Case Nos. 73856 & 74566

In the Supreme Court of Nevada

CLARK COUNTY SCHOOL DISTRICT,

Appellant,

vs.

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

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable NANCY ALLF, District Judge
District Court Case No. A-14-700018-C

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

In their answering brief, plaintiffs misstate the legal principles that govern these federal claims.

Plaintiffs first ignore that a "state-created danger" claim under the Due Process Clause requires "affirmative conduct by the state in placing the plaintiff in danger." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011). Plaintiffs omit this essential element, which the district found to be missing here.

Then plaintiffs diminish the requirement of deliberate indifference (an element of both plaintiffs' "state-created danger" and Title IX claims). They treat it like negligence. And they seek to impose liability where they, by representing that they were not being harassed, induced the school's inaction. No federal court has ever found liability in that circumstance.

In addition, plaintiffs misrepresent the basis for both their Title IX complaint and the district court's decision, switching from a "perceived sexual orientation" theory (which the evidence did not support) to new theories that the district court did not consider.

Plaintiffs made these legal misstatements because they cannot

make out a claim under controlling federal law. This Court should reverse.

I.

CCSD DID NOT ENGAGE IN AFFIRMATIVE CONDUCT UNDER THE "STATE-CREATED DANGER" EXCEPTION

The Due Process Clause generally does not require states to protect their citizens against private violence. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). One narrow exception is a "state-created danger." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). But that exception requires that the state's affirmative action created, or exposed the plaintiff to, a danger he would not otherwise have faced. *Id.*

Plaintiffs cannot show that here. In fact, the district court found that CCSD "*fail[ed] to take affirmative action*." (6 App. 1457:24-26 (emphasis added); *accord* 8 App. 1969:22-25, 8 App. 1971:21-23.) This "is fatal to the claim." *Ramos-Pinero v. Puerto Rico*, 453 F.3d 48, 55 n.9 (1st Cir. 2006). So plaintiffs ignore this element.

A. Deliberate Inaction Cannot Constitute a State-Created Danger

The district court was wrong when it held that a state entity vio-

lates the Due Process Clause when its *failure* to act, rather than an actual affirmative act, leaves a plaintiff exposed to harm by third parties.

> [T]he point of the state-created danger doctrine is that the *affirmative actions* of a state official "create[d] or expose[d] an individual to a danger *which he or she would not have otherwise faced*."

Henry A. v. Willden, 678 F.3d 991, 1002-03 (9th Cir. 2012) (quoting *Kennedy*, 439 F.3d at 1061) (first emphasis added; brackets and second emphasis in *Henry A.*) (cited at RAB 35-36).[1]

A plaintiff must first prove the state's affirmative act. *Ramos-Pinero*, 453 F.3d at 55 n.9. Only after that does the doctrine's second element come into play, that the state "act[ed] with deliberate indifference to that danger." *Henry A.*, 678 F.3d at 1002 (citing *Kennedy*, 439 F.3d at 1062-64). (That separate element, which is part of both a Due Process claim and a Title IX claim, is discussed below at Section "II.")

[1] *Accord Johnson v. City of Seattle*, 474 F.3d 634, 641 (9th Cir. 2007); *Windle v. City of Marion*, 321 F.3d 658, 662-63 (7th Cir. 2003); *Sanford v. Stiles*, 456 F.3d 298, 311-12 (3d Cir. 2006); *see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989).

B. CCSD's Failure to Stop the Bullying Was Not a State-Created Danger

1. Responsive Action, Even Aimed at Eliminating a Danger, Is Not a State-Created Danger

In their answering brief, plaintiffs do not identify any CCSD acts that *increased* the danger to them; they instead allege that CCSD's *remedial* actions in response to the bullying were inadequate. (RAB 36.) That does not fulfill the requirement of a state-created danger.

To be actionable, the "affirmative conduct" must *create* the danger or *thrust* the plaintiff into harm's way, not a remedial act that falls short of eliminating the danger. In *Johnson v. City of Seattle*, for example, police officers were not liable for injuries in a riot because their plan of action, though "calamitous in hindsight," "did not place [the plaintiffs] in any worse position than they would have been in had the police not come up with any operational plan whatsoever." 474 F.3d at 639, 641. Similarly, in *Sanford v. Stiles*, a guidance counselor's failed intervention with a student who was considering suicide could not be characterized as "affirmative actions" causing his death; rather, the counselor "fail[ed] to prevent" a suicide that would have happened without any intervention. 456 F.3d at 312.

And in *Lamberth v. Clark County School District*, another case in-

volving a student's suicide, the court held that CCSD's allegedly intentional failure to protect the victim from bullying was mere "inaction—not wrongful affirmative conduct." 698 F. App'x 387, 388 (9th Cir. 2017) (citing *Kennedy*, 439 F.3d at 1061).[2]

Here, the bullying existed *before* the school's allegedly inadequate response. (*See* 2 App. 470:20-471:15, 3 App. 551:1-22). At most, the failure to remedy that preexisting danger left plaintiffs exposed to the same dangers they already faced. That is not a state-created danger for which an action under Due Process lies.

