Case Nos: 73856 & 74566

IN THE SUPREME COURT OF NEVADA

CLARK COUNTY SCHOOL DISTRICT (CCSD)

Appellant/Defendant.

v.

MARY BRYAN, mother of ETHAN BRYAN; AIMEE HAIRR, mother of NOLAN HAIRR,

Respondents/Plaintiffs,

District Court Case No. A-14-700018-C

Appeal from the Eighth Judicial District Court, Clark County, Nevada,
The Honorable Nancy Allf, District Court Judge
District Court Case No.: A-14-700018-C

RESPONDENTS' BRIEF

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DISCLOSURE STATEMENT PURSUANT TO N.R.A.P.26.1

Plaintiffs are individuals and have no parent corporations, and no publicly held company owns 10% or more of its stock. There is no such corporation. John H. Scott, and Allen Lichtenstein represented Plaintiffs in District Court and have appeared in this Court. Staci Pratt and Amanda Morgan have also appeared for Plaintiffs in District Court, but are not part of this Appeal.

Dated this 4th day of September 2018

/s/ Allen Lichtenstein

CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word (2007) in 14 point Times New Roman Style.

2. I further certify that this brief complies with the page- or type/volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13997 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of September 2018.

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I. Introduction

On November 15, 2016, a five day bench trial commenced in Department 27 of the Eighth Judicial District Court of Nevada, the Hon. Judge Nancy L. Allf presiding. The Plaintiffs were Mary Bryan, mother of minor child Ethan Bryan, and Aimee Hairr, mother of minor child Nolan Hairr. The Defendant was the Clark County School District (CCSD).

At trial two separate claims for relief were pursued by Plaintiffs. The first was a violation of Title IX of the Civil Rights Act. The second was pursuant to 42 U.S.C. § 1983, for violation of Plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

On July 20, 2017, the Court issued its Finding of Facts and Conclusions of Law, (App.[1] 1952-1974.), stating the following.

> On June 29, 2017, the Court issued its Decision and Order in favor of Plaintiffs Ethan Bryan and Nolan Hairr and against Defendant Clark County School District (CCSD) on the claims that Defendant violated Plaintiffs' rights under Title IX of the Civil Rights Act and Plaintiffs' rights to Substantive Due Process under the Fourteenth Amendment to the United States Constitution and pursuant to 42 U.S.C. 1983. The Court also ruled that, "Plaintiffs are entitled to a judgment for all damages sought under these two claims asserted in the Complaint, and proven at trial."

(App. 1952.) Each Plaintiff was awarded the sum of $200,000. (App. 1972.)

[1] All cites to the Appendix (App.) refer to Appellant's Appendix.

Both claims for relief require a showing that Defendant CCSD was aware of the bullying of Ethan and Nolan by C.L. and D.M., and that Greenspun Junior High School officials who were mandated to respond to reports of bullying as set forth in NRS Chapter 388, instead acted in a manner that evidenced deliberate indifference. Whether a Defendant acted with deliberate indifference is a question for the trier fact. *Mellen v. Winn*, No. 17-55116, 2018 U.S. App. LEXIS 22952, at *38 (9th Cir. Aug. 17, 2018). A Plaintiff seeking to establish deliberate indifference needs to show that the Defendant knew of and disregarded an excessive risk to the Plaintiffs' health or safety. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007).

Here, the evidence presented at trial left the District Court no doubt that school officials were aware of the offensive anti-gay, homophobic and sexually explicit name-calling that C.L. and D.M. subjected Ethan and Nolan to. Evidence at trial also showed that school officials were similarly aware of the physical assaults by the bullies, including Ethan being hit on the leg several times with a sharp piece of a trombone, causing scratching of his legs, and also of Nolan being stabbed in his genital area by C.L. (to see if he was a girl), who used the sharpened end of a pencil to do the stabbing. School officials were also aware that the slurs and physical assaults related to Ethan and Nolan's perceived sexual orientation, as

well as gender stereotyping, and that the bullying forced both Ethan and Nolan to leave Greenspun Junior High School.

The Title IX claim requires a showing by a preponderance of the evidence of sex discrimination, along with Defendant's deliberate indifference. Trial testimony clearly convinced the trier of fact that this is what occurred. For the Substantive Due Process claim, while a showing of deliberate indifference is also required, no claim or evidence of discrimination is a necessary part of that cause of action. Here, as described below, all of the elements of violations of Title IX and of Substantive Due Process are established, as was found by District Court Judge Allf**.**

II. Standard of Appellate Review

Questions of law are reviewed de novo." *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993); *Nicholas v. State*, 116 Nev. 40, 43, 992 P.2d 262, 264 (2000). In contrast, the Nevada Supreme Court reviews a District Court's factual findings for an abuse of discretion, and will not set aside those findings unless they are clearly erroneous and not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009); *Kockos v. Bank of Nevada*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974); *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012). "Substantial evidence is that which a reasonable mind might accept as adequate to

support a conclusion." *Mason-McDuffie Real Estate*, Inc. v. Villa Fiore Dev., LLC, 335 P.3d 211, 214 (2014**).**

After hearing testimony during a five day bench trial, and full briefing of all of the issues, the District Court issued its June 29, 2017 Decision and Order. (App. 1448-1460.) In it, Judge Allf, in her capacity as trier of fact, set forth factual findings, as recounted below. It is important to note that in its Opening brief, CCSD actually never argue that those factual findings of both Title IX and 42 U.S.C. § 1983 violations were clearly erroneous, or an abuse of discretion, or not supported by substantial evidence which a reasonable mind might accept as adequate to support a conclusion. Instead, CCSD recites its own version of the facts, and in so doing fails to even adequately argue that the factual findings by the District Court should be overturned pursuant to the proper standards of appellate review.

III. Timeline of Pertinent Facts

The unchallenged factual findings by the District Court are set forth in the June 29, 2017 Decision and Order are quoted as follows: (App. 1449-1453.)

"Ethan Bryan and Nolan Hairr entered the sixth grade at Greenspun Jr. High School in August of 2011. Both students were enrolled in Mr. Beasley's third period band class in the trombone section. Nolan, eleven years old, reported being small for his age and wore long blonde hair. From almost the outset of their

enrollment, both boys began to be bullied by C.L. and D.M. On numerous occasions, C.L. and D.M. taunted Nolan with homophobic slurs and sexual expletives, touching, pulling, and running their fingers through Nolan's hair and blowing in his face. Nolan reported the behavior by filling out a complaint report at the Dean's office. However, at this time, Nolan did not mention the homophobic and sexual content of the slurs that he was enduring and a subsequent meeting with Dean Winn did not proffer resolution.

On or about September 13, 2011, C.L., who was sitting next to Nolan in band class, reached over and stabbed Nolan in the groin with the sharpened end of the pencil (the "September 13th Incident"). C.L. remarked that he did so to see if Nolan was a girl and also referred to Nolan as a tattletale. Nolan took the tattletale reference as a sign that the stabbing was, at least in part, retaliation for Nolan filing a complaint report.

On or about September 15, 2011, while Nolan was at Ethan's house, Mrs. Bryan overheard Ethan and Nolan talking about an issue that took place at school. After Nolan went home, Mrs. Bryan questioned Ethan about what the two boys had been discussing. In response, Ethan described to his mother the incident where C.L. stabbed Nolan in the groin and about the overall bullying occurring in Mr. Beasley's band class. This conversation sparked a series of complaints and reports that is the foundation for the claims asserted against CCSD.

The first parental complaint occurred via email on September 15, 20th ("September 15th email") from Mrs. Bryan, addressed to Nolan's band teacher, Mr. Beasley, Counselor Halpin, and Principal McKay-all of whom where mandatory reporters under N.R.S. § 388.1351. The September 15th email identified C.L. and D.M. by name and described the physical assaults and verbal abuse. Both Mr. Beasley and Counselor Halpin acknowledged receiving the September 15, 2011 email. However, Principal McKay's email address was incorrect, so he did not receive the original complaint contained within the September 15th email. While Mr. Beasley and Counselor Halpin admitted that neither of them followed up on the September 15th email, this Court does not find this failure alone deliberately indifferent. However, actual knowledge of the bullying was triggered upon the receipt of the September 15th email.

In response to the September 15th email, Mr. Beasley changed the arrangements in the trombone section of his band class so that Nolan sat in front of C.L. and not next to him. Mr. Beasley made this decision without consulting with anyone else, especially Principal McKay.

Like Nolan, Ethan was also subjected to bullying by C.L. and D.M. After the September 13th Incident, the bullying escalated where C.L. and D.M. taunted him about his weight and made homophobic slurs and vile and graphic innuendos concerning sexual relations between Ethan and Nolan.

