual assault. JA 232.

During the reinvestigation, AP Davis, AP Crumrine, and SRO Hassapes watched "slightly improved quality" video of the bus incident. JA 290. AP Crumrine and SRO Hassapes did not feel that it changed their prior conclusion about whether L.M. had assaulted M.L. on the bus. JA 243. But AP Davis used the purportedly higher quality video to argue, this time, that M.L. had pulled L.M. toward her when he was on top of her and kissing her—and therefore actively consenting. JA 297; JA 301; JA 139. AP Davis described what had occurred as "an intense physical interaction," JA 175, but also sharply equivocated. She contradicted herself mid-sentence in allowing that "the possibility of an unwanted sexual encounter [f]or a few moments might have occurred," but nevertheless saying that it was "impossible to conclude" that there was a "non-consensual" interaction between L.M. and M.L. JA 298. She wrote this despite still not having any view of anything that had happened below the seat level—where all of the groping and digital penetration would have taken place. JA 139 (discussing angle).

Notably, AP Davis reached that conclusion despite numerous facts that cut in the opposite direction. First, she found that L.M. was "not credible" based on his statements. JA 298. She found that his version of events did not match the video, and indeed, lacked internal consistency. JA 298. She also characterized him as "inappropriate, racist, sexist, and attention-seeking," JA 298, but weighted that against other students not having "described [him] as being sexually aggressive physically," JA 298, apparently excluding the bus assault under investigation and the prior incident in which someone described him trying to put his hand up a girl's dress when she didn't consent. JA 198. She also inferred nothing about the underlying

incident from the subsequent campaign of retaliation. As to that campaign: even though she reversed her conclusion on the underlying sexual assault, AP Davis also found that L.M. had violated the no contact order by bullying and retaliating against M.L. JA 300-01. She issued him a four-day suspension and required him to attend a small number of meetings with a school counselor about his behavior. JA 299. The School District also simply "directed that he must continue to have absolutely no contact" with M.L. JA 303.

Not long after AP Davis informed M.L. and her family of her conclusions and the meager punishment issued to L.M., M.L. left the high school and eventually transferred to another high school. JA 16.

II. Statutory Background

Title IX prohibits recipients of federal funds from permitting sex-based discrimination in their programs or activities. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999). When schools turn a blind eye to sex-based discrimination of their students, the statute gives students a private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689 (1979), and people bringing such suits may pursue money damages. *See, e.g.*, *Franklin v. Gwinett Cnty. Public Schools*, 503 U.S. 60 (1992). As a statute enacted under the Spending Clause of the Constitution, schools that receive federal funds may face such liability to money damages where they have "adequate notice that they could be liable for the conduct at issue." *Davis*, 526 U.S. at 640. Put another way, the school must be aware of the conditions put on the funding, and able "to ascertain what is expected of it." *Id*.

The notice to schools is simple: they may face liability for permitting sex-based discrimination. The Supreme Court has repeatedly held that schools face liability for their deliberate indifference to discriminatory acts after engaging in inquiries into the schools' ability to stop harassment, and whether they did so. *Gebser v. Lago Vista Indep. Sch. Dist.* held that schools can face monetary liability for their own deliberate indifference to some discriminatory acts of teachers or professors, analyzing the control that the schools exert over many of them. *Id.*, 524 U.S 274 (1998). *Davis* held that schools could face monetary liability for their deliberate indifference to some acts of other students, after engaging in the same inquiry. *Davis*, 526 U.S. at 643. *Davis* cited the text of the statute itself, relevant regulations, and "the common law," all of which "put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties," i.e., other students. *Id.* at 644. In the wake of *Gebser* and *Davis*, the Supreme Court has permitted Title IX claims for another type of sex-based discrimination, retaliation, because the statute "broadly prohibits a funding recipient from subjecting any person to discrimination" and therefore provided notice of liability to schools. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). The key issue across all these cases is the school's own deliberately indifferent conduct that permits discrimination—which has always given rise to liability.

The text of the statute demonstrates the responsibility of a funding recipient school to students and others who pursue the educational opportunities and benefits the school provides. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance . . .” 20 U.S.C. § 1681(a). The passive construction—“be excluded;” “be denied;” “be subjected to”—centers the person seeking benefits, and makes no mention of exactly how that denial might occur. The surrounding statutory context confirms this focus, and the particular emphasis on a school’s responsibility to take action to avert denials of benefits to that class. By the very text of the statute, discrimination is prohibited in a manner that puts the onus on the funding recipient school to ensure that those who seek its educational opportunities and benefits can do so on equal footing, free of sex-based discrimination.

Schools must take effective action to protect equal access to educational benefits, especially for students who have already been harassed or assaulted. Students who have already suffered sex-based harassment—up to and including sexual assault—face heightened, substantial risk of ongoing sex-based harassment, and accordingly, a heightened risk of denial of their educational benefits. Under the circumstances, turning a blind eye to the risk of future sex-based harassment can violates the law even where no additional sex-based harassment occurs, because the unreasonable response makes an already-harassed or -assaulted student vulnerable to additional sex-based harassment. *Davis* itself notes that a school subjects a student to discrimination by making that student “liable or vulnerable,” or “expos[ing]” them, *Davis*, 526 U.S. at 645,[2] to “further harassment after an initial incident without [that

[2] *See also Doe v. Brown Univ.*, 896 F.3d 127, 130 (1st Cir. 2018); *Doe v. Pawtucket Sch. Dep’t*, 969 F.3d 1 (1st Cir. 2020) (“The deliberate indifference standard of course requires that the funding recipient’s actions—or failure to act—caused the student's

student] actually *undergoing* additional harassment." *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406, 411-12 (4th Cir. 2021) (Wynn, J., concurring in denial of rehearing en banc) (emphasis in original) (quoting *Davis*, 526 U.S. at 645). "Once a funding recipient . . . has actual knowledge of sexual harassment" severe enough to potentially deprive a student of educational benefits, "the recipient cannot, acting with deliberate indifference, turn a blind eye to that harassment." *Farmer v. Kansas St. Univ.*, 918 F.3d 1094, 1104 (10th Cir. 2019). For that reason, if "the institution's response, after learning of [a past incident, is] unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity," the student may have a Title IX claim. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172-73 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); *see also Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007).