2. The Consensus Is that a School District Is Not Liable for a Failure to Stop Bullying

The imposition of liability here offends the consensus of federal authority. CCSD demonstrated (AOB 25 & n.5) that no federal court has ever held a school district liable for a state-created danger based on allegedly deficient handling of bullying by other students. This is because the bully himself, not the state, creates the harm.

Plaintiffs cite no contrary authority. The district court's holding

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[2] In *Lamberth*, the Ninth Circuit affirmed Judge Gordon's dismissal of federal claims for lack of affirmative conduct. *See Lamberth v. Clark Cty. Sch. Dist.*, No. 2:14-cv-02044-APG-GWF, 2015 WL 4760696, at *5 (D. Nev. Aug. 12, 2015).

that CCSD violated plaintiffs' substantive due process rights flies in the face of every federal circuit that has considered the issue. (AOB 25 & n.5.)[3]

3. Plaintiffs' Argument Relies on Cases Applying Other Doctrines

In eliminating the element of affirmative conduct, plaintiffs rely on pre-*DeShaney* cases that apply different doctrines. (*See* RAB 35-38.) For example, while they cite *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972) and *U.S. ex rel. Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975), these cases involve direct harm by the state, not by third parties, in placing prisoners in solitary confinement without adequate justification. And *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) involved a plaintiff whom the state had involuntarily

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[3] Federal district courts reach the same conclusion. *Lansberry v. Altoona Area Sch. Dist.*, 318 F. Supp. 3d 739, 756 (W.D. Pa. 2018) (school's "failure to intervene to stop the bullying merely preserved the status quo," and "a schools failure to enforce its own policy does not comprise an affirmative use of state authority"); *H.J. ex rel. Wells v. Delaplaine McDaniel Sch.*, No. CV 17-3229, 2017 WL 5901096, at *4 (E.D. Pa. Nov. 30, 2017) ("[F]or H.J.'s complaint to rise to the level of a state-created danger, she would need to allege facts that show an active effort on the part of the school to encourage bullying, and an effort to make the school a less safe place for the children."); *Bridges ex rel. D.B. v. Scranton Sch. Dist.*, 66 F. Supp. 3d 570, 584 (M.D. Pa. 2014), *aff'd*, 644 F. App'x 172 (3d Cir. 2016); *Lamberth I*, 2015 WL 4760696, at *5.

placed in foster care. In this case, the harm was created by third-parties.

After *DeShaney*, these cases would be considered under the separate "special relationship" exception for individuals in state custody, where "it is the State's affirmative act of restraining the individual's freedom . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." 489 U.S. at 200.

That is not the situation here. The federal circuits unanimously hold that compulsory school attendance does not give rise to a "special relationship" creating due process liability for mere failure to protect a student from harm. *Morrow v. Balaski*, 719 F.3d 160, 170 (3d Cir. 2013) (en banc; *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 857-58, 863 (5th Cir. 2012) (en banc); *Patel*, 648 F.3d at 973-74; *Hasenfus v. LaJeunesse*, 175 F.3d 68, 71 (1st Cir. 1999); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995); *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 993-95 (10th Cir. 1994); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-55 (1995); *Chambers v. N. Rockland Cent. Sch.*

Dist., 815 F. Supp. 2d 753, 763 n.10 (S.D.N.Y. 2011) ("The consensus among the courts is that the 'special relationship' doctrine does not apply to the school setting.").

Plaintiffs here neither alleged nor attempted to prove liability under the "special relationship" exception; only under the "affirmative conduct" exception. Thus, plaintiffs' reliance on pre-*DeShaney* "special relationship" cases is inapposite.

4. The District Court's Own Finding of Inaction Defeats Due Process Liability

The district court found that CCSD "*fail[ed] to take affirmative action*." (6 App. 1457:24-26 (emphasis added); *accord* 8 App. 1969:22-25, 8 App. 1971:21-23). That finding defeats a due process claim based on "state-created-danger."

II.

PLAINTIFFS HAVE NOT DEMONSTRATED DELIBERATE INDIFFERENCE, WHICH IS NECESSARY FOR BOTH THEIR DUE PROCESS AND TITLE IX CLAIMS

Plaintiffs also fail on the requirement, under both the Due Process and Title IX claims, that the harm must be caused by "deliberate indifference" by the state. The absence of this element defeats both claims.

A. What Conduct Meets the Exacting Test of Deliberate Indifference is a Question of Law for this Court

1. Plaintiffs Misrepresent the Standard

In analyzing both due process claims for a "state-created danger" and sexual harassment claims under Title IX, deliberate indifference is demonstrated only by an "official decision" to "refuse[] to take action" to address the danger or harassment. *See Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290 (1998). It "is not a mere 'reasonableness' standard." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649 (1999). It is an "exacting standard." *J.S., III v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 987 (11th Cir. 2017). So exacting, in fact, that even a "grossly or wantonly negligent . . . standard is less exacting than the federal deliberate indifference standard." *See Cortez v. Skol*, 776 F.3d 1046, 1054 (9th Cir. 2015).