The second parental complaint occurred on September 22, 2011 from Mrs. Hairr, via a telephone conversation with Vice Principal DePiazza. During this conversation, Mrs. Hairr told Vice Principal DePiazza about the stabbing of Nolan's genitals by another student in band class.

On or about October 19, 2011, Ethan told his mother that C.L. and D.M. had removed the rubber stopper out of a piece of his trombone and repeatedly hit Ethan in the legs with the remaining sharp piece of the instrument leaving scratch marks on his legs. Ethan also informed his mother that C.L. and D.M. continued to make lewd sexual comments including calling both Ethan and Nolan "gay," "faggots," and made references about the two boys engaging in gay sex together.

On or about October 19, 2011, Mrs. Bryan sent a second email ("October 19th email") addressed to the same three individuals as the September 15th Email. Mr. Beasley and Counselor Halpin both acknowledged receipt of this email, but because it was addressed to the same incorrect email address as before, Principal McKay did not receive it. Later that day, on October 19, 2011, Mrs. Bryan and her husband went to the school where they met with Dean Winn for approximately one hour to discuss the bullying, specifically the physical assaults and homophobic slurs.

On or about October 19, 2011, Counselor Halpin attended a weekly administrators meeting with Principal McKay and Vice Principal DePiazza.

Counselor Halpin testified that he reported the bullying that was occurring in Mr. Beasley's band class in considerable detail and disclosed the September 15th Email and the October 19th email. Counselor Halpin specifically recalled Principal McKay directing Vice Principal DePiazza to take care of the matter. Principal McKay testified that he was not interested in the details of such matters and left it to his subordinates to address the issue. Principal McKay further testified that he did not follow up with Vice Principal DePiazza about how the investigation was going or what the investigation uncovered until February 2012. All of the school officials had conflicting testimony about who was tasked with the investigation into the bullying, but all testified that no investigation into the bullying was conducted until February 2012.

The bullying and harassment continued throughout the fall and into early 2012. Both boys avoided band class and school altogether. Ethan faked illness to avoid class and Nolan would try to avoid C.L. and D.M. by lingering in the halls and in the library. By the middle of January, both boys had almost completely stopped going to school altogether to avoid the continuous bullying.

Mrs. Bryan pulled Ethan out of Greenspun Jr. High in January 2012 after Ethan contemplated suicide. On or about January 2, 2012, Mrs. Hairr pulled Nolan out of Greenspun Jr. High after Nolan had an emotional breakdown because of the bullying. Mrs. Hairr filed a police report, reporting the bullying and harassment.

On or about February 7, 2012, Mrs. Bryan and Mrs. Hairr removed the boys from Greenspun Jr. High. Subsequently, Assistant Superintendent Jolene Wallace and Principal McKay's direct supervisor, ordered Principal McKay to conduct an investigation into the bullying of Ethan and Nolan. This is the only investigation that took place into the bullying of the Ethan and Nolan." (App. 1449-1453.)

IV. Argument

A. The Evidence and Testimony at Trial shows a Title IX Violation.

1. Title IX Standards

Section 901(a) of Title IX 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 USC § 1681(a). Based on the receipt of federal funds, CCSD is subject to Title IX requirements. *Id.* Under Title IX, student on student harassment and bullying based upon sex is actionable.

For liability under Title IX for student on student sexual harassment: 1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs", 2) the Plaintiff must suffer "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school", 3) the school district must have "actual

knowledge of the harassment", and 4) the school district's "deliberate indifference subjects its students to harassment". *See, Henkle v. Gregory*, 150 F.Supp.2d 1067, 1077-1078 (D. Nev. 2001). *See also, Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at *60-61 (D. Minn. Mar. 16, 2015) *reversed in part on other grounds in Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2016 U.S. Dist. LEXIS 115934 (D. Minn. Aug. 29, 2016).

> In *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court discussed the standard for determining a school district's direct liability for a third party's discriminatory actions. See 526 U.S. at 633. The *Davis* Court held that "a [Title IX] private damages action may lie against the school board in cases of student-on-student harassment . . . only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities . . . [and] only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *See id*. The Court also held that a school district would only be liable for a third-party's actions when the school "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id*. at 630.

2015 U.S. Dist. LEXIS 31591, at *60- *61.

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998), In the instant case, the testimony at trial showed that: 1) Greenspun Junior High School officials exercised substantial control over both the

students involved in the bullying and the context in which the harassment occurred; 2) both Ethan and Nolan were bullied at school; 3) the harassment they endured was sexual in nature; 4) the harassment was so severe, pervasive, and objectively offensive that it deprived Ethan and Nolan of access to the educational opportunities and benefits provided by the school; 5) the appropriate school officials had actual knowledge of the bullying and sexual discrimination suffered by Ethan and Nolan; and, 6) the appropriate school officials demonstrated deliberate indifference to the bullying endured by Ethan and Nolan. (App. 1964-1968.)

2. Ethan and Nolan were Bullied in Mr. Beasley's Band Class.

It is beyond question that school officials exercised substantial control over both the students involved in the bullying, and the context in which the harassment occurred. The fact that Ethan and Nolan were bullied in Mr. Beasley's band class is also not at issue, as it is acknowledged by CCSD. See the testimony of, (Ethan Bryan, App. 551-553.) (Nolan Hairr, App. 471-472.) They were not only called names, but both were physically assaulted by the bullies. On September 13, 2011, C.L. stabbed Nolan in the groin with a pencil during Mr. Beasley's band class. (Nolan Hairr, Day 1 at App. 478-481.) On October 18, 2011 Ethan was physically assaulted at the end of band class ("Like they took off one of the like rubber

stoppers on the instrument and was like scratching my legs with it.") (Ethan Bryan, App. 559-562.)

3. The bullying was sexual in nature.

The sexual nature of the bullying aimed at Nolan was also the subject of Nolan's testimony. (Nolan Hairr, Day 1 at App. 478-481.) He testified that from the very beginning of the school year he had to endure being called names such as "faggot, fucking fat faggot, fucking faggot, gay, gay boyfriend, cunt." *Id.* When he was 11 years old at the beginning of sixth grade, Nolan was a small child who, according to the testimony of Dean Winn, had "beautiful blonde hair down to his shoulders." (Cheryl Winn, App. 1082.)

While Ethan had been bullied by C.L. and D.M., their comments had started off being directed at his size and weight. After the stabbing incident, the bullies also began directing their homophobic slurs against Ethan as well. (Ethan Bryan, App. 558.) C.L. and D.M. continuously taunted Ethan and Nolan with homophobic slurs and innuendo, and specifically made statements concerning homosexual relations and explicit sexual acts between Ethan and Nolan in vile and graphic terms. "[T]hey called us faggots and stuff like that, and they asked us if we jerked off together, things like that. (*Id.*,) CCSD's Opening brief fails to show that the District Court's finding that bullying endured by Ethan and Nolan was sexual in nature was clearly erroneous or not supported by substantial evidence.

CCSD argues that, "[f]or Title IX claims based on homophobic harassment, the harassment must be motivated by a perception that the plaintiff is actually gay." Appellant's brief at 54, *citing Patterson v. Hudson Area Sch.*, 724 F. Supp. 2d 682, 691 (E.D. Mich. 2010). Yet, CCSD's brief does not even reference what the bullies thought. Any argument that because it cannot be proven that C.L. and D.M. actually thought that Nolan and Ethan were homosexuals, no action under Title IX is warranted, is itself clearly erroneous. At the outset, it is important to note that neither of the two bullying students ever appeared at trial.[2] Assumptions of what the bullies thought about Nolan and Ethan's sexuality cannot, therefore, be the basis for this Court determining that the bullying was not sexual in nature. On the contrary, the verbal and physical actions of the bullies speak for themselves.

The Court in *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011), noted that a Title IX claim for sexual harassment can be based on gender stereotyping.

> [W]e conclude the district court did not err when it instructed the jury "the harasser must be motivated by Wolfe's gender or his failure to conform to stereotypical male characteristics." This instruction is consistent with the applicable law.

648 F.3d at 867. Moreover, CCSD's argument evidences a fundamental misunderstanding of the applicable law. *See, EEOC* v. *Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013).

[2] C.L.'s deposition was published at trial, but not referenced at all in CCSD's Appellant brief. No deposition of D.M. was introduced at trial.

> It may be difficult judicially to assess whether and how harassment between two members of the same sex, neither of whom is homosexual, is "because of' the victim's sex. But cruelty and irrationality typify harassment, prejudice, stereotyping and hostility generally, see, e.g., *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 118 S. Ct. 998 (1998); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989)., and we echo the Supreme Court's confidence that "[c]ommon sense, and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiffs position would find severely hostile or abusive."*Oncale*, 523 U.S. at 82.