The case law tracks with decades-old empirical research that recognizes the enhanced risk faced by people who have already suffered a sexual assault. Survivors of sexual abuse or assault have an increased risk of suffering physical, mental, and emotional effects that specifically inhibit their equal access to educational benefits. The risk is especially acute when young people experience sexual trauma, for whom research demonstrates increased propensity for psychiatric and non-psychiatric medical illnesses that can persist for decades. Nancy L. Talbot *et al.*, *Childhood Sexual Abuse is Associated With Physical Illness Burden and Functioning in Psychiatric Patients 50 Years of Age and Older*, Psychosomatic Medicine, 71:4 (Sept.

---

subsequent harassment in some way or made the student liable or vulnerable to harassment").

17, 2009) at 417-22.[3] Longstanding research demonstrates that young people who experience sexual abuse and assault may have psychological effects that can affect their education, including increased propensity for PTSD, substance abuse, major depression, dissociation, and panic disorder. Beth E. Molnar *et al.*, *Child Sexual Abuse and Subsequent Psychopathology: Results From the National Comorbidity Survey*, American Journal of Public Health, 91:5 (May 2001).[4] Most concerningly, people who are sexually assaulted and abused also subsequently report suicidal ideation, self-harm, and suicide attempts at higher rates than people who have not been assaulted or abused. *See id*. But the after-effects of an assault need not be that dire to pose a substantial risk of a denial of educational benefits.

III. Procedural History

D.L., as M.L.'s father and next friend, filed a complaint against Concord School District and School Administrative Unit 8 on April 24, 2018.[5] JA 45-75. Defendants filed an answer. JA 76-93. The Parties engaged in substantial discovery and motions practice, including entering into a stipulated protective order given the many minor students involved in the case. JA 32-44. Defendants filed an operative motion for summary judgment on April 4, 2022. JA 91-119. The Court held an argument on the

---

[3] *Available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2746033/.

[4] *Available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446666/pdf/11344883.pdf.

[5] The Complaint also asserted claims against several individual defendants who were voluntarily dismissed during the litigation, which are not relevant to this appeal, and which are therefore omitted from the procedural history. The full docket can be found at JA 32-44.

summary judgment motion on August 24, 2022, JA 43-44, after which the parties submitted supplemental sealed exhibits at the request of the Court.[6] The District Court granted summary judgment to the School District Appellees on September 30, 2022. JA 2-3.

[6] After the hearing, the District Court requested the full deposition transcripts of APs Corkum, Crumrine, and Davis, and Superintendent Forsten. Those documents were filed subject to a sealed motion to file the transcripts under seal, which the Court granted. *See* Doc. 50.

STANDARD OF REVIEW

This appeal is of the Court's order granting summary judgment to Appellees based on the Court's legal conclusion that no reasonable juror could regard the School District's actions after M.L.'s sexual assault to amount to deliberate indifference. This Court's review of a grant of summary judgment is de novo. *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 87 (1st Cir. 2018) This Court reviews grants of summary judgment while "construing the record in the light most favorable to the nonmovant and resolving all reasonable inferences in that party's favor." *Baum-Holland v. Hilton El Con Mgmt.*, 964 F.3d 77, 87 (1st Cir. 2020) (collecting cases). In undertaking that review, this Court "must keep in mind that granting summary judgment is only proper when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Rivera-Rivera*, 898 F.3d at 87 (quoting Fed. R. Civ. P. 56(a)). "Where a genuine dispute of material facts exists, such a dispute must be resolved by a trier of fact, not by a court on summary judgment." *Rivera-Rivera*, 898 F.3d at 87 (quoting *Kelly v. LaForce*, 288 F.3d 1, 9 (1st Cir. 2002)); *see also Ahmed v. Johnson*, 752 F.3d 490, 495 (1st Cir. 2014) ("Summary judgment is inappropriate if the evidence is sufficiently openended to permit a rational fact finder to resolve the issue in favor of either side."

SUMMARY OF ARGUMENT

The law requires funding recipient schools to do what they can to protect students who have suffered sex-based harassment from the substantial risk of additional sex-based harassment. Failing to fulfill those obligations can amount to deliberate indifference on the part of the school. A reasonable jury could find deliberate indifference to M.L.'s risk of post-assault harassment on the part of the School District Appellees here for several, independent reasons. First, Appellees unreasonably delayed taking action when it knew M.L. faced a substantial risk of post-assault sex-based harassment. Second, when it finally did act, it took actions that proved immediately ineffective, and, to whatever extent those actions even might have worked, they unreasonably imposed a burden on M.L. instead of L.M. Third, Appellees unreasonably made no effort to change its course of action when that course of action proved immediately ineffective. And to be clear: given the School District's own acknowledgment of L.M.'s campaign of retaliation, the School District unreasonably failed to act to protect M.L. regardless of how Appellees regarded the underlying truth of L.M. sexually assaulting M.L. Finally, the School District's unreasonable, poorly executed investigations incorporated sex-based stereotypes and victim-blaming attitudes through which a reasonable jury could fine deliberate indifference to sex-based harassment that violates Title IX.