Rather than meeting this requirement, plaintiffs improperly rely on cases decided before the Supreme Court's articulation of the higher standard in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). (*See* RAB 29, 37.) While plaintiffs cite *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972) and *U.S. ex rel. Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975), neither decision even mentions "deliberate indifference." And

even though *Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134, 143 (2d Cir. 1981) suggested that "deliberate indifference and negligence" are not "mutually exclusive," *DeShaney* and *Davis* rejected that framework: "negligence is mutually exclusive of deliberate indifference and intent." *Smith v. Johnson*, 779 F.3d 867, 871 (8th Cir. 2015); *accord Davis*, 526 U.S. at 642 ("we declined the invitation to impose liability under what amounted to a negligence standard"); *DeShaney*, 489 U.S. at 198 n.5 ("the mere negligent or inadvertent failure to provide adequate care is not enough" to "exhibit[] 'deliberate indifference'.").

2. Whether Conduct Rises to the Level of Deliberate Indifference Is a Legal Issue, Not a Factual One

Plaintiffs suggest that deliberate indifference is a pure question of fact. (RAB 2.). That's not true. While "[q]uestions of a Defendant's specific conduct are questions of basic fact, . . . the question of whether those actions could meet the legal standard for deliberate indifference is a mixed question of law and fact that we review *de novo* as a question of law." *Stefan v. Olson*, 497 Fed. App'x 568, 575 (6th Cir. 2012). Indeed, the district court's ruling that "school officials acted with deliberate indifference for Title IX violation purposes" is a conclusion of law, not a finding of fact. (8 App. 1968.)

Respondents' reliance on *Mellen v. Winn*, 900 F.3d 1085 (9th Cir. 2018) is also misplaced. Read in context, *Mellen* stands for the unremarkable point that determining whether an individual possessed knowledge of particular circumstances "is a question of fact." *Id.* at 1101 (quoting *Lemire v. Cal. Dep't of Corrs. & Rehab.*, 726 F.3d 1062, 1078 (9th Cir. 2013)). The "deliberate indifference" standard, even in *Mellen*'s context of the Eighth Amendment, has both objective and subjective components composing a mixed question of fact and law:

> [T]he official must both be aware of facts from which *the inference could be drawn* that a substantial risk of serious harm exists, and he must also *draw the inference*.

Farmer v. Brennan, 511 U.S. 825, 837 (1994), *cited in Lemire*, 726 F.3d at 1078. Similarly, a school district accused of Substantive Due Process and Title IX violations must be shown (1) to have possessed knowledge that a student was in danger of harassment *and* (2) to have made a conscious choice "not to alleviate that danger." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658-59 (5th Cir. 1997).

An appellate court must retain *de novo* review of the legal question: whether a school district's acts, as found by the district court, satisfy the "exacting standard" of deliberate indifference. Thus, a court

can find that a school district's response was not deliberately indifferent as a matter of law. *Davis*, 526 U.S. at 649; *accord Saphir ex rel. Saphir v. Broward Cty. Pub. Sch.*, No. 17-11370, 2018 WL 3641719, at *3-4 (11th Cir. July 31, 2018) (affirming summary judgment on lack of deliberate indifference).

While this Court gives deference to a district court's findings of facts supported by substantial evidence, the district court's legal conclusion that those facts demonstrate "deliberate indifference" is subject to *de novo* review here. Indeed, that is the legal issue on appeal, especially in a bench trial.

3. The District Court's Notion of What Constitutes Deliberate Indifference Is Not Entitled to Deference

Plaintiffs have never suggested, and the district court did not find, that CCSD "refused to take action" or made an "official decision" not to remedy the harassment directed at Ethan and Nolan. There is no dispute that CCSD attempted to remedy the reported harassment by, among other things, (1) soliciting Ethan and Nolan to fill out incident reports, (2) conducting numerous meetings with Ethan and Nolan, their parents, the bullies (C. and D.), and C.'s mother, (3) disciplining C., (4)

twice rearranging seating assignments, (5) repeatedly following-up with Ethan and Nolan to see how things were going, and (6) offering to help Ethan and Nolan change classes or schools. And there is no dispute that both Ethan and Nolan, upon repeated inquiry, *denied* the very harassment that now forms the basis for their damages.