731 F.3d at 455 n.5. Here, the District Court, in its role as finder of fact, determined that the bullying Ethan and Nolan endured at the hands of C.L. and D.M. went, in the words of *Oncale*, *supra*, beyond "simple teasing or roughhousing among members of the same sex," into the realm of "conduct which a reasonable person in the plaintiffs position would find severely hostile or abusive."

The Court in *Wood* v. *Wick Communs. Co.*, 32 F. App'x 403 (9th Cir. 2002), addressed the situation where, in a Title VII context, the finder of fact was required to look beyond a pretextual explanation for Defendant's action, to evaluate the actual words spoken.

> [T]he comments by Wood's supervisor are sufficient direct evidence of discriminatory motive to raise a genuine question of material fact regarding his reasons for terminating her. A finder of fact could reasonably construe the supervisor's comments as expressing a gender stereotype motivated by an unlawful bias. *See Cordova* v. *State Farm Ins. Cos.*, 124 F.3d 1145, 1150 (9th Cir. 1997). It is significant that the comments were not isolated "stray remark[s]," *Merrick* v. *Farmers*

> *Ins. Group,* 892 F.2d 1434, 1439 (9th Cir. 1990), but instead occurred repeatedly.

32 F. App'x at 405 .

Although *Wood* was a Title VII case,"[i]t is undisputed that Title IX forbids discrimination on the basis of gender stereotypes. *Videckis* v. *Perpperdine Univ.*, No. CV 15-00298 DDP (JCX*)*,2015 U.S. Dist. LEXIS 169187, at *19 (C.D. Cal. Dec. 14,2015). "Gender stereotyping is a concept that sweeps broadly." *Id. See also, Students & Parents for Privacy v. United States Dep't of Educ.,* No. 16-cv-4945, 2016 U.S. Dist. LEXIS 150011 (N.D. Ill. Oct. 18, 2016).

> [T]he entire purpose behind Title IX was to address discrimination on the basis of sex broadly in educational institutions, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). Still, courts routinely rely on Title VII jurisprudence to determine the meaning of similar provisions in Title IX. *Carmichael v. Galbraith*, 574 F. App'x 286, 293 (5th Cir. 2014) ; *Jennings v. Univ. of N. Carolina,* 482 F.3d 686, 695 (4th Cir. 2007); *Doe v. Claiborne Cty., Tenn. By & Through Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 514 (6th Cir. 1996).

2016 U.S. Dist. LEXIS 150011, at *50-51.

Moreover, Nolan and Ethan's opinions about C.L. and D.M.'s mindset is immaterial. *Centola* v. *Potter,* 183 F. Supp. 2d 403, 411 (D. Mass. 2002) ("C*entola's* inconsistent testimony regarding his tormentors' motivations is not sufficient to refute this inference that he was discriminated against because of his sex.") In short, it is not necessary for Plaintiffs to prove C.L. and D.M. believed

Ethan and Nolan were actually gay. See, *Martin* v. *NY. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

> [C]ourts have held that "a man can ground a claim [under Title VII] on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252,259 (1st Cir. 1999); *see also Centola* v. *Potter*, 183 F. Supp. 2d 403,409 (D.Mass. 2002) (collecting cases). Indeed, the Second Circuit in dicta held that "a suit [by a man] alleging harassment ... based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex ...." *Simonton* v. *Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

224 F. Supp. 2d at 446.

Thus, the sworn testimony of both Nolan and Ethan, stand in stark contrast to CCSD's benign "boys will be boys" version of the homophobic and sex stereotyping insults that both boys were subjected to by C.L. and D.M. Nor does the "boys will be boys" approach by CCSD negate the physical assault of C.L. stabbing Nolan in the genitals with a pencil "to see if he was a girl," and Ethan being scratched on his legs by C.L. as part of the sexual harassment. CCSD has not made a case that the District Court's factual determination that the bullying was sexual in nature was unreasonable and without supporting evidence.

4. The bullying of Ethan and Nolan was severe, pervasive, and objectively unreasonable, and deprived them of significant educational opportunities.

The District Court, as finder of fact, found that the nature of the bullying was severe, pervasive, and objectively unreasonable. (App. 1966.) It involved

verbal abuse of a sexual and homophobic nature beginning from the start of the school year and only ceased when Ethan and Nolan were forced to flee Greenspun. (*Id.*) Both boys suffered so sufficiently from the bullying that they did whatever they could to not attend school in order to avoid the bullying. (*Id.*)

In January 2012, Ethan feigned illness in order to stay home from school. (Ethan Bryan, App. 567-568.) He would eat paper in order to make himself sick. (*Id.* at 569-570) Ethan testified that the bullying was so severe and pervasive that he saw suicide as his only way out. (*Id*.) Fortunately he was prevented from doing so by his mother's intervention. (*Id.*; Mary Bryan, App. 823-825.) At that point, she was forced to take him out of Greenspun. (Mary Bryan, App. 826-827.

In January 2012, Nolan stopped going to band class in order to avoid the bullying. (Nolan Hairr, App. 491-492.) Nolan subsequently had a breakdown due to the constant bullying. This forced his parents also to remove him from Greenspun. (Aimee Hairr, App. 1208-1210.) The creation of a sufficiently hostile environment forced Ethan and Nolan's parents to remove them from Greenspun Jr. High School and deprived them of an educational opportunity.

CCSD argues, that when specifically asked the question, neither Nolan nor Ethan were able to articulate the exact nature of the educational opportunity they lost, meant that there was no such loss. The inability of a child to articulate the exact nature of such loss, however, does not negate its existence, as CCSD

suggests. Ethan and Nolan could not possibly know what learning or other educational opportunity they may have missed out on.

Loss of educational opportunity based on a hostile environment inquiry actually "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale,* 523 U.S. at 81. "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Id, citing Harris v. Forklift Sys*., 510 U.S. 17, 23 (1993). *See also, Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).

> Surely one is "denied the benefits of, or subjected to discrimination under" an education program on the basis of sex when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program.

830 F. Supp. at 1575.

The severity of the hostile environment, forced both Nolan and Ethan to quit Greenspun to escape both verbal and physical harassment from C.L. and D.M. that school officials were aware of, yet allowed to continue. This was clearly a loss of educational opportunity. See *Doe v. Bd. of Educ.*, 982 F. Supp. 2d 641 (D. Md. 2013).

> [H]arassment sufficiently severe to compel a child to withdraw from school would seem to subsume the deprivation of the participation in, or benefits of, a particular program or activity.

982 F. Supp. 2d at 653, *citing Davis*, 526 U.S. at 652, and *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 256-57 (6th Cir. 2000)(Severe harassment that culminates in withdraw from school constitutes the deprivation of the participation in, or the benefits of, a program or activity.)

5. Appropriate school officials had actual notice of the existence and the discriminatory nature of the bullying.

Appropriate school officials had notice of the existence and nature of the bullying suffered by Ethan and Nolan. *See, Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

> [I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

524 U.S. at 290.

The Court in *Warren v. Reading Sch. Dist.*, 278 F.3d 163 (3d Cir. 2002), stated that the school principal was the appropriate person for Title IX purposes. In *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) the Court considered an individual who exercises substantial control, for Title IX purposes to be anyone with the authority to take remedial action.

> *Davis* makes clear, however, that a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him,

> curtailing his privileges, or providing additional supervision, would meet this definition.

186 F.3d at 1247.

In the instant case, several Greenspun personnel testified that they had authority to take remedial disciplinary actions when appropriate. Band teacher Robert Beasley affirmed that he understood that part of his job was to discipline children who did not follow the rules. (Robert Beasley, App. At 973.) He also stated that the scope of his disciplinary authority ran to "any behavior including but not limited to bullying." (*Id*.)

Dean Winn testified that campus discipline was, in fact, one of her primary responsibilities. (Cheryl Winn, App. 1044.) Principal McKay testified that he, Vice Principal DePiazza and Dean Winn, were the school administrators who were primarily responsible for matters of discipline. Moreover, they all received regular training in the area. (Warren P. McKay, App. 1141.) Dr. McKay testified that he delegated the responsibility for discipline to Mr. DePiazza. (Warren P. McKay, App. 1149) Vice Principal DePiazza testified that while Dean Winn handled most of the disciplinary issues, he was responsible for her as her supervisor. (Leonard DePiazza, App. 672.)

Principal McKay verified that he had the ultimate responsibility and authority for discipline and investigations of bullying within the school, but that he had delegated it to Dean Winn through her supervisor Vice Principal DePiazza.

(Warren McKay, App. 1145.) That appropriate persons at Greenspun were apprised of the bullying and of the sexual nature of that bullying was verified by the testimony of Nolan's and Ethan's mothers. Nolan's mother, Aimee Hairr, testified that she clearly explained this to Vice Principal DePiazza in her September 22, 2015 conversation with him. (Aimee Hairr, App. 1194-1195.)