ARGUMENT

This Court, similarly to others, describes a Title IX claim as including the following elements: "To succeed in bringing such a deliberate indifference claim, a plaintiff must show that (1) he or she was subject to severe, pervasive, and objectively offensive sexual harassment; (2) the harassment caused the plaintiff to be deprived of educational opportunities or benefits; (3) the funding recipient was aware of such harassment; (4) the harassment occurred in [the funding recipient's] programs or activities; and (5) the funding recipient's response, or lack thereof, to the harassment was clearly unreasonable." *Brown Univ.*, 896 F.3d at 130; *see also Porto*, 488 F.3d at 72-73. In the District Court, Appellees did not dispute whether M.L. met any of the elements except deliberate indifference. JA 18. Accordingly, this brief discusses why a reasonable jury could find that Appellees acted with deliberate indifference.

I. A reasonable jury could find that the School District was deliberately indifferent to M.L.'s risk of post-assault harassment.

A reasonable jury could find that the School District acted with deliberate indifference to a substantial risk of sex-based harassment after her initial assault, because the School District's actions made her "liable or vulnerable," *Davis*, 526 U.S. at 645, to future sex-based harassment, and in fact caused her to experience sex-based harassment. A jury could find this for several independent reasons: First, the school initially delayed responding at all, brushing off reports of a sexual assault on a school bus, which exposed M.L. to additional harassment in the short term. Second, the initial measures that it did impose promptly failed, and construing inferences in M.L.'s favor, were not even reasonably calculated to succeed. And by imposing

numerous burdens on M.L. herself, rather than on L.M., a reasonable jury could find those measures unreasonable even if they had worked better. Third, the School District failed to change any of those measures as it learned of their ineffectiveness—if anything, the School District eventually issued a modified punishment so minimal that a reasonable jury could regard it as "tacit approval" of sex-based harassment. In holding otherwise as a matter of law, the District Court construed facts in favor of Appellees to credit the School District's ineffective response to M.L.'s sexual assault.

As the District Court saw it, M.L.'s family preferred different actions, and the School District's having taken some actions sufficed. JA 22. But merely having taken some action is not enough to evade liability when a District knows of its ineffectiveness. On the summary judgment record, including construing all inferences in favor of M.L.—as required at summary judgment—this Court should recognize that a reasonable jury could look at the School District's delayed, ineffective, and unchanging actions and find that those actions were unreasonable. Here, the summary judgment record contains evidence, and supports inferences, from which a reasonable jury could conclude that Appellees' unreasonableness amounted to deliberate indifference, and that M.L. could make out her claim.

A. The School District was deliberately indifferent because it unreasonably delayed in responding to L.M. sexually assaulting M.L.

A reasonable jury could find that the school acted unreasonably and thus with deliberate indifference because of the school's initial delay in acting at all, which exposed M.L. to further harassment from L.M. Initially, the School District quite

effectively turned "a blind eye to [] harassment." *Farmer*, 918 F.3d at 1104, in the form of reports of a sexual assault on a school bus, which caused M.L. to experience additional post-assault harassment. And "[o]nce a funding recipient . . . has actual knowledge of sexual harassment" severe enough to deprive a student of educational benefits—such as a sexual assault—"the recipient cannot . . . turn a blind eye to that harassment." *Farmer*, 918 F.3d at 1104.

A School District can potentially face liability where it eventually acts, but has dragged its feet long enough to make a student more vulnerable to additional sex-based harassment. District Courts repeatedly find potential liability where the school has delayed, even comparatively briefly, in taking effective action. *See, e.g.*, *Roussaw v. Mastery Charter High Sch.*, No. 19-1458, 2020 WL 2615621, at *6-7 (E.D. Pa. May 22, 2020) (describing a delay of thirteen days after an assault before the school took any action as "unreasonable under the circumstances"). This tracks with official regulatory guidance on the subject, too. The Office of Civil Rights at the Department of Education long ago called for schools to "take immediate and appropriate corrective action," without delay, to address hostile environments of which they have knowledge, including when the problems are caused by other students. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034-01, at 12040 (Mar. 13, 1997).

Here, the School District's delay not only made M.L. more vulnerable to future sex-based harassment, but allowed L.M. to do just that. L.M. assaulted M.L. on the bus on November 29, and threatened the bus driver on the way off the bus. JA 225-26, JA 158, JA 180. The bus driver, Ms. Bolster, and M.L., shared those facts with

M.L.'s father, who shared them with the School District immediately. The Assistant Principal and SRO Hassapes interviewed both M.L. and L.M., and L.M. specifically told the SRO that it had been "more than a kiss" and that he "knew what he did was wrong." JA 275, JA 123, JA 130. Instead of following up on those statements—as a reasonable person would have—the School District declined to open an investigation at all. JA 124, 130. When Ms. Bolster submitted a written statement underscoring all of this, they kept their eyes dutifully trained away from the subject matter, and did not open an investigation—or impose any discipline, or take any action at all—then, either. The upshot of this unreasonable school response was that on December 4th, L.M. was able to sit close to M.L. on the bus again, and to follow her when she moved, forcing Ms. Bolster to intervene. JA 124, JA 130. And on December 5th, L.M. was able to harass her brother via text and try to contact her father. JA 164. The school did not open an official investigation until after M.L. and her family made an additional report about the subsequent post-assault harassment—too late to have addressed the risk, even though they knew that the risk existed. JA 124, JA 164.

B. The School District was deliberately indifferent because, when it finally did act, it acted unreasonably and imposed a burden on M.L.