Despite all this, the district court held that none of these facts as a matter of law was legally sufficient to avoid liability because CCSD failed to provide an investigation under NRS 388.1351, which the district court concluded made CCSD deliberately indifferent as a matter of law. That was legal error that this Court should correct on *de novo* review.[4]

B. Failure to Meet a State Statutory Standard Is Not in Itself Deliberate Indifference

Deliberate indifference is not demonstrated just because a "particular protective service" is not provided. *DeShaney*, 489 U.S. at 196-

[4] CCSD's efforts to remedy the reported harassment included telephone calls and meetings with Ethan and Nolan's parents and with C.'s mother. "Courts applying the deliberate indifference standard from *Davis* have regarded the involvement of parents as evidence that a school district is responding to harassment in a reasonable manner." *Doe v. Galster*, 768 F.3d 611, 619 (7th Cir. 2014) (citing *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1000-01 (5th Cir. 2014)).

97. That is true even if, like the investigation contemplated in NRS 388.1351, the service is required under state law. *See KF ex rel. CF v. Monroe Woodbury Cent. Sch. Dist.*, 2012 WL 1521060, *7 (S.D.N.Y. 2012) ("The school district was not required to proceed in a particular manner, even if there are policies in place that would appear to require the initiation of a formal investigation."). Even were Nevada to impose tort duties based on "the reluctance of bullied students to report the truth of what is happening to them to school officials," as plaintiffs assert NRS 388.1351(2) does, this case is not about state law.[5]

Plaintiffs cite no appellate decisions holding that the bare violation of a state statutory duty demonstrates deliberate indifference. Such a violation might be negligence *per se* under state law, but it does not meet the much more stringent standard of deliberate indifference for a federal § 1983 or Title IX claim.

C. Believing Plaintiffs' Own Denials of Ongoing Bullying Is Not Deliberate Indifference

It was not deliberate indifference for school officials to believe

[5] Plaintiffs do not challenge the dismissal of their state-law claims in this appeal. Unlike their federal claims, state-law claims are subject to the $100,000 cap in NRS 41.035(1) and do not allow automatic recovery of attorney's fees.

plaintiffs' representations. If students insist that harassment has stopped, the school does not violate the federal constitution or Title IX in believing the students.[6]

A school's duty to investigate misconduct ends when the student denies the misconduct. For example, in *Benefield ex rel. Benefield v. Board of Trustees of the University of Alabama at Birmingham*, a 15-year-old student at first denied that he had been sexually exploited and "hid her actions from her parents" and the school. 214 F. Supp. 2d 1212, 1222-23, 1226 (N.D. Ala. 2002). Based on the denial, the school stopped investigating. *Id.* at 1215. As a matter of law, the school's efforts to ask the plaintiff about these incidents, followed by the plaintiff's denials, could not constitute deliberate indifference so as to create federal liability. *Id.* at 1223, 1226.

Similarly, in *P.H. v. School District of Kansas City*, the school district could not be liable under § 1983 or Title IX where the plaintiff hid

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[6] Even their parents believed them. (3 App. 545:3–9.) Nolan's mother admits that between learning about the pencil-jabbing incident on September 21, 2011 and withdrawing Nolan in February 2012, she believed Nolan's reports that he was fine. (5 App. 1204:1–5, 1205:15–19.) She admitted she had no communication with anyone at the school for a period "because Nolan didn't mention any teasing or bullying." (5 App. 1224:11-1225:8.)

the misconduct. 265 F.3d 653, 660 (8th Cir. 2001). When asked, "the boy denied the incident" of a teacher's sexual misconduct. *Id.* at 662. The student's denial was a key fact in the Eighth Circuit's concluding that the school district lacked the "actual knowledge and an official decision not to remedy the discrimination" necessary to constitute deliberate indifference. *Id.* at 662.[7] *See also Galster*, 768 F.3d at 617-18 ("The standard set out in *Davis* is not satisfied by knowledge that something might be happening and could be uncovered by further investigation.").

Here, both Ethan and Nolan repeatedly told CCSD that "everything was fine." These statements deprived CCSD of actual knowledge of ongoing harassment and thwarted further remedial action.

Plaintiffs suggest they lied because they were "reluctant to talk about the sexual nature of the harassment they were subject to." (RAB 24, 28.) Nonetheless, their lies affirmatively misled CCSD to induce inaction. (3 App. 564:2-10; 6 App. 1259:24-28, 1263:1-2, 266:1-1269:6-7; 2 App. 480:13-481:2, 483:14-18, 495:16-24; 6 App. 1259:24-28, 1263:1-2, 1266:1-2, 1269:6-7.) Nonetheless, they later sued CCSD for the very in-

[7] *See also Benefield*, 214 F. Supp. 2d at 1220 n.16 (citing *P.H.*, 265 F.3d at 661-62 and noting that the *P.H.* court's discussion of notice for the plaintiff's § 1983 claim applied equally to plaintiff's Title IX claim).

action they induced. As a matter of law, there is no liability under § 1983 or Title IX in these circumstances.[8]

D. CCSD's Remedial Steps Were Not Deliberately Indifferent

The responsive actions that CCSD did take are further proof that CCSD was not deliberately indifferent as a matter of law.