On page 47 of their Opening brief, CCSD argues both that, 1) appropriate school officials both did not have any knowledge of the homophobic nature of the bullying endured by Ethan and Nolan, and that, 2) the school took prompt remedial action about it.

> The district court inappropriately found CCSD's "actual knowledge" from an in-person meeting in which Mrs. Bryan disclosed to Dean Winn homophobic slurs that had been directed at Ethan. (8 App. 1967:26–1968:1.)18 After that meeting, the school took prompt, effective remedial action, such that that first report was also the only report of harassment before Ethan withdrew.

Appellant's Opening Brief, at 47. CCSD fails to explain exactly what it found inappropriate about the District Court's conclusion that:

> Later that day, on October 19, 2011, Mrs. Bryan and her husband went to the school where they met with Dean Winn for approximately one hour to discuss the bullying, specifically the physical assaults and homophobic slurs.

There was certainly ample evidence of it. Mary Bryan's testimony makes it clear that Ethan's parents were quite explicit in recounting to Dean Winn, not only

the physical assault that Ethan endured the day before, as stated in Mary's October 19, 2011 email, but also of the vile homophobic slurs that Ethan and Nolan were constantly being subjected to.

> Q Were you -- during that meeting, were you or your husband more specific about the things that were coming out of CL's mouth?
>
> A Absolutely. And I –
>
> Q What did you tell –
>
> A We made it clear to her that this was not -- Ethan's a big boy. He is very tall. He's had a weight problem – as he made him stand up in front of the court yesterday and show everybody, he has a weight problem. This is not the first

(Mary Bryan, App. 812.)

> time he's been teased.
>
> He has been somebody that stands out in crowds for his whole life. He has not -- that's not the first time he's been called fat. This is the first time that it was to this degree and of this nature. That's why my husband and I went down there and made a big deal of it. This wasn't playground, ooh, you're fat, you're a giant. He had heard that. His whole life he's been overweight.
>
> Q Okay. But were you more specific in terms of what was different about this in terms of the name calling?
>
> A Absolutely. We let her know that this was incredibly unacceptable, this implying that the two boys were the class gay wads or whatever, faggots or gay boyfriends. My husband was very clear, so was I, that it was unacceptable and we didn't want to have to have the kids tolerate it not even a day longer.

(Mary Bryan, App. 813.)

Appellant's brief does not contest the existence or the content of the meeting between Mr. and Mrs. Bryan and Dean Winn on October 19, 2011. See Appellant's brief at 12 ("According to Mrs. Bryan, she met with Dean Winn later on October 19 and described the homophobic slurs.") Thus, although CCSD argues that school officials had no knowledge of the bullying of Ethan and Nolan by C.L. and D.M. prior to February 2012, it cannot account for the very clear, explicit, and uncontested testimony by Mary Bryan that the District Court, as finder of fact, found credible.

Moreover, while, as noted above, CCSD claims that effective remedial action was taken in response to Dean Winn's October 19, 2011 meeting with the Bryans, Appellant's brief fails to describe exactly what remedial action that was taken by the school to remedy the situation in 2011. That is not surprising considering the fact that Dean Winn testified that she did not even remember meeting with Mr. and Mrs. Bryan on October 19, 2011. (Winn, App. 1108.) However, she did not deny that the meeting occurred.

Thus, by October 19, 2011 at the latest, at least two of the three Greenspun Junior High School administrators responsible for investigation of bullying and for discipline, Vice Principal DePiazza and Dean Winn had actual notice of the verbal and physical sexual harassment and bullying that Ethan and Nolan were being

subjected to in Mr. Beasley's band class, as did Principal McKay, Vice Principal DePiazza, Counselor Halpin and band teacher Beasley.

CCSD attempts to make much of the fact that neither the September 15, 2011 nor the October 19, 2011 emails mentioned the sexual nature of the assaults and harassment. At the time that Mary Bryan wrote the September 15, 2011 email, she was not aware that the stabbing of Nolan Hairr in the genitals was accompanied by a statement by C.L. regarding whether Nolan was a boy or girl. Nolan's parents did not even find out about the incident until September 21, 2011. (Aimee Hairr, App. 1189-1190.) As for the October 19, 2011 email by Mary Bryan, she testified that she did not include the vile homophobic language in the email because she felt more comfortable expressing it in the face to face meeting with Dean Winn on the same day. (Mary Bryan, App. 858.)

CCSD appears to place great emphasis on the fact that both Ethan and Nolan were reluctant to admit to being bullied and even more reluctant to talk about the sexual nature of the harassment they were subject to. Both Ethan and Nolan testified that they were reluctant to disclose the bullying, both verbal and physical, to anyone for fear of retaliation by C.L. and D.M. Nolan testified that after he lodged a complaint with the Dean about the verbal abuse, touching and hair pulling by C.L., C.L. subsequently stabbed Nolan in the groin with a pencil calling him a tattletale. (Nolan Hairr, App. 478-480.) This fear of retaliation was specifically

mentioned in Mary Bryan's September 15, 2011 email. (Plaintiffs' Trial Exhibit App. 2225.)

> They are good kids who do not have to put up with this for a minute longer. Nolan is afraid to notify an adult for fear of retaliation. I trust that you will take this matter as seriously as I have.

Both Mr. Beasley and Mr. Halpin testified that they had, in fact, received Mary Bryan's September 15, 2011 email. (John Halpin, App. 918.) (Robert Beasley, App. 983.) and were therefore aware of Nolan's reluctance to report the bullying he was enduring for fear of further retaliation. In his testimony, Mr. Beasley acknowledged that based on his training and experience, bullied students are often reluctant to report such incidents to a teacher or other adult, often for fear of retaliation. (Robert Beasley, App. 985-986.) Counselor John Halpin also recognized Nolan's reluctance to take his complaint about the stabbing incident to the Dean. (John Halpin, App. 929.)

Ethan too feared retaliation if he reported the bullying to school authorities. He was particularly concerned when he learned that his mother planned to complain about the scratching of his leg by a sharp piece of a trombone.

> Q Now, at some point did your mother become aware of what happened at school that day?
>
> A Yes.
>
> Q And how did that happen?

A When I came home there was marks on my leg and she asked me what those were and I told her what happened.

Q And when you told your mother what happened, did you understand and believe she was going to report it to the school?

(Ethan Bryan, App. 562.)

A I don't know.

Q Did you at some point learn that she did report it?

A Yes.

Q And were you concerned or worried about the fact that she had reported it to the school?

A A little bit, yes.

Q And what do you mean by that, a little bit?

A Well, because earlier in the year when Nolan had reported something they -- we were -- we noticed it becoming like more frequent and like they retaliated.

(Ethan Bryan, App. 562.)

6. Ethan and Nolan's reluctance to report the continued bullying for fear of further retaliation does not show that appropriate school officials did not have actual knowledge of it.

As noted above, both the band teacher, Mr. Beasley and the Counselor, Mr. Halpin, acknowledged that it is not unusual for bullied children to not want to report the suffering that they are enduring. CCSD, however, seems to imply that because Ethan and Nolan "would say everything is fine" when casually asked how

they were doing, that the bullying was somehow made up as a ruse to get them into parochial school.

This implication, obviously, is both offensive and totally illogical. It is also totally irrelevant. Regardless of how the 11-year-old boys felt, the two emails plus the conversations that the boys' mothers had with appropriate school officials clearly constitute actual notice. Even if the appropriate school officials did not believe the reports of the extent and nature of the bullying related to them by Ethan and Nolan's parents, they still had a statutory duty to investigate.

Principal McKay acknowledged that in 2011, NRS 388.1351(2) required that once a report of bullying is received, the Principal or his or her designee shall initiate an investigation not later than one day after receiving notice of the violation, and that the investigation must be completed within 10 days after the date on which the investigation is initiated. (Warren McKay, App. 1164.) Dr. McKay also testified that he assigned Vice Principal DePiazza to conduct that investigation (*Id*. at 1167.) In reality, however, neither Principal McKay, nor his two designees Vice Principal DePiazza or Dean Winn, ever complied with the investigation requirement of NRS 388.1351(2). This constitutes deliberate indifference.

CCSD counters with the argument that they did conduct an investigation in 2011. Various school officials periodically asked Ethan and Nolan how they were

doing and received no complaints in response. As noted above, the reluctance of bullied students to report the truth of what is happening to them to school officials is rather commonplace. Yet, CCSD largely bases its defense on both Ethan and Nolan's fear and reluctance to disclose the ordeal they were forced to endure.