Second, a reasonable response to a substantial risk of future sex-based harassment requires a school to have "reasonably believed that it had been successful in stopping" sex-based harassment. *Porto*, 488 F.3d at 75. Evidence of "continual harassment despite [a student's] repeated reports to school authorities" demonstrates that "authorities knew that what they had been doing . . . had not sufficed" and was

therefore unreasonable. *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1313 (10th Cir. 2020). "[W]hen a student experiences sexual assault at the hands of a peer on a school bus . . . their school must not respond with indifference, so as to leave the student vulnerable to further attacks." *Fairfax Cnty.*, 10 F.4th at 413 (Wynn, J., concurring in denial of rehearing en banc). And a school cannot take action that it knows will be ineffective, and thereby escape liability. *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 668-71 (2d Cir. 2012) (rejecting as deliberately indifferent disciplinary actions taken that a school knew to be ineffective). A School District's actions should not be judged according to their "effectiveness by hindsight," *Porto*, 488 F.3d at 74, but rather, in light of circumstances at the time. Here, Appellees' initial measures virtually immediately failed, and in fact, were not reasonably calculated to succeed. Moreover, even if the measures had worked, Appellees ran afoul of Title IX under the known circumstances by imposing an enormous burden on M.L. herself—putting her to the impossible choice of risking further harassment or giving up access to educational benefits—rather than on L.M., who had assaulted her and subsequently harassed her.

1. The School District's initial actions were not reasonably calculated to address the risk of future harassment.

Courts applying these principles regularly reject dismissal or summary judgment based upon schools' assertions that they have taken *some* action, when parties dispute the sufficiency or responsiveness of that action. This can be true even when schools offer robust resources and counseling to a student after an assault, if (and because) such resources do not stop sex-based harassment from others. *Doe v. East*

Haven Bd. of Educ., 200 F. App'x 46, 49 (2d Cir. 2006). For example, taking general action that does not remedy the specific threat posed by one student to another can amount to deliberate difference. *See Doe v. Howard Univ.*, 396 F.Supp.3d 126, 133 (D.D.C. 2019); *see also Swanger v. Warrior Run Sch. Dist.*, 346 F.Supp.3d 689, 705-06 (M.D. Pa. 2018) (describing as indifferent a school taking actions it knows are ineffective). This is particularly true where a student and their parents "made multiple reports on different occasions," which "suggests that the bullying behavior was not likely to subside in the absence of" further meaningful action by the School District. *McCann ex rel. J.M. v. York Sch. Dep't*, 365 F.Supp.3d 132, 142 (D.Me. 2019). As another example, an unreasonably light suspension or discipline of a harasser can amount to deliberate indifference, because failure "to meaningfully and appropriately discipline the student harasser" might mean "the harasser and other students are left to believe that the harassing behavior has the tacit approval of the school." *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-cv-141, 2016 WL 10592223, at *11-23 (D.N.M. Jan. 11, 2016) (rejecting a "minimalist response" as unreasonable and evidence of deliberate indifference). The touchstone is that a school must "reasonably believed that" its actions will be "successful in stopping" sex-based harassment. *Porto*, 488 F.3d at 75.

Here, even allowing for the School District's initial, unreasonable delay in acting, the measures it imposed did not address the circumstances of M.L.'s ongoing vulnerability to further attacks. For one thing, the School District's initial measures did not address the single greatest point of ongoing exposure—it affirmatively left L.M. and M.L. on the same bus where it already know that he had assaulted her. *E.g.*

JA 124, JA 130. The School District, belatedly, explained that as being not unreasonable because it had assigned him a particular seat on the bus. But the District Court's bare, one sentence acceptance of that argument, concluding that "the school acted reasonably when it created a physical distance between the two students by instructing L.M. to ride at the front," JA 22, improperly construes several facts in favor of the School District. For one, the effectiveness of that measure would depend on L.M. sitting and remaining in that seat—but by the time the School District belatedly imposed that measure, it already knew that students on the bus, including specifically L.M., regularly switched seats mid-ride. JA 124, JA 130, JA 164. For another, the effectiveness would require that M.L. would not be made liable to additional harassment by virtue of L.M. remaining on the bus—even though, by the time the School District belatedly made that decision, it already knew that L.M. had followed her up the bus and begun his campaign of text harassment since the initial assault. JA 164; *compare id. with Porto*, 488 F.3d at 74-75 (discussing "only one minor alleged incident of sexual harassment"). It also assumes, improperly, that Ms. Bolster could constantly monitor seat assignments and drive safely. A reasonable jury could regard this as an unreasonable measure destined to fail—as it did—from the start.

Beyond the unreasonable bus assignment decision, a reasonable jury could also find that the School District set its no contact order up to fail. While the School District imposed a no-contact order, it did not even notify the teacher most likely to encounter fraught situations that would test it—the math teacher who taught L.M. and M.L. during back-to-back periods in the same room, when they would be entering and exiting during the same break. JA 296-299. Indeed, given the room placement, it

may well not have been possible for them to avoid such an encounter. *Id*. Construing all inferences in favor of M.L., a jury might reasonably conclude that the School District's meager measures provided scant protection to M.L., and were unreasonable responses to a sexual assault. A jury might particularly conclude that the School District's decision to leave L.M. and M.L. on the same bus was unreasonable, but it might also conclude that failing to notify other faculty members who might be well-positioned to see violations of (and enforce the protections of) a no contact order meant that the School District did not intend the no contact order to have much effect in the first place.