1. CCSD Was Not Deliberately Indifferent to Nolan's Mistreatment

Upon learning from Mrs. Bryan's September 15, 2011 e-mail that Nolan was a target of C. and D.'s bullying, school officials immediately responded. By September 22, (1) the dean met with Nolan, (2) Nolan was directed to file an incident report, (3) Mr. Beasley moved the seats in the band room, (4) Mr. Beasley reprimanded C. and D. and referred C. to the dean's office, and (5) the dean conducted a mandatory disciplinary conference with C. and his mother. (4 App. 987:20-988:18; 5 App. 1018:15-1022:12, 1088:11-12; 1100:18-21; 1101:22-1103:5, 1125:16-1126:13; 9 App. 2226, 5 App. 1200:7-23.) As Nolan conceded at trial, at this point, the bullying toward him—sexual or otherwise—had already

[8] In demonstrating how plaintiffs' lies undermine their federal claims, CCSD is *not* suggesting that their post-transfer reports of bullying were "made up." (*Contra* RAB 26-27.)

stopped. (3 App. 513:23-514:4, 543:5-544:9.)

These protective actions preceded any knowledge about the sexual nature of Nolan's bullying. Plaintiffs do not dispute that Ms. Bryan's September 15, 2011 e-mail described no homophobic comments or any other discrimination "on the basis of sex" sufficient to trigger CCSD's duties under Title IX.[9] (4 App. 839:2-842:11.)[10] And by the time Assistant Principal DiPiazza first heard C.'s remark that he stabbed Nolan in the genitals to see if he was a girl (8 App. 1958:16-27), Nolan conceded that he no longer faced such harassment. (3 App. 513:23-514:4, 543:5-544:9.)

In taking effective remedial steps to promptly address Nolan's

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[9] Plaintiffs misrepresent that "[a]t the time 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." (RAB 24.) Mrs. Bryan testified that she was aware of this statement when she wrote her September 15th email, but she did not advise CCSD of this information. (4 App. 838:18-839:9.) This confirms that the September 15 email did not constitute notice of any harassment on the basis of sex.

[10] *See Davis*, 526 U.S. at 652 (no Title IX claim for "the child who refuses to go to school because the school bully calls him a 'scaredy-cat' at recess"); S. Duncan, *College Bullies—Precursors to Campus Violence: What Should Universities and College Administrators Know About the Law?*, 55 VILL. L. REV. 269, 305 (2010) ("Generic bullying or 'status neutral harassment' . . . is not currently prohibited by federal . . . statute.").

plight, CCSD was not deliberately indifferent.

2. CCSD Was Not Deliberately Indifferent to Ethan's Mistreatment

Even according to plaintiffs, school officials first learned about bullying toward Ethan on October 19, after Nolan's bullying had stopped. (8 App. 1960:23-27.)

CCSD reacted immediately. Mr. Beasley moved seats again. (5 App. 1027:12-1028:12; 3 App. 539:20-23, 596:22-597:7.) Counselor Halpin spoke with Ethan's mother. (4 App. 810:17-18, 862:20-863:4.) Ethan was asked to complete an incident report, in which he did not mention any sex-based or homophobic conduct. (9 App. 2228, 2231.) Ethan also insisted that the problems had been resolved. (3 App. 556:1-557:3, 592:7-594:18, 651:10-652:12.) After October 19, despite periodic follow-ups with Ethan, neither Ethan nor his mother reported any additional misconduct—sexual or otherwise—until after Ethan withdrew from the school. (4 App. 949:12-951:2; 3 App. 545:6-14.)

Far from being deliberately indifferent, CCSD had every reason to believe that its remedial actions were effective.

III.

THE DISTRICT COURT'S FINDING THAT PRINCIPAL MCKAY IGNORED DISTRICT POLICY CANNOT BE A BASIS OF *MONELL* LIABILITY

A school district can be liable under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978) only when its own policies caused the deprivation of the federal right. *Monell* does not support districtwide liability for a violation of CCSD policy by an individual principal who is not a final policymaker.

A. There Was No Deprivation of a Federally Protected Right Pursuant to Official CCSD Policy

Monell creates liability under 42 U.S.C. § 1983 only for deprivations of *federally* protected rights caused by adherence to an "official municipal policy of some nature." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 471 (1986) (quoting *Monell*, 436 U.S. at 691). Plaintiffs identify neither the federal right that was supposedly denied nor the CCSD policy that resulted in its deprivation. Instead, they argue there was a *violation* of CCSD policy, but this very argument defeats *Monell* liability.

1. There Is No Federal Constitutional Right to an Education in this Context

Plaintiffs and the district court misconstrue public education as a federal constitutional right, at least in this context. (6 App. 1459:11-12.) The U.S. Supreme Court has long held that there is no such right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-35 (1973); *accord Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Nor is education a fundamental right.").