7. Greenspun school officials acted with deliberate indifference for Title IX violation purposes.

Deliberate indifference is "the conscious or reckless disregard of the consequences of one's acts or omissions." *Henkle v. Gregory,* 150 F.Supp.2 at 1078. Deliberate indifference occurs where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."' *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000). Deliberate indifference must be evaluated under an objective deliberate indifference standard. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018).

The standard for deliberate indifference does not vary between Title IX, Title VII, and 42 USC 1983 cases. *Doe A. v. Green*, 298 F.Supp.2d 1025, 1035 (D. Nev., 2004). Deliberate indifference consists of deliberate action or deliberate inaction. *Wereb v. Maui County*, 727 F.Supp.2d 898, 921 (D. Haw., 2010) *citing, Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir., 2006); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

In other cases, Defendants have been "charged with knowledge" of unconstitutional conditions when they persistently violated a statutory duty to inquire about such conditions and to be responsible for them. *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972); *United States ex rel. Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975); *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981).

> The more a statute or regulation clearly mandates a specific course of conduct, the more it furnishes a plausible basis for inferring deliberate indifference from a failure to act, even without any specific knowledge of harm or risk. This is because failure to undertake a specific course of action in vindication of a general duty can reasonably be attributed to a bona fide difference of opinion as to how the duty should be performed. However, no such alternative explanation for nonfeasance can be raised where the task mandated is specific and unequivocal. . . .
>
> The failure to report in the face of clear statutory instructions to do so, simply as evidence of an overall posture of deliberate indifference toward Anna's welfare. Under this theory the statute does not in and of itself furnish any basis for a finding of liability, but merely constitutes incremental documentation of a pervasive pattern of indifference.

649 F.2d at 145-46.

CCSD argues that Plaintiffs are asserting a "deliberate indifference per se" theory based on the failure to conduct the investigation mandated under NRS 388.1351(2). This is incorrect. The failure to adhere to the statute requiring investigation is not dispositive of the issue. However, as in *Doe v. N.Y.C. Dep't of Soc. Servs.*, the failure to investigate the reported physical, sexual, and other verbal bullying, in the face of clear statutory instructions to do so, is significant evidence

of an overall posture of deliberate indifference toward Ethan's and Nolan's welfare. Such finding by the District Court, as finder of fact, is clearly not unreasonable.

To be actionable, the behavior of Greenspun officials must have, at a minimum, "cause[d] students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645. "[I]f an institution either fails to act, or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination. *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274, 290 (1998); *See, Jane Doe A v. Green*, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004).

> The Ninth Circuit has explained that a school district will be liable for discrimination occurring on school grounds 'if the need for intervention was so obvious, or if inaction was so likely to result in discrimination, that it can be said to have been deliberately indifferent to the need.' *Monteiro v. Tempe Union High School Dist*. 158 F.3d 1022, 1034 (9th Cir.1998) (discussing a school district's response to racial discrimination in a Title VI cause of action). *See also Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir.2001) (discussing liability under the deliberate indifference standard utilized for claims brought under § 1983). Deliberate indifference exists 'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.' *Reese v. Jefferson School District No. 14J*, 208 F.3d 736 (9th Cir.2000). In Nevada, the Ninth Circuit's civil jury instruction has been utilized to clarify the standard for a Title IX claim, defining deliberate indifference as 'the conscious or reckless disregard of the consequences of one's acts or omissions.' *Henkle v. Gregory*, 150 F.Supp.2d 1067 (D.Nev.2001).

298 F.Supp.2d at 1035; *see also, S.B. v. Bd. of Educ.*, 819 F.3d 69(4th Cir. 2016).

> That is not to say, of course, that only a complete failure to act can constitute deliberate indifference, or that any half-hearted investigation or remedial action will suffice to shield a school from liability. Where, for instance, a school has knowledge that a series of "verbal reprimands" is leaving student-on-student harassment unchecked, then its failure to do more may amount to deliberate indifference under *Davis*. *Patterson v. Hudson Area Schs*., 551 F.3d 438, 448-49 (6th Cir. 2009); *see also Zeno v. Pine Plains Cent. Sch. Dist*., 702 F.3d 655, 669-70 (2d Cir. 2012) (school response to student-on-student harassment may be unreasonable where school "dragged its feet" before implementing "little more than half-hearted measures").

819 F.3d at 77.

CCSD's argument that in 2011, while Ethan and Nolan were both still at Greenspun, school officials conducted an adequate investigation into the claims that Ethan and Nolan were bullied both physically and verbally is belied by school officials' own testimony. Despite the fact that Principal McKay specifically tasked Vice Principal DePiazza with conducting a proper investigation at the October 19, 2011 administrators meeting, both Mr. DePiazza and Dean Winn testified that neither of them conducted any investigation. To suggest now that the "how are you doing" queries were in any way adequate, contradicts Principal McKay's own testimony as to what constitutes a proper investigation.

> Q (By John Scott) … Just in your mind what would have been a good investigation?
>
> A Statements that reflect students that were close to the area of where whatever was reported was, interviews with maybe a teacher or other staff member that might have been in the area, looking at the progressive discipline of students that are involved. If wrongdoing is

found or if parents need to be informed of different things, communication with parents.

Q Fair enough. And when we talk about getting statements from students, would that necessarily include or not include interviewing students who are either witnesses, victims or alleged predators?

. . .

(Warren McKay, App. 1142.)

MR. SCOTT: Okay.

Q The alleged person who committed the bullying, would typically you expect the investigation include interviewing that suspect?

A Absolutely.

Q And would you expect -- and it might include or might not include getting a written statement from the suspect?

A Yes

Q The same for the victim, it would include interviewing the victim and possibly getting a written statement from the victim?

A Yes.

Q And why would you expect the investigation to include an interview of the victim?

A Well, you want to have statements from all the students. We can remember a lot of things when we're investigating, but when we have to use that information to come up with a conclusion, obviously we want to have that information to back up our decision.

Q Well, why not just let students make written statements without interviewing them?

A Typically you can glean a lot of information from a student, and when you're interacting with them personally,

(Warren McKay, App. 1143.)

things come up and you're able to maneuver your questioning to fit whatever is happening, so.

Q So would it be fair to say if there's an allegation or a particular incident, you don't expect a sixth grader to necessarily know what is -- what an investigator or dean may think is important when that student writes down or reports the incident?

A Right. What they might recall doesn't factor in particulars. So you're able to ask questions that draws attention to that, so that they can recall and then give you a complete picture.

Q And would that go -- be the same for student witnesses who were identified; you would find out if there were student witnesses, get statements, also interview them if they had information?

A Yes.

(Warren McKay, App. 1144.)

Here school officials' failure to take further action once it was apparent that the nominal efforts it had taken did not end the problem "supports a finding of deliberate indifference." *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1136 (9th Cir., 2003), *See also, Vance v. Spencer County Public School Dist.*, 231 F.3d 253 (6th Cir., 2000).

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail,

> such district has failed to act reasonably in light of the known circumstances.

231 F.3d at 261.

It is undisputed that no investigation, much less one conforming to statute and even Principal McKay's standards for adequate investigation, was ever undertaken in 2011, despite the Principal's instructions to the Vice Principal to do so. The only time an investigation occurred was in February 2012, which was ordered by the District, and occurred well after both Ethan and Nolan had been removed from Greenspun, and a police report had been filed by Plaintiffs' parents. The District Court properly found that this constituted deliberate indifference on the part of school officials who had actual notice of the physical and homophobic bullying that Ethan and Nolan were subjected to.

The District Court, in finding that CCSD violated Title IX based its decision on the substantial, even overwhelming evidence elicited at trial, that: 1) Defendant exercised substantial control over both the harasser and the context in which the known harassment occurred, 2) Ethan and Nolan suffered sexual harassment ... that is so severe, pervasive, and objectively offensive that deprived them of access to the educational opportunities or benefits, 3) Defendant had actual knowledge of the harassment, and 4) Defendant exhibited deliberate indifference to the known harassment. CCSD's Opening brief provides no basis for this Court to reverse this finding on the clearly erroneous standard of there being no way any

other reasonable finder of fact could reach these conclusions based upon the testimony at trial.

B. The Evidence and Testimony at Trial shows a Substantive Due Process Violation.

CCSD argues that Plaintiffs have not alleged any constitutional violation, and that under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Due Process Clause of the Fourteen Amendment to the United States Constitution in and of itself does not require state actors to protect private citizens from harm inflicted by other private citizens. *DeShaney*, however, does not apply here because of the state created danger exception to *DeShaney*. Appellant's argument is that Nolan and Ethan had no constitutionally protected interest in an education.