2. The School District unreasonably imposed a burden on M.L. to protect herself.

Regardless of how likely those measures were to work, a reasonable jury could find that they amounted to deliberate indifference for a separate reason. Schools may not respond to sex-based harassment by imposing responsibility on the students who have suffered the harassment to protect themselves in the future. "[I]t is not enough to try to help a student cope with the misbehavior of other students." *Sch. Dist. No. 1*, 970 F.3d at 1313. While "listening to students' reports of harassment and threats is an important step in seeking to rectify" sex-based discrimination, that is different from making a "real effort to . . . end the harassment." *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 690 (4th Cir. 2018); *see also McCann*, 365 F.Supp.3d at 142 (discussing school responding to reports by modifying targeted student's own individual disability plan). This matters particularly because forcing a student to take their own self-protective measures puts them to the impossible choice of avoiding

sex-based harassment or foregoing educational benefits. A "student's ability to benefit from the educational experience provided by the school is often undermined unless the school steps in to remedy the situation because the student is put in the position of choosing to forego an educational opportunity in order to avoid contact with the harasser, or to continue attempting to receive the educational experience tainted with the fear of further harassment or abuse." *Wamer v. Univ. of Toledo*, 27 F.4th 461, 471 (6th Cir. 2022).

Here, the School District forced M.L. to affirmatively take her own steps to limit her in-person contacts with L.M. It "provided her with options to prevent" her from having to see L.M. JA 138. It moved her to an all-female Commons, without altering L.M.'s assignments. JA 137-38. And regarding one explicit schedule conflict, it reassigned M.L. rather than L.M. JA 231-32. But any effectiveness on the part of M.L. in avoiding L.M. only underscores the School District's deliberate indifference. M.L.'s own actions to protect herself, such as repeatedly altering her paths through the school, eating lunch outside of the cafeteria and away from her friends, and, particularly, ceasing to use the school bus for transportation, each reflected the impossible choices that the *Wamer* Court decried. The School District should not get credit for the measures M.L. had to take of her own accord, because schools may not address sex-based harassment by imposing responsibility on the students who have suffered the harassment. *Feminist Majority Found.*, 911 F.3d at 690. A reasonable jury could conclude that the very fact of M.L.'s need to take her own protective measures—measures that effected repeated denials of educational benefits, including

especially transportation and shared time with classmates at lunch—reflected the unreasonableness and deliberate indifference of the School District.

C. The School District unreasonably failed to change course when its actions proved immediately ineffective.

Third, when a school knows that its actions have not worked, failure to modify those actions is unreasonable and deliberately indifferent. This Court, like others, has held that if a selected tool proves to be ineffective, a school has the responsibility to take additional or alternate steps to stop the harassment. "Once the school had knowledge that its response was inadequate, it was required to take further reasonable action in light of the circumstances to avoid new liability." *Willis v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999) (cleaned up); *see also Porto*, 488 F.3d at 73-74 (characterizing *Willis* as holding that a school may face liability where it "either did nothing or failed to take additional reasonable measures after it learned that its initial remedies were ineffective"). Other Circuits agree. *See Sch. Dist. No. 1*, 970 F.3d at 1314 ("Failure of authorities to try something else can show deliberate indifference."); *id.* at 1313 ("Ongoing "harassment despite [] repeated reports to school authorities" demonstrates that "authorities knew that what they had been doing . . . had not sufficed"); *see Zeno*, 702 F.3d at 669 (discussing ineffective measures). Schools must exert the control that they have, and they must consider all of the tools available to them when addressing sex-based harassment. This is why merely disciplining a student who engages in sex-based harassment may not suffice; "even immediate disciplinary actions against students engaged in harassment, if known to be ineffective, can be clearly unreasonable." *Sch. Dist. No. 1*, 970 F.3d at 1314 (citing

Zeno, 702 F.3d at 668-71). Ineffectiveness of initial measures imposes a responsibility to try something else, and abdicating that responsibility can demonstrate deliberate indifference and open a school to liability. *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000), *overruled on other grounds*. Ultimately, for a School to have acted reasonably, it must have "reasonably believed that it had been successful in stopping" sex-based harassment. *Porto*, 488 F.3d at 75.

The reasonableness of a funding recipient school's response, and the feasibility of alternative measures, turns on the availability of other "tools for remedying harassment," *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 865 (7th Cir. 2018). Those tools can include the authority and policies to remove a harasser from physical locations—like a bus—to stop sex-based harassment. *Id.* at 865. But the inquiry is broad and specific to the harassment in question; the tools available to stop sex-based retaliation via text messages or social media might look different than physical removal. In the context of online threats lodged against a school's students, for example, the Fourth Circuit regarded as potentially deliberately indifferent a university's disinclination to utilize its control of the university wireless network. *Feminist Majority Found.*, 911 F.3d at 688. And while this might be a closer call for universities like the school in *Feminist Majority Foundation*, reticent to exert too much control over students who are generally legal adults, high schools like Appellees' school by their nature exert more control over their students. *See Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038, 2045 (2021) (discussing "special leeway when schools regulate speech that occurs under its supervision," specifically contrasting high schools and colleges, and holding that high schools have interests in regulating

even off-campus use of social media); *see also Davis*, 526 U.S. at 646 ("the nature of the State's power over public schoolchildren is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.").