Plaintiffs do not even mention these cases. They instead rely on the procedural due process cases of *Vitek v. Jones*, 445 U.S. 480 (1980) and *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir. 1997). (RAB 35.) But these cases do not identify education as a federal constitutional right. For *procedural* due process, for example, states can withdraw state-created rights, but only with protections such as notice and a hearing. (*See* AOB 41 n.15 (discussing *Goss v. Lopez*, 419 U.S. 565 (1975)).) By contrast, *substantive* due process forbids certain fundamental federal rights from being withdrawn, at all. For example, the bullies C. and D. might have had a procedural due process claim had CCSD expelled them without notice. Plaintiffs here, however, brought just a substantive due

process claim based on a nonexistent federal right to an education.[11] As that right did not exist, neither does such a claim.

2. No Deprivation Was Caused by CCSD Policy

Even if plaintiffs were deprived of some federally protected right, the district court did not find that CCSD had a policy to disregard that right.

B. Principal McKay Enforces but Cannot Make CCSD Policy

The district court imposed liability on CCSD for inaction by Principal Warren McKay, but he was not a final policymaker for CCSD.

1. Only Acts by CCSD Final Policymakers Can Support Districtwide Liability

Principal McKay was not a policy maker against whom liability could be imposed on the school district. "Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481. That kind of policymaking authority is different from "imple-

[11] There is, in any case, no evidence that Ethan and Nolan were deprived of a free public education. Both finished 6th grade and all of 7th grade at tuition-free EKA, where they excelled, and Nolan finished 8th grade at EKA, before they chose for personal reasons to transfer to a private, faith-based school.

mentative action," *Gleason v. Beesinger*, 708 F. Supp. 157, 159-60 (S.D. Tex. 1989), which may still involve discretion. *Pembaur*, 475 U.S. at 483 n.12. Whether someone is a final policymaker is a question of state law, *id.* at 483, subject to *de novo* review. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Minnick v. County of Currituck*, 521 Fed. App'x 255, 262 (4th Cir. 2013).

2. CCSD's Final Policymaking Authority Is Vested in its Board of Trustees, Not Principals

"Nevada law designates the Board of Trustees for a School District as the body responsible for setting *all* District policies." *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004) (citing NRS 386.350) (emphasis added).[12] NRS 388.133 initially vests the department of education with statewide policymaking authority over all provisions of NRS chapter 388. NRS 388.134 in turn directs the board of trustees for each school district to adopt those policies, along with any expanded policies consistent with those statewide policies. CCSD's board did so. (9 App. 2218.)

In contrast, principals merely implement that policy. NRS

[12] *See also* NRS 385.005(1), 386.365(4), 388.134(1).

388.1351(2) requires principals to act "in accordance with the policy governing disciplinary action adopted by the board of trustees of the school district," forbidding them from exercising final policymaking authority with respect to bullying investigations. And students may appeal a principal's decision up to the district level. NRS 388.1351(3). Principal McKay's actions under NRS 388.1351 are subject to CCSD's "higher authority"; his actions are not final. *See Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001).

The evidence at trial also confirmed that Principal McKay did not have policymaking authority for purposes of NRS 388.1351(2). (5 App. 1173 (Principal McKay's testimony that the trustees, not he, set district policy for bullying and discipline); *see also* 5 App. 1175-76 (describing superintendent's authority to overrule principal even on individual disciplinary decisions).)

This makes sense. Looking at the policymaking authority at the district level, certainly at that time, encourages uniform application throughout the district, instead of vesting each of CCSD's 300-plus principals with *ad hoc* and conflicting authority to set district-wide policy for student discipline and statutory compliance. *Lytle*, 382 F.3d at 983

("For a person to be a final policymaker, he or she must be in a position of authority such that a final decision by that person may appropriately be attributed to the District."). A principal's job description, which may include "the ability to suspend students, relocate their classrooms and handle disciplinary matters within one school[,] hardly constitutes policy making authority." *McSweeney v. Bayport Bluepoint Cent. Sch. Dist.*, 864 F. Supp. 2d 240, 255 (E.D.N.Y. 2012). A CCSD principal has the responsibility to enforce district policies regarding bullying and discipline at an assigned school, but not the right to create such policies for the entire district.

3. Plaintiffs Ignore the Review Mechanism in NRS Chapter 388

Plaintiffs' contention that principals are final policymakers for *Monell* liability (RAB 40) ignores the backdrop of NRS chapter 388. The foreign cases cited by plaintiffs are unhelpful to their position:

Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) is a police case and sheds no light on whether principals are final policymakers regarding student discipline. Similarly, in *Williams v. Fulton County School District*, a *teacher*-discipline case, the court did not even decide the policymaker question, just that it would be "much more appropriately re-

solved at summary judgment, not at the pleading stage." 181 F. Supp. 3d 1089, 1125 (N.D. Ga. 2016).