1. Plaintiffs had a constitutionally protected interest in their safety and in their education.

However, the United States Supreme Court and the Ninth Circuit have both said that state law can create a liberty or property interest. *Vitek v Jones*, 445 U.S. 480 (1980); *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir. 1997). Moreover, a student's right to a public education is a property interest protected by the Due Process Clause, *Goss v. Lopez*, 419 U.S. 565, 576 (1975)[3]. *See also*, *Henry A. v. Willden*, 678 F.3d 991 (9th Cir. 2012).

[3] CCSD dismisses *Goss* because it involved a procedural rather than a substantive

> Generally, "the Fourteenth Amendment's Due Process Clause . . . does not confer any affirmative right to governmental aid" and "typically does not impose a duty on the state to protect individuals from third parties." *Patel v. Kent Sch. Dist*., 648 F.3d 965, 971 (9th Cir. 2011) (citations and alterations omitted). There are, however, two exceptions to this rule. First, there is the "special relationship" exception — when a custodial relationship exists between the plaintiff and the State such that the State assumes some responsibility for the plaintiff's safety and well-being. *Id*. at 971 (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 198-202, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). Second, there is the "state-created danger exception" — when "the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger[.]'" *Id*. at 971-72 (quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)). "If either exception applies, a state's omission or failure to protect may give rise to a § 1983 claim." *Id*. at 972.

678 F.3d at 998.

Here, the District Court, after hearing all of the testimony at trial, determined that school officials placed Ethan and Nolan in danger by acting with indifference to known and obvious danger. In fact, as noted above, on page 47 of its brief, CCSD argues that after the October 19, 2011 meeting between Dean Winn and Mr. and Mrs. Bryan, the school acted with what it said was prompt effective remedial action. Moreover, on pages six and seven of the CCSD brief, Appellant clearly states that the response to Ethan and Nolan being bullied in band class was to place them seated in front of the bullies as opposed to next to them.

2. Defendant acted with deliberate indifference for substantive due process violation purposes.

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due process claim However, nothing in *Goss* even suggests that it is inapplicable to either.

The "state-created danger exception" — when "the state affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known and obvious danger,'" is manifested here. As noted above, the standard for deliberate indifference does not vary between Title IX, Title VI, and 42 U.S.C. § 1983 cases. *Doe A. v. Green*, *supra*, 298 F.Supp.2d at 1035, and may involve deliberate action or deliberate inaction. *Wereb v. Maui County*, *supra*,727 F.Supp.2d at 921, *citing, Long v. County of Los Angeles*, *supra*, 442 F.3d at 1185; *City of v. Canton*, *supra*, 489 U.S. at 388.

In other cases, Defendants have been "charged with knowledge" of unconstitutional conditions when they persistently violated a statutory duty to inquire about such conditions and to be responsible for them. *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972); *United States ex rel. Larkins v. Oswald,* 510 F.2d 583 (2d Cir. 1975); *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981).

> These cases are best understood not as imposing strict liability under § 1983 for failure to perform statutory duties, but as inferring deliberate unconcern for plaintiffs' welfare from a pattern of omissions revealing deliberate inattention to specific duties imposed for the purpose of safeguarding plaintiffs from abuse. *See Duchesne v. Sugarman*, 566 F.2d 817, 832 n.31 (2d Cir. 1977).

649 F.2d at 145.

Thus, despite CCSD's assertion that Plaintiffs are asserting a "deliberate indifference per se" theory based on the failure to conduct the investigation

mandated under NRS 388.1351(2), as in *Doe v. N.Y.C. Dep't of Soc. Servs.*, the failure to investigate the reported physical, sexual, and other verbal bullying, in the face of a clear statutory mandate is not a "per se" violation, but presents significant evidence of deliberate indifference toward Ethan's and Nolan's safety and well-being.

3. CCSD is subject to *Monell* liability.

CCSD argues that the District cannot be held responsible for the actions of Greenspun Junior High School officials pursuant to *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). This argument was rejected by the District Court in the denial of Defendants' Motion for Summary Judgment:

> THE COURT: You know, actually, it was my intention all along to dismiss the individuals from all causes of action. The entity if liable is liable based upon the acts of those individuals.

(Transcript of April 26, 2016 Hearing re: Summary Judgment, App. 257.)

Appellant is incorrect in its argument that there can be no CCSD liability. The Ninth Circuit has identified three distinct alternative theories of municipal liability, by showing: 1) a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity; 2) that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or 3) that an official with final policymaking authority either delegated that

authority to, or ratified the decision of, a subordinate. *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). *See also, Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Liability can be established by the existence of a government policy or custom that leads to a constitutional deprivation. *Monell v. Department of Social Services of New York*, 436 U.S. at 694; *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 983 (9th Cir. 2002); *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). The other two theories of municipal liability attach when a final policymaker for the government acts in a manner that can fairly be said to represent official action. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986).

Liability may attach either when the final policymaker is a final policymaking authority who made the allegedly unconstitutional action, or when that action is ratified, or delegated to a subordinate. *Menotti*, 409 F.3d at 1147; *Ulrich*, 308 F.3d at 984-85. A policy includes "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur*, 475 U.S. at 481. When determining whether an individual has final policymaking authority, the pertinent query is whether he or she has authority "in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781 (1997). The individual must be in a position of authority to the extent that a

final decision by that person may appropriately be attributed to the District. *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004); *see also, Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). A government entity can be liable for an isolated constitutional violation. *Id.*

Principals can be considered as final policymakers for the purposes of *Monell* liability with respect to student discipline issues. *Williams v. Fulton Cnty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1126-27 (N.D. Ga. 2016), *citing*, *Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004); *see also, Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 268 (N.D.N.Y. 2000):

> The legislature did not intend to impose upon the board of education a duty to make and assume direct responsibility of enforcing rules reaching down into each classroom in the school system. Principal Murdock, as principal of Cumberland Head Elementary School, was the highest ranking person in the school. By virtue of her position, she was directly responsible for discipline in her school.

89 F. Supp. 2d at 268 (internal citations omitted), *citing Luce v. Board of Educ.*, 2 A.D.2d 502, 505, 157 N.Y.S.2d 123, 127 (3d Dep't 1956), *aff'd*, 3 N.Y.2d 792, 143 N.E.2d 797, 164 N.Y.S.2d 43 (1957).

4. NRS 388.1351(2) specifically tasks the school Principal with responsibility for investigating reports of bullying.

The question of whether a particular individual has policymaking authority is a question of state law. *Pembaur, supra*, 475 U.S. at 483; *Lytle, supra*, 382 F.3d

at 982-83; *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); While CCSD may argue that all disciplinary decisions made by a Principal of a school are subject to review at the District level, Plaintiffs' claims largely rest not only with disciplinary decisions that were never made, and the decision to place Ethan and Nolan back into an even more precarious situation, but also with the school's failure to even conduct an investigation regarding the bullying of Ethan and Nolan. The language of NRS 388.1351(2) in 2011, stated that: once a report of bullying is received, **the Principal or his or her designee shall** initiate an investigation not later than one day after receiving notice of the violation, and that the investigation must be completed within 10 days after the date on which the investigation is initiated. (emphasis added)

The statutory language was unambiguous in stating that the duty to investigate reports of to the school was tasked to the "Principal or his or her designee." The plain language of the statute provided no authority for CCSD to designate somebody else at the District level to override this delegation of responsibility and authority. Because under this statute, the final policymaker was specifically Principal McKay or his designees, Vice Principal DePiazza and Dean Winn. The failure of any of them to conduct the requisite investigation on the reports of the bullying of Ethan and Nolan, by C.L. and D.M. in 2011, was

ultimately attributable to the Principal himself. Therefore, Defendant CCSD retained liability for the substantive due process violation under *Monell*.

C. The damages awarded Ethan and Nolan were not an abuse of discretion.

At the February 17, 2016 Hearing before the Honorable Bonnie A. Bulla, Discovery Commissioner, CCSD's Counsel, Mr. Park, acknowledged that the Court, acting as finder of fact in a bench trial can determine a fair compensation amount for Nolan and Ethan's damages.

> DISCOVERY COMMISSIONER: What you need to do is compel a number for the general damages; otherwise, you want the Plaintiff from being excluded to asking about those damages at trial, is that right?
>
> MR. PARK: Almost, Your Honor. If they don't give us a number, that's fine. They just can't present a specific number to the Jury. **They can say compensate us fairly and reasonably based on the evidence you've heard, or the Judge, if it ends up being a bench trial here,** it may still be a question as to what –
>
> DISCOVERY COMMISSIONER: Okay.
>
> MR. PARK: -- you ask for.