Here, a jury could find the School District's lackluster response to the immediate failure of its meager protective measures to have been unreasonable and deliberately indifferent. For one thing, although the District Court and the School made much of the no contact order, *e.g.* JA 20, as M.L. and her family repeatedly notified the school, L.M. immediately and flagrantly violated it. L.M., his girlfriend, and other associates, texted M.L. and her friends and family directly about L.M.'s assault of M.L. L.M., for example, texted a close friend of M.L.'s, knowing that it would get back to her, that it was "burying time" and that he would "ruin her life." JA 283-84. L.M.'s campaign of retaliation in violation of the no contact order contributed to even longtime friends of M.L.'s, like A.B., amplifying the trauma of her assault by parroting L.M.'s talking points to her. JA 181. And L.M.'s girlfriend, S.D., texting inaccurate gossip about a nonexistent lawsuit compounded the issue. For this reason, Superintendent Forsten's own notes from January after the assault acknowledge that "L.M. has shown inability" to respect the no contact order. JA 291. Notably, unlike the anonymous retaliatory threats in *Feminist Majority*, which the Fourth Circuit still held a reasonable jury could have found the university acted with deliberate indifference by failing to change tactics to stop, Appellees here knew exactly who was retaliating against M.L., and why, and did nothing to address its ineffective response.

And to be clear: the School District's other measures failed, too. M.L. kept encountering L.M. in the halls, especially outside of their back-to-back math class.

JA 296-299. The School District ensured that she would encounter L.M. on their shared bus, too, by refusing to protect M.L. and other students by requiring L.M. to find other transportation to school. In response to these repeated failures, however, the School District apparently declined to do anything about the ineffectiveness of its initial choices, other than to remind L.M. of the no contact order that he was already violating with abandon. JA 12, JA 134. Not only did this not stop L.M., it did not stop L.M.'s *father* from coming to campus and retaliating against M.L. JA 259. A reasonable jury could infer not only that the School District's measures did not work, but that the School District's refusal to modify them in any useful way once they repeatedly failed amounted to deliberate indifference.

If anything, even when the School District modified L.M.'s punishment months later, after the re-investigation, it only underscored potential liability in light of the ineffective measures. The School District eventually changed its mind—inexplicably, *see* Argument Section II, *infra*—about whether L.M. had sexually assaulted M.L. But even the shoddy reinvestigation acknowledged retaliation on the part of L.M. JA 300-01. By imposing light discipline in the form of a mere four-day suspension, the School District imposed a punishment so minimal that a reasonable jury could potentially regard it as "tacit approval" of undisputed sex-based harassment that L.M., his family, and his friends engaged in toward M.L.

D. The School District acted unreasonably regardless of how it viewed the evidence of L.M. sexually assaulting M.L.

Appellees' unreasonable response and deliberate indifference—and this, Appellees' potential liability—does not depend on how Appellees viewed the truth of

whether L.M. sexually assaulted M.L. Regardless of the details of the underlying assault, even the School District admits that L.M.—and his girlfriend, and his friends, and his father—engaged in a campaign of retaliation. In analogous legal contexts, making a good faith report of sex-based discrimination that results in retaliation supports a finding of retaliation even if the underlying report proves entirely unfounded. Of course, the assault did happen—as the District Court should have construed, and this Court should construe, on the summary judgment posture. But the fact remains that regardless, a funding recipient's failure to protect a good faith reporter of sex-based discrimination from retaliation has long exposed a funding recipient to liability regardless of the underlying incident. Appellees should fare no differently.

First, although Title IX does not explicitly name all the ways that a school's actions may permit or exacerbate a denial of equal benefits and opportunities in education, the Supreme Court has held that it encompasses retaliation. The statutory purpose and the surrounding context confirm that Congress intended the law to apply broadly to situations in which members of the benefitted class face a denial of equal opportunities in education on the basis of sex. "The statute is broadly worded" because Congress enacted Title IX "to prevent the use of discriminatory practices." *Jackson*, 544 U.S. at 168-69. Because of that Congressional purpose, *Jackson* recognized liability for a different type of claim than the Supreme Court had previously recognized in *Gebser* and *Davis*, in reliance on the post-*Cannon* cases as having "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Id*. at 169. That is to say,

Jackson held that students could bring claims for deliberate indifference to retaliation.

In analogous legal contexts, a good faith report of underlying unlawful discrimination imposes a responsibility on a funding recipient not to retaliate (or countenance retaliation) against the reporter, regardless of the underlying merits. Courts have long looked to law applying Title VII when applying Title IX because the substantive standards are analogous. *See Mabry v. State Bd. of Comm. Coll. Occ. Educ.*, 813 F.2d 311, 317 (10th Cir. 1987) ("We find no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits."); *Milligan v. Bd. of Trs.*, 686 F.3d 378, 388 (7th Cir. 2012) (applying Title VII retaliation framework to a Title IX retaliation claim); *Papelino v. Albany Coll. Of Pharm. Of Union Univ.*, 633 F.3d 81, 91-92 (2d Cir. 2011) (same). And under Title VII, the Supreme Court has held that what matters is "the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint." *Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006). Put another way: it does not matter whether retaliation related to an underlying assault, or not. What matters is whether the report of the underlying assault was made in good faith. Deliberate indifference to retaliation itself matters regardless of how Appellees felt about the underlying assault.

Here, Appellees do not (and cannot) dispute the campaign of retaliation that eventually helped force M.L. out of school. JA 300-01. As a reminder, that campaign included L.M. harassing her in person, via text message and social media, through her friends, with the help of his own friends and family, and even with his dad visiting

campus to retaliate against M.L. JA 13-14, JA 181, JA 212, JA 259, JA 283-84, JA 291. He violated the no contact order, threatened M.L., and had his family and associates do the same. *See id*. The School District acknowledges this, but relies upon the fact that they had issued an ineffective no contact order and, eventually, imposed a four day suspension. That suspension is so short that a reasonable jury could find that it connoted "tacit approval" of L.M.'s actions. But regardless, the School District did not protect M.L. from that retaliation, even after they knew about it. That amounts to a violation regardless of how the School District viewed the evidence of the underlying assault. *But see* Argument Section II, *infra*, discussing the School District's unreasonable investigation.