Plaintiffs' other cases highlight the element of unreveiwability of the principal's actions, which is not the case under NRS chapter 388. *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) involved a principal's imposition of corporal punishment that really could not be reviewed. "[W]hether a governmental decision maker is a final policy maker" depends on "whether there is an actual 'opportunity' for 'meaningful' review." 370 F.3d at 1292 (quoting *Oladeinede v. City of Birmingham*, 230 F.3d 1275, 1295 (11th Cir. 2000)). There, however, the principal directed that a student be "paddled" just days before graduation and "did not offer to 'stay' [the student's] punishment while he sought Board review." *Id.* at 1293. So even though the school board ordinarily set official policy for student discipline, it "necessarily bound itself" to decisions regarding spanking because it gave principals "this power without integrating itself into the pre-spanking review process." *Id.* Important here, the court cautioned that "our holding that [the principal] acted as a final decision maker in this context does not mean

that he always acts as such." *Id.*[13]

Here, in contrast, CCSD's board of trustees did not let principals loose without reserving power to review decisions regarding bullying investigations. The requirement of district-level review is built into the appeal procedure of NRS 388.1351(3).

C. The District Court Based *Monell* Liability on Facts that Defeat *Monell* Liability

The district court held CCSD liable, not because Principal McKay *enforced* an unconstitutional CCSD policy, but rather because he *violated* CCSD Policy 5137, which properly embraces NRS 388.1351. (9 App. 2218-24.) This argument upends *Monell*'s requirement of action "pursuant to" official policy and imposes the very kind of vicarious liability that *Monell* prohibits. *Pembaur*, 475 U.S. at 477-78 (citing *Monell*, 436

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[13] *See also Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 268 (N.D.N.Y. 2000) (recognizing limited policymaking authority under New York law for a principal who made the unreviewable decision to deprive a student of music, art, and recess, and to make her sit on the school stage during lunch). Courts split "as to whether a principal may qualify as a final policymaker for purposes of *Monell* liability" under the unique structure of New York law. *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 373-74 (S.D.N.Y. 2014). Courts finding such authority under New York law, however, rely on the fact that the challenged action is unreviewable. *Id.* Since a principal's disciplinary decisions under NRS 388.1351 are reviewable, *Rabideau* supports CCSD's position that Principal McKay was not a final policymaker.

U.S. at 691). This Court should reverse.

IV.

CCSD DID NOT VIOLATE TITLE IX

A. The Claims of Gender Stereotyping and Hostile Environment Are Not before this Court

1. The Title IX Claim Is Based Solely on Perceived Sexual Orientation

The only Title IX theory in the complaint is harassment on the basis of Ethan's and Nolan's "perceived sexual orientation," which plaintiffs alleged was a kind of harassment "on the basis of sex." (1 App. 116:5-6, 118:17, 120:19, 121:10, 123:14, 124:14, 125:14, 126:6-7, 21-22, 128:7, 130:23, 141:11, 142:11-12, 145:4-5.)

And the district court found no Title IX violation other than on the basis of perceived sexual orientation. (8 App. 1964:15-16.)

2. Plaintiffs Waived Any Claim Based on Gender Stereotyping or Hostile Environment

Plaintiffs nonetheless try to defend the judgment based on an unpleaded theory of "gender stereotyping" (RAB 13-16) and, for the first time on appeal, a theory of "hostile environment" (RAB 17-18).

This Court should not adjudicate plaintiffs' new theories in the first instance. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d

981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").[14]

B. Plaintiffs Did Not Establish a Claim Based on Perceived Sexual Orientation[15]

1. "On the Basis of Sex": Ethan and Nolan Were Not Harassed on the Basis of Perceived Sexual Orientation

Fatal to plaintiffs' "perceived sexual orientation" claim is their concession that no one perceived Ethan and Nolan to be gay.[16]

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[14] Plaintiffs seek to shift to new theories for several reasons. In addition to the fatal defects in plaintiffs' "perceived sexual orientation theory" discussed below, plaintiffs must also be concerned that there is no such claim. This very issue is raised in petitions pending before the U.S. Supreme Court. *See Altitude Express, Inc. v. Zarda ex rel. Zarda*, No. 17-1623 (U.S. filed May 28, 2018) (asking the U.S. Supreme Court to resolve a circuit split over whether Title VII forbids sexual-orientation discrimination); *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107 (U.S. filed May 11, 2018) (similar question on gender-identity).

[15] Citing Title VII cases, plaintiffs claim that courts must "look beyond a pretextual explanation for Defendant's action." (RAB 14.) Title IX cases, however, are different from workplace claims because "schools are unlike the adult workplace." *Davis*, 526 U.S. at 651. There is nothing pretextual in the observation that "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.*

[16] Although C.'s deposition was published at trial, plaintiffs imply that without live testimony, the district court could not determine "what the bullies thought about Nolan and Ethan's sexuality." (RAB 13.) According to plaintiffs, the court needed that testimony to determine "that the

The basis for the harassment must be decoupled from the words used: just as someone can be singled out for abuse *because of* sex even without the abuse *consisting of* sexual slurs or attacks, so can slings of a "sexual nature" be trained on a victim chosen for reasons having nothing to do with sex. Whether harassment is "on the basis of sex" depends on "the reasons for the individual plaintiff's treatment," not the words used. *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 364 (S.D.N.Y. 2016) (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

In a "perceived sexual orientation" case such as plaintiffs', that at a minimum requires the plaintiff to demonstrate that the harasser perceived the plaintiff to be gay. *See Patterson v. Hudson Area Sch.*, 724 F. Supp. 2d 682, 691 (E.D. Mich. 2010); *A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7*, 2012 WL 4794314, at *2 (D. Or. Oct. 9, 2012). (*Contra* RAB 15-16.) And even when there is such a perception, the mere use of "gendered or sexually loaded insults" is insufficient to establish discrim-

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bullying was not sexual in nature," placing the burden on CCSD to prove that negative. (RAB 13.)