(App. 226.)(emphasis added)

At trial, that is exactly what occurred. Plaintiffs left the question of damages solely to the sound discretion of the District Court. CCSD argues that it was improper for the District Court to refer to *Henkel v. Gregory*, 26 150 F.Supp.2d 1067 (D. Nev. 2001) "as a guideline for damages in similar school bullying cases."

(See, July 20, 2017 Findings of Fact and Conclusions of Law, App. 1972.) CCSD argues that this is inappropriate because of the factual differences between the two cases, so therefore the District Court abused its discretion in referencing *Henkel.*

However, CCSD neglects to mention that any differences between the instant case and *Henkel* were taken into account by the District Court. ("Using *Henkel* as a guidepost, the $451,000 award in 2001 would be equivalent to approximately $625,000 in today's dollars." (*Id.*) Yet, that was not the amount awarded to Ethan and Nolan. Each boy was awarded a total sum of $200,000 by the District Court after hearing all of the trial testimony. (*Id.*) CCSD has not shown any abuse of discretion.

D. The Fees Awarded were not an Abuse of Discretion.

The District Court granted Plaintiffs' requested fee award pursuant to Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) (42 U. S. C. § 1988), in the amount of $470,418.75 (October 16, 2017 Order, App. 2159- 2160). The Court reduced the requested hourly rate for Plaintiffs' attorney John H. Scott from $650 per hour to $450 per hour, and the rate for Allen Lichtenstein from $600 per hour to $450 per hour. The total fee award to Plaintiffs was $470,418.75.

Congress passed this Act "as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to take civil rights cases. *Evans v. Jeff D.*, 475 U.S. 717, 748-49 (1986). "[A] plaintiff who obtains relief in a private

lawsuit "'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." *Id*., at 749. The purpose of these fee shifting standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights. *Id.*

By creating Section 1988, Congress realized that civil rights cases are distinct from the ordinary private contractor tort case, in that the vindication of civil rights goes well beyond the interests of just the parties involved, but serves also the public interest. *See, Bouvia v. Cty. of L.A.*, 195 Cal. App. 3d 1075, 241 Cal. Rptr. 239 (1987). Thus, a substantial fee award is a mechanism to attract high quality legal representation for cases that may otherwise be economically impossible.

In Plaintiffs' Motion for Fees and Costs, (App. 1553-17115.) Plaintiffs set forth a lodestar amount comprised of the number of hours spent on this case multiplied by the reasonable hourly fee. *See, Hensley v. Eckerhart*, 461 US. 424, 433 (1983). "A 'strong presumption' exists that the lodestar figure represents a 'reasonable fee,' and therefore, it should only be enhanced or reduced in 'rare and exceptional cases.'" *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 n.4 (9th Cir. 2000), *citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, (1986); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041,

1045 (9th Cir. 2000). ("The lodestar amount is presumptively the reasonable fee amount."); *Herbst v. Humana Health Ins.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989) ("There is a strong presumption that the lodestar rate is reasonable.")

CCSD argues that this Court should reduce Plaintiffs' fee award because it claims Plaintiffs' achieved only partial success. CCSD also argues that attorneys John H. Scott and Allen Lichtenstein (in his capacity as a private attorney after July 31, 2014) should receive a billing rate of $250 an hour. Here, despite the CCSD's arguments to the contrary, Plaintiffs achieved complete success, which constitutes excellent results. Plaintiffs' attorneys' hourly rates are reasonable, even though the District Court significantly reduced them. (This Appeal does not challenge the hours spent component of the lodestar amount.)

When determining a reasonable fee award under a federal fee-shifting statute, a district court must first calculate the lodestar by multiplying the number of hours reasonably expended, by the reasonable hourly rate. *Carter v. Caleb Brett LLC*, 741 F.3d 1071, 1073 (9th Cir. 2014); *citing, Van Skike v. Dir., Office of Workers' Comp. Programs*, 557 F.3d 1041, 1046 (9th Cir. 2009); and *Tahara v. Matson Terminals, Inc*., 511 F.3d 950, 955 (9th Cir. 2007).

1. The amount involved and the results obtained

Despite CCSD's protestations to the contrary, Plaintiffs received excellent results. Plaintiffs prevailed on both the Title IX and Substantive Due Process

claims based on the finding of deliberate indifference on the part of school officials. Plaintiffs believed that the Court, as finder of fact, was best positioned to set the amount of damages due Plaintiffs. The Court awarded each Plaintiff the sum of $200,000 as fair compensation.

CCSD argues that because Plaintiffs did not prevail on all of its legal theories, they did not achieve excellent results. This argument is contrary to well established law. All of the hours set forth in Plaintiffs' Motion involved the same set of facts. In order for hours to be exempt from inclusion in the fee calculation, those hours must involve both different theories of law and different facts. *Herbst, supra*, 105 Nev. at 591, 781 P.2d, at 765. CCSD did not and could not argue that the claims against the school district and its agents involved claims based on different facts. Plaintiffs received excellent results. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley, supra*, 461 U.S. at 435.

> Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Id.

Nonetheless, CCSD asserts that because Plaintiffs failed to prevail on every contention raised in the lawsuit, the lodestar amount should be reduced.

Defendant's position is incorrect as a matter of law. The Supreme Court in *Hensley*, rejected the approach taken by the CCSD in favor of one that looks at the success of the attorneys as a whole.

> It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

461 U.S. at 435.

Similarly, the Nevada Supreme Court, in *Herbst v. Humana Health Ins.*, 105 Nev. at 781, stated that if the claims in question revolved around a common core of facts, none of the hours expended are exempt.

> [W]here the plaintiff's claims involve a common core of facts he is entitled to attorney's fees even for the work performed on his unsuccessful claims. It is only where a plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims that he should not be entitled to attorney's fees for work done on the unsuccessful claims.

105 Nev. at 591, 781 P.2d at 765, *citing Hensley*, 461 U.S. at 435. *See also, Webb v. Sloan*, 330 F.3d 1158, 1168-69 (9th Cir. 2003).

> In *Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 902-03 (9th Cir. 1995), we examined our cases concerning "relatedness" in fee awards. We acknowledged that the test for

> relatedness of claims is not precise. *Id.* at 903. However, we offered some guidance, explaining that "the focus is to be on whether the unsuccessful and successful claims arose out of the same 'course of conduct.' If they didn't, they are unrelated under *Hensley*." *Id.* We explained that claims are *unrelated* if the successful and unsuccessful claims are "distinctly different" *both* legally *and* factually. *Id.* at 901, 902. Again echoing *Hensley*, we reasoned that such hours are excludable because work on such distinctly different claims "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 901 (quoting *Hensley*, 461 U.S. at 435 (internal quotation marks omitted)). We cited cases in which we asked "whether it is likely that some of the work performed in connection with the unsuccessful claim also aided the work done on the merits of the successful claim." *Id.* at 903 (brackets and internal quotation marks omitted). Ultimately, however, we reaffirmed that the focus is on whether the claims arose out of a common course of conduct. *Id.* In short, claims may be related if **either the facts *or* the legal theories are the same.**

330 F.3d at 1168-69 (emphasis added).

CCSD argues that all but one of the Defendants, with the exception being CCSD itself, ended up being dismissed from the case, therefore showing only partial success. This argument, however, shows nothing of the sort. All of the Defendants listed in Plaintiffs' October 10, 2014 Amended Complaint (App. 111-149.) were either agents of CCSD or the School District itself. All of the claims for relief are based on the exact same facts. Although Plaintiffs proffered several different legal theories, that alone is not a proper basis for reducing the lodestar in light of the claims being made on the same facts. Unrelated claims are only those that are both factually *and* legally distinct. *Ibrahim v. United States Dep't of Homeland Sec.*, 835 F.3d 1048, 1062 (9th Cir. 2016), *citing Webb*, 330 F.3d at

1168. In *Cabrales v. Cty. of L.A.*, 935 F.2d 1050 (9th Cir. 1991), the Court noted that the measure of success is the end result of the litigation.

> Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war. Lawsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning.

935 F.2d at 1053. Here, despite the winnowing of claims and Defendants during the course of proceedings, Plaintiffs obtained the relief they were seeking, thus providing excellent results.

CCSD does not even argue that any of the claims made against the CCSD Defendants are **both legally and factually distinct**. Therefore, Plaintiffs' success against the District on the Title IX and Substantive Due Process claims, due to the Court's ruling that school personnel exhibited deliberate indifference to known dangers that Nolan and Ethan were continuing to face, did not result in partial success, but instead, complete success, or in other words, excellent results.

2. Defendant's claim that Plaintiffs did not receive declaratory or injunctive relief is incorrect.

Defendants also argue that Plaintiffs were only partially successful because they did not receive declaratory and injunctive relief. To the extent that this relief related to NERC, such matters were resolved out of court prior to the filing of Plaintiffs' Amended Complaint. As for Defendant CCSD, it cannot be seriously

argued that the Court did not provide declaratory relief to Plaintiffs in its June 29, 2017 Order.