* * *

Although proving deliberate indifference requires a plaintiff to show an unreasonable response on the part of a school, case law does not immunize all but the very worst scholastic actors. Indeed, on a sufficiently clear record, declining to take effective action opens a school not just to monetary liability under Title IX, but summary judgment granted to a Title IX plaintiff on the issue of that liability. *Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*, 279 F.Supp.3d 807, 815 (S.D. Ill. 2017) (granting summary judgment to the plaintiff and holding that "[a]t a minimum, the complete lack of a response by school officials to J.W.'s complaint was clearly unreasonable, and a rational factfinder could not conclude otherwise."); *Doe v. N. Penn Sch. Dist.*, – F.Supp.3d –, No. 20-cv-5142, 2022 WL 10789493 (E.D. Pa. Oct. 19, 2022) (granting summary judgment on liability in post-assault claim regarding unreasonable school response). *Freeburg* and *North Penn* reflect particularly

egregious circumstances. But they illustrate an important point: schools cannot point to ineffective actions to evade liability, and courts should not rubber stamp those meager responses without regard to the facts of the case.

The sufficiency of a school's response to a prior incident of sex-based harassment is normally "a question for the jury" for exactly that reason. *Fairfax Cnty.*, 10 F.4th at 413 (Wynn, J. concurring in denial of rehearing en banc); *see also Cavalier v. Catholic Univ. of America*, 306 F.Supp.3d 9, 26 (D.D.C. 2018) (describing "a fact intensive inquiry that often must be resolved by the trier of fact"). Indeed, as this Court has held repeatedly across legal contexts beyond merely Title IX, the "reasonableness" of a person or entity's actions is generally a fact question. *See, e.g.*, *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 34 (1st Cir. 2003) ("the judgment call as to reasonableness is itself a jury issue unless no reasonable jury could decide it in the plaintiff's favor"); *Keeler v. Hewitt*, 697 F.2d 8, 12 (1st Cir. 1982) ("However, the 'reasonableness' of defendants' conduct was a question of fact for the jury to determine from the totality of a number of specific, and, in many instances, disputed facts."); *McIntyre v. RentGrow Inc.*, 34 F.4th 87, 99 (1st Cir. 2022) (reversing because conflicting evidence of reasonableness "presented a question of fact for the jury"). To be sure: Appellees can and assuredly will dispute the sufficiency and reasonableness of their responsive measures. But they should do that to a jury, well-positioned to assess reasonableness as a matter of fact. *Fairfax Cnty.*, 10 F.4th at 413 (Wynn, J., concurring in denial of rehearing en banc). Here, because a reasonable jury could conclude that the school's meager response had been ineffective at addressing the

substantial risk of further sex-based harassment, summary judgment is inappropriate, and this Court should reverse.

II. A reasonable jury could find that the School District's investigation was so poorly executed as to be unreasonable.

Funding recipient schools have a responsibility not to engage in sex-based discrimination through their conduct in investigating sex-based harassment in their programs. *Davis* itself requires this. It describes at least "two possible ways that a school's clearly unreasonable response could lead to further harassment: that response might (1) be a detrimental action, thus fomenting or instigating further harassment, or it might (2) be an insufficient action (or no action at all), thus making the victim vulnerable to, meaning unprotected from, further harassment." *Doe v. Metro Gov't of Nashville & Davidson Cnty., Tenn.*, 35 F.4th 459, 471 (6th Cir. 2022) (discussing and characterizing *Davis*). Certainly, Appellees' limited and ineffective actions after they learned of her assault exposed M.L. to further sex-based harassment, which she actually and repeatedly suffered. *See* Section I, *supra*. But the School District did not take those ineffective actions in a vacuum. Appellees' investigations themselves were so poorly executed as to provide an independent basis upon which a reasonable jury could find that Appellees acted with deliberate indifference.

Appellees' investigations reflected an unreasonable reticence on the part of the School District to acknowledge that L.M. had sexually assaulted M.L. at all. That reticence manifested in the ineffective actions the school took to protect M.L., but also in Appellees' conduct in the underlying investigations themselves. Appellees'

investigations engaged in classic victim blaming, incorporated sorely mistaken understanding of the nature of consent and sexual assault, and deliberately ignored or explained away L.M.'s repeated self-incriminating statements and other evidence to downplay the sex-based harassment at issue. The School District's actions differ from better executed investigations that have been held sufficient under Title IX. Under the circumstances, a reasonable jury might fairly conclude that the School District conducted an investigation "so misdirected or so poorly executed as to be clearly unreasonable." *Fitzgerald*, 504 F.3d at 175. This is true for three different reasons.

First, Appellees initially unreasonably brushed away L.M.'s statements without even opening an official investigation at all. In declining to open an official investigation after M.L.'s first report, Appellees chose to ignore L.M. asking to speak to SRO Hassapes "man to man," specifically so that he could apologize because he "knew he was wrong" regarding what he had done to M.L. JA 275, Ja 123, JA 130. Seemingly recognizing the significance of L.M. reaching out to SRO Hassapes, AP Crunmire followed up with him—but inexplicably did not press him about the statement that it has been "more than a kiss" or how that might impact why he thought what he'd done was wrong. JA 267. Instead, they accepted at face value L.M.'s facially implausible statement that he and M.L. were "now on good terms" the same day she made a statement about his misconduct. JA 130-31. Appellees also apparently did not think twice about those statements in the context of Ms. Bolster's report, which shared that she thought something wrong had happened. They still declined to open an investigation. JA 124, JA 130.