Plaintiffs, however, bore the burden to show that any harassment they suffered was "on the basis of sex." *See Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992); *see also Murphy v. Franklin Pierce Law Center*, 882 F. Supp. 1176, 1182 (D.N.H. 1994). Any failure of proof counts against plaintiffs.

ination on the basis of sex, "particularly among children." *Brodsky v. Trumbull Bd. of Educ.*, 2009 WL 230708, at *7 (D. Conn. 2009). Homophobic words, even when used to hurt, scar, or retaliate against a foe, do not convert general bullying or harassment into a Title IX claim. *See Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165-66 (5th Cir. 2011). The victim must be targeted *because* of that perception; that is, the offensive behavior "must be based on sex, rather than personal animus or other reasons." *Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679, 685 (W.D. Ky. 2003).[17]

Here, the undisputed evidence showed that C., D., and the school teachers and administrators perceived Nolan and Ethan as straight, not gay. (3 App. 539:24-541:9, 648:18-21; 10 Supp. App. 2260:4-22, 2272:7-2273:10.) Sixth-grader C. didn't even know the meaning of the homophobic words he used; he just knew they were an insult. (*Id.* at 10

[17] *See also Galster*, 768 F.3d at 613 ("Keeping in mind how thoughtless and even cruel children can be to one another, the Supreme Court has interpreted . . . Title IX to impose a demanding standard for holding schools and school officials legally responsible for one student's mistreatment of another."); *Seamons v. Snow*, 84 F.3d 1225, 1226 (10th Cir. 1996) (dismissing Title IX claim based on retaliation for plaintiff's earlier report).

Supp. App. 2260:7-22, 2267:11-21.)[18] This is consistent with Nolan's admission that, however derogatory C. and D.'s epithets, the bullies "just randomly pick[ed] on people in the band class." (2 App. 497:9-498:8, 499:6-9.) When Nolan initially reported their bullying, C. and D. considered Nolan a "tattle-tale," culminating in C.'s jabbing Nolan with a pencil out of retaliation. (2 App. 480:2-481:9, 3 App. 519:9-520:1, 564:3-15.) No one suggests that that or any other incident arose from C.'s belief that Nolan was gay. (3 App. 519:9-520:1, 564:3-15.) C. and D. deployed words and actions of a "sexual nature" because they wanted to hurt and retaliate against Nolan and Ethan, not because of their perceived sexual orientation. The absence of such a perception defeats plaintiffs' Title IX claims.

[18] Plaintiffs say that "Nolan and Ethan's opinions about C.L. and D.M.'s mindset is [*sic*] immaterial," citing *Centola v. Potter*, 183 F. Supp. 2d 403, 411 (D. Mass. 2002). (RAB 15.) *Centola* actually says that while the plaintiff's "impression of why his [harassers] took these actions against him" is not *conclusive*, it "is relevant." 183 F. Supp. 2d at 411. In any case, in addition to Ethan's and Nolan's admissions that no one perceived them as gay, the trial included C.'s testimony that he did not perceive them as gay. (10 Supp. App. 2260:4-22, 2272:7-2273:10.) No evidence suggested otherwise.

2. Causation: Plaintiffs Do Not Dispute the Absence of a Causal Link between the Alleged Title IX Violation and Plaintiffs' Harassment

CCSD's response, even if deliberatively indifferent to the harassment Ethan and Nolan received, did not *cause* the harassment, as Title IX requires. *Davis*, 526 U.S. at 642-43 (Title IX defendants liable in damages "only where their own deliberate indifference effectively 'caused' the discrimination") (quoting *Gebser*, 524 U.S. at 290 (1998)). The district court did not identify any causal link between CCSD's deliberate indifference and C. and D.'s harassment of Ethan and Nolan—an omission that plaintiffs do not address in the answering brief. (*See* AOB 51-52.)[19]

[19] Plaintiffs largely do not rebut CCSD's argument on damages. (*See* AOB 62-64.) Without reprising the opening brief, CCSD does not waive its arguments that the damages were arbitrary and excessive. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010); *Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450, 514 P.2d 1180, 1182 (1973).

CONCLUSION

For these reasons, this Court should reverse and render judgment for CCSD.

Dated this 4th day of January, 2019.

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Dated this 4th day of January, 2019.

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