> COURT ORDERS for good cause appearing and after review, Defendant CCSD violated Title IX of the Civil Rights Act.
>
> COURT FURTHER ORDERS for good cause appearing and after review, violated Plaintiffs' substantive due process rights as guaranteed by the Fourteenth Amendment to the United States constitution pursuant to 42 U.S.C. § 1983.
>
> COURT FURTHER ORDERS for good cause appearing and after review Judgment shall be entered in favor of Plaintiffs Mary Bryan, on behalf of Ethan Bryan, and Aimee Hairr, on behalf of Nolan Hairr.

June 29, 2017 Order, (App. 1459.) This declaration is undoubtedly clear and unambiguous.

Defendant also argues that Plaintiffs received a damage award that was only one third of what they sought. This is untrue. Throughout the course of this lawsuit, Plaintiffs only requested damage relief in whatever amount the Court would deem fair and reasonable. In fact, CCSD vehemently objected to Plaintiffs not seeking a specified damage amount but leaving the question instead to the discretion of the Court. This does not show partial success.

3. The damages awarded to Plaintiffs do not show only partial success.

Defendants' reliance on *McAfee v. Boczar*, 738 F.3d 81 (4th Cir. 2013), for their argument that the Court should not grant a fee award greater than the

Plaintiffs' damage award is misplaced. While noting that in *Riverside v. Rivera*, 477 U.S. 561 (1986) a fee award that was seven times the damage award was proper, the *McAfee* Court rejected as disproportionate, a fee award that was more than 100 times the damage award of $3,000. No such "pronounced disproportionality" exists here. Plaintiffs' requested lodestar amount of $694,071.25 is only 1.7 times the total damage award of $400,000.00, thus falling well within the *McAfee* standards.

4. Plaintiffs' counsels' rates were reasonable.

CCSD argues that the proper rates for Plaintiffs' attorneys in this case, John H. Scott, and Allen Lichtenstein (as a private attorney) is $250 per hour. While not dispositive in and of itself, Plaintiffs' Retainer Agreement indicates that counsel disclosed a $600-$750 per hour usual hourly rate for similar civil rights cases. (App. 2143.) The Court in *Quesada v. Thomason*, 850 F.2d 537, 541 (9th Cir. 1988) *citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974), stated that "the fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case.").

5. The Waite Declaration does not set a standard fee of $250 per hour.

Defendant's counsel Dan Waite's Declaration stated that he charged $250 per hour in this case. (App. 2059-2060.) No mention was made of Defendant's

counsel Dan Polsenberg's rate. It is also important to note that Mr. Waite did not claim that this is his normal hourly rate for clients. Nor did he produce a copy of any Retainer Agreement that CCSD had with Lewis Roca Rothgerber and Christie, LLP. Thus, we do not have any information as to whether the District received a discounted rate because of the volume of the work that Lewis, Roca, Rothgerber and Christie, LLP does for it.

In *Costa v. Comm'r of SSA*, 690 F.3d 1132 (9th Cir. 2012) the Court rejected a policy of setting a flat rate of $250 per hour on civil rights cases.

> In *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008), we also rejected the district court's method of determining a reasonable hourly rate. We said that the district court "erred by applying what appears to be a de facto policy of awarding a rate of $250 an hour to civil rights cases." *Id*. at 1115. We then explained, "[d]istrict judges can certainly consider the fees awarded by other judges in the same locality in similar cases. But adopting a court-wide policy—even an informal one—of 'holding the line' on fees at a certain level goes well beyond the discretion of the district court." *Id*.

690 F.3d at 1136

The Ninth Circuit in *Moreno*, noted that the District Court, "has pretty much held the line at $250 [an hour] for the past ten years."

> The court also erred by applying what appears to be a de facto policy of awarding a rate of $ 250 an hour to civil rights cases. At the fees hearing, the district court noted that "300 an hour is a fairly big step for me, and I think for the court generally" and that "the court has pretty much held the line at 250 [an hour] for the past ten years." While the district court's final fee order does not reiterate this

> reasoning, an effort to adhere to this de facto policy probably influenced the final rate awarded, which was $ 250 an hour.

534 F.3d at 1115.

It should be noted that *Moreno* was a 2008 case. Thus, the $250 per hour rate established 10 years before that would mean that was considered the appropriate rate back in 1998. It is clearly inappropriate now.

6. Comparable rates show Plaintiffs' counsels' rates were reasonable.

Citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002), the Court in *Ellick v. Barnhart*, 445 F. Supp. 2d. 1166, 1172 n. 18 (C.D. Cal. 2006) noted that, "[t]he hours spent by counsel representing the claimant and counsel's "normal hourly billing charge for non-contingent-fee cases" may aid "the court's assessment of the reasonableness of the fee yielded by the fee agreement." Courts may look to comparable hourly rates in the area for guidance on granting fee awards. *Pierce v. Underwood*, 487 U.S. 552 (1988).

> A "reasonable" hourly rate cannot be determined with exactitude according to some preset formulation accounting for the nature and complexity of every type of case. Therefore, courts often assume that an attorney's normal hourly rate is reasonable, or, in the case of public interest counsel, a reasonable rate is generally the rate charged by an attorney of like "skill, experience and reputation." *Blum* v. *Stenson*, 465 U.S. 886, 895, n. 11 (1984).

487 U.S. at 581.

Plaintiffs' August 9, 2017 Fee Motion detailed the decades of federal civil rights litigation experience of both Plaintiffs' counsel, John H. Scott and Allen Lichtenstein. (App. 1573-1574.) Both charge a normal rate of over $600 per hour. The $450 per hour awarded by the District Court is well within the normal range within the relevant community.

In a recent Las Vegas case, *Nike, Inc. v. Fujian Bestwinn China Indus. Co.*, No. 2:16-cv-00311-APG-VCF, 2017 U.S. Dist. LEXIS 93397 at *1 (D. Nev. June 16, 2017), Federal District Court Judge Gordon approved of billing rates for the prevailing party based on skill and experience.

> The fees Nike seeks are reasonable and justified. I have considered the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P. 2d 31, 33 (Nev. 1969) and in Local Rule 54-14. Nike's lawyers are skilled intellectual property attorneys with significant experience and an excellent rating. Their hourly rates of $455, $325, $235, and $240 are reasonable for lawyers with their respective qualifications in this area of the law.

2017 U.S. Dist. LEXIS 93397 at *1; *see also, Mayweather v. Wine Bistro,* No. 2:13-cv-210-JAD-VCF, 2014 U.S. Dist. LEXIS 168718, at *3 (D. Nev. Dec. 4, 2014) (finding $295 and $675 reasonable hourly fees in Las Vegas in 2014) adopting Doc 58, Magistrate's Report at 16); *Marrocco v. Hill,* 291 F.R.D. 586, 589 (D. Nev. 2013) (finding hourly rates between $375 and $400 reasonable in Las Vegas in 2013); *Liberty Media Holdings, LLC v. FF Magnat Ltd.*, No. 2:12-cv-01057-GMN-RJJ, 2012 U.S. Dist. LEXIS 124808, at *14 (D. Nev. Sep. 4, 2012)

($400-$500 for partners and $325 for associates was reasonable for Las Vegas legal market in 2012).

The $450 per hour rate awarded Mr. Scott and Mr. Lichtenstein in this case was not an abuse of discretion. In *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016), the Ninth Circuit noted that the lodestar:

> should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement.

821 F.3d at 1166.

Here, the case was undertaken on a pure contingency basis. Although by itself, the fact that a case is a contingency one is not an independent factor to be considered, it should be part of the lodestar factor analysis. *City of Burlington v. Dague*, 505 U.S. 557 562-563 (1992). In *Murphy v. Smith*, the United States Supreme Court reiterated that: [o]ur cases interpreting §1988 establish "[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee." 138 S. Ct. 784, 789 (2018), *citing Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565 (1986). Such is the case here. There was no abuse of discretion by the District Court.

V. Conclusion

For all of these reasons, CCSD's Appeal should be denied, and the District Court's decisions affirmed.

Dated this 4th day of September 2018

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Plaintiffs-Respondents' Brief complies with NRAP 32. This document is proportionately spaced, has a Times New Roman typeface of 14 point and contains 13,997 words.

Dated this 4th day of September 2018.

/s/ Allen Lichtenstein

CERTIFICATE OF SERVICE

I hereby certify that I served upon all counsel, the foregoing Plaintiff's/Appellant's Opening Brief via the Court's electronic filing and service process and/or email, and/or United States Mail, on September 4, 2018.

/s/ Allen Lichtenstein