Second, even when it eventually did open an investigation and a reinvestigation, the School District bent over backward to exclude or downplay evidence pointing to culpability by L.M. on the way to ultimately reaching a factually unsupported conclusion. For example, the School District had text messages from L.M. in which he wrote, while still on the bus in the immediate aftermath of the events in question, that he "did something horrible" and "kinda sick." He wrote that "all I end up doing is fucking everything up" and that, regarding people he cares about, "I do something wrong to them." JA 261-62. Bizarrely, the School accepted at face value his later assertion that he had been going through a rough time because his grandmother had been sick—as if his grandmother's illness could explain his concern that he had done something wrong to someone. His proffered explanation could not plausibly explain those statements on their face, and could not especially in context of their timing—immediately after the assault. The School District similarly declined to consider the context of text messages from L.M.'s girlfriend, S.D., including one in which she allowed that L.M. had "gone too far." JA 181. Even though AP Davis specifically sought out information about L.M.'s other romantic and interpersonal actions, and collected reports that he was "manipulative, mean, and possessive," JA 292, JA 185, and had previously "got physical when she didn't want to" with another girl by "trying to put his hand up her dress," JA 198, she included none of that information in her final report. By contrast, the School District imposed an extremely high level of scrutiny on Ms. Bolster's reports and her potential reasons for making them, and M.L.'s description of their relative seating on the bus ride. The School District also

declined to interview M.L.'s counselor, who would have testified that she presented like a classic victim of sexual assault. JA 232.

Third, however, the School District's reinvestigation incorporated outdated and pernicious sex-based stereotypes, which directly contributed to sex-based harassment of M.L. That reinvestigation involved AP Davis obtaining higher quality video of the assault—although the quality improvement is disputed—that AP Davis used to conclude solely via divination of body language that M.L. had purportedly consented to kissing L.M. JA 290. AP Davis used that conclusion to support an ultimate finding that it was "impossible to conclude" that there had been "non-consensual" interaction beyond kissing. JA 298. This made little sense on its face, in light of AP Davis's simultaneous finding that "the possibility of an unwanted sexual encounter [f]or a few moments might have occurred." JA 298. But beyond that, it was classic victim-blaming on the part of AP Davis, and fundamentally misunderstands the nature of consent. Even if M.L. had consented to kissing, consent to kissing would not constitute consent to groping or digital penetration. *See, e.g.*, *Cruz-Sanchez v. Rivera-Cordero*, 835 F.2d 947 (1st Cir. 1987) (consent to some sexual activity not consent to future sexual activity); *Doe v. Stonehill College*, No. 21-1227 (1st Cir. Dec. 14, 2022) (same); *Jeffries v. Nix*, 912 F.2d 982 (8th Cir. 1990) (same); *Mosely v. Kemper*, 860 F.3d 1020 (7th Cir. 2017) (consent to relationship does not equate to consent to explicit photos). Indeed, the Fourth Circuit recently reversed a jury verdict in favor of a school district in a Title IX case, and specifically included school officials purporting to infer from body language that the victim was a "willing participant" in explaining why a reasonable jury could find deliberate indifference. *Doe v. Fairfax*

Cnty. Sch. Bd., 1 F.4th 257, 272 (4th Cir. 2021) (describing school officials inferring consent from victim's head being "rested on his shoulder" and her "wearing his hat").

This matters particularly because of the nature of L.M.'s own admissions. Having "gone too far" and known "what he did was wrong," JA 275, JA 123, JA 130, in the context of teenage students, means going beyond consent given—that is, L.M. had exceeded whatever amount of consent *he himself* had perceived M.L. as having initially given. AP Davis's conclusion was particularly unreasonable because the purported consent that she claimed to have seen from M.L. relied upon body language that took place in view above the top of the seat, while all the groping and digital penetration took place below the seat level and out of view. JA 139. To say that it was *impossible* to conclude what had happened out of view, after finding L.M. non-credible, JA 298, with the damning text messages in the record, and with L.M.'s admissions and subsequent conduct, required an inherently unreasonable inclination to excuse sex-based harassment based upon stereotypes and mistaken views of consent. "A reasonable jury could conclude that the school officials improperly trivialized and dismissed the reports of sexual assault" by assuming "that the bus incident was a consensual sexual encounter between teenagers." *Fairfax Cnty.*, 1 F.4th at 272. A jury could find such a response to be clearly unreasonable. *Id.* at 273.

Even as District Court erred on this point, it nevertheless underscored the School District's failures here. It called what the School District had conducted "far from a perfect investigation," and observed that "a reasonable investigator may well have come to a different conclusion." JA 27. But the problem was not the investigation's result (although that was wrong). The problem was incorporating sex-based

stereotypes and long-rejected notions of consent and assault, bending over backward to excuse abhorrent behavior in the face of nonsense explanations and its own finding of L.M.'s non-credibility, and constructing a largely one-sided record. Especially on the summary judgment posture, two key inferences remain: First, L.M. assaulted M.L. And second: a school bending over backward in those ways did so because it specifically intended not to find that the assault had taken place. Together, a reasonable jury might fairly conclude that the School District conducted a sham investigation "so misdirected or so poorly executed as to be clearly unreasonable." *Fitzgerald*, 504 F.3d at 175.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,
/s/ Jim Davy

Jim Davy
CA1 Bar Id. 1205361
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Counsel for Appellant

Feb. 27, 2023

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 11,754 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.66.1, set in Century Schoolbook 12-point type.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Feb. 27, 2023, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Jim Davy

Jim Davy
CA1 Bar Id. 1205361
